An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law

Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission

JUST/2014/RCON/PR/CIVI/0082

Strand 1

Mutual Trust and Free Circulation of Judgments

[written by Hess, Requejo Isidro, Gascón Inchausti, Oberhammer, Storskrubb, Cuniberti, Kern, Weitz, Kramer]
[June – 2017]

Max Planck Institute
LUXEMBOURG
for Procedural Law

[written by Hess, Requejo Isidro, Gascón Inchausti, Oberhammer, Storskrubb, Cuniberti, Kern, Weitz, Kramer]
[June – 2017]

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate A — Civil and Commercial Justice
Unit A1— Civil Justice

Contact: Head of Unit

E-mail: just-civil-coop@*ec.europa.eu*

European Commission
B-1049 Brussels

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (http://www.europa.eu).

Luxembourg: Publications Office of the European Union, 2017

ISBN 978-92-79-70883-1
doi: 10.2838/38491

© European Union, 2017

Organisational Structure

Scientific Coordinator

Professor Burkhard Hess (Max Planck Institute Luxembourg for Procedural Law)

assisted by Dr. Pietro Ortolani (Strand 1) and Dr. Stephanie Law (Strand 2)

Members of the Consortium

Professor Fernando Gascón Inchausti (Complutense University Madrid)

Professor Marta Requejo Isidro (Max Planck Institute Luxembourg for Procedural Law)

Professor Paul Oberhammer (University of Vienna)

Professor Gilles Cuniberti (University of Luxembourg)

Dr. Eva Storskrubb (University of Uppsala)

Professor Karol Weitz (University of Warsaw, Supreme Civil Court)

Professor Thomas Pfeiffer, Professor Christoph Kern LL.M. (Heidelberg University)

Professor Xandra Kramer (Erasmus University Rotterdam)

Professor Emmanuel Jeuland (Université Paris 1 Panthéon-Sorbonne, Institut de droit processuel)

Professor Remo Caponi (University of Florence)

Professor Piet Taelman, Professor Stefaan Voet (KU Leuven)

Professor Chris Hodges (University of Oxford, Center for Social and Legal Studies)

Members of the Advisory Board

Karin Basenach, Director of the European Consumer Centre, Luxembourg

Fabio Guastadisegni, head of the Italian litigation practice, Clifford Chance

Professor Christian Kohler, University of Saarbrücken, former Director-General of the DG Library, Research and Documentation of the CJEU

Professor Hans Micklitz, European University Institute Florence

Leo Netten, Union Internationale des Huissiers de Justice

Professor Fausto Pocar, University of Milano, International Criminal Court for the former Yugoslavia, The Hague

Ignacio Sancho Gargallo, Judge at the Spanish Supreme Court, Madrid

Professor Vassilios Skouris, Former President of the CJEU, Bucerius Law School

National Reporters

Austria	Paul Oberhammer
Belgium	Piet Taelman and Stefaan Voet
Bulgaria	Polina Pavlova and Kristina Sirakova
Croatia	Emilia Misčenić and Vesna Tomljenovic
Cyprus	Nikolaos Katiforis
Czech Republic	Bohumil Dvořák and Silvia Kubešová
Denmark	Clement Salung Petersen
Estonia	Irene Kull
Finland	Anna Nylund
France	Emmanuel Jeuland, Vincent Richard
Germany	Christoph Kern and Thomas Pfeiffer
Greece	Apostolos Anthimos
Hungary	Viktória Harsági and Dániel Gelencsér
Ireland	Brian Hutchinson
Italy	Remo Caponi and Albert Henke
Latvia	Inga Kačevska
Lithuania	Vigita Vebraite
Luxembourg	Gilles Cuniberti, Anthi Beka
Malta	Marisa Vella; Francesca Galea Cavallazzi and Rya Gatt
The Netherlands	Xandra Kramer

Poland	Karol Weitz and Agnieszka Golab
Portugal	Dario Moura Vincente and Miguel Teixeira de Sousa
Romania	Elena Alina Ontanu
Slovakia	Kristián Csach
Slovenia	Verica Trstenjak
Spain	Fernando Gascón Inchausti
Sweden	Eva Storskrubb
UK	Christopher Hodges, Stephanie Law, Vincent Richard

General Introduction

Methodology, Scope and Aim of the Study

1. Introduction

1. On the 21st of December 2015, the European Union, represented by the European Commission, and Prof. Burkhard Hess, Director of Max Planck Institute for International, European and Regulatory Procedural Law, representing the co-contractors, signed a service contract with the reference JUST/2014/RCON/PR/CIVI/0082. The subject of the contract was the elaboration of an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law.

2. The contract's starting date was the 21st of December 2015. The period of execution of the tasks was initially established as 12 months and was extended on the 21st of December 2016 from the 21st of December until the 31st January 2017 with the express written agreement of the parties.

3. The present document summarizes the main features of the study, setting out its object, its main actors and the methodology applied. It also includes an assessment of the difficulties encountered in the development of the different tasks that have led to the final outcome.

2. Object of the Study

4. In response to the tender specifications the study consists of two parts. The first examines whether divergences in national procedural laws and practices constitute obstacles to mutual trust and, in the affirmative, identifies the locus and the scale of such obstacles; it thereby facilitates the identification of the areas in which mutual trust needs to be further enhanced in line with the European Council Conclusions of 26/27 June 2014. In addition, the study addresses possible obstacles to legal certainty when businesses and citizens engage in cross-border litigation.

5. The second strand of the study evaluates whether and to what extent national procedural laws and practices ensure the effective procedural protection of EU consumers. Within the realm of consumer law, the study focusses on EU law

governing consumer contracts.[1] It investigates whether national procedural rules and practices satisfy the procedural requirements stemming from the rulings of the Court of Justice of the European Union concerning the principles of effectiveness and equivalence, and the obligation established on the part of the national courts to undertake ex officio an assessment of compliance with EU consumer law.

6. Both strands of the study investigate the legal and the practical situations in the civil procedural laws of the 28 EU Member States. The findings derived from, assessments made within and recommendations based on the study are established on empirical discoveries and are made from a comparative law perspective. The objective of the study is to facilitate and to improve the law-making activities of the European Union and its Member States.

3. Organisational Framework

7. In order to satisfactorily address the two strands of the project, ensuring expertise, completeness and efficiency, a complex organizational framework has been set up; it has the following components:

3.1 The Consortium

3.1.1 Members of the Consortium

8. A Consortium made up of leading European research institutions and the most prestigious European universities was formed at the beginning of the study; it has been led by the Max Planck Institute Luxembourg for Procedural Law. The Consortium incorporated 15 researchers from 12 institutions, including the MPI.[2] The

[1] The study focuses in particular on Directives 93/13/EEC on unfair terms in consumer contracts, Directive 2011/83/EU on consumer rights (including Directives 97/7 and 85/577, (which have been replaced with Directive 2011/83/EU), Directive 99/44/EC on sales and guarantees, Directive 2008/48/EC on consumer credit (previously Directive 87/102/EC), Directive 90/314/EEC on package travel and Directive 2008/122/EC on timeshare.

[2] The members of the Consortium are: Professor Remo Caponi (University of Florence); Professor Gilles Cuniberti (University of Luxembourg); Professor Fernando Gascón Inchausti (Complutense University Madrid); Professor Chris Hodges (University of Oxford, Center for Social and Legal Studies); Professor Emmanuel Jeuland (Université Paris 1 Panthéon-Sorbonne, Institut de droit processuel); Professor Xandra Kramer (Erasmus University Rotterdam); Professor Paul Oberhammer (University of Vienna):Professor Thomas Pfeiffer, Prof. Christoph Kern (Heidelberg University); Professor Marta Requejo Isidro (Max Planck Institute Luxembourg for Procedural Law); Dr. Eva Storskrubb (University of Uppsala); Professor Piet Taelman, Professor Stefaan Voet (University of Gent).

members of the Consortium elaborated both national reports and (most of them) chapters of the final report. Its main task therefore comprised the undertaking of research and the collection and processing of data from every EU Member State.

9. For the purposes of elaborating the study, two sub-groups were established within the Consortium: sub-group A, dealing with the impact of different national procedures on the free movement of judgments, and sub-group B, addressing the implementation of EU consumer protection instruments in the domestic procedures of the Member States. The Members of the Consortium agreed on the allocation of the different strands of the study among its Members. While each Member was required to monitor a specific part of the study, all worked collegially on the final draft.

3.3.2 Leadership

10. The Max Planck Institute Luxembourg established and ensured the operational efficiency of the Consortium, and coordinated the elaboration of the study thereby safeguarding its consistency and completeness. The MPI contributed to the study with the leadership of its director, Prof. Dr. Dres. h.c. B. Hess, and the collaboration of the Department for Comparative and European Procedural Law. Dr. Pietro Ortolani was the Senior Research Fellow responsible for the mutual trust strand while Dr. Stephanie Law was the Senior Research Fellow responsible for the consumer protection strand. Within the Institute, a core team monitored the progress of the study.[3] Fellows of the MPI from different regions were responsible for the different geographical areas addressed by the study. In this regard, they acted as “Regional Contact Points”; each Contact Point provided guidance and support to the National Reporters and the other Members of the Consortium with respect to a specific jurisdiction or, as the case may be, group of jurisdictions. The Research Fellows supported and monitored the collection of data and interviews, in accordance with the research methodology set out by the Consortium.

[3] The members of the “core team” were Prof. Burkhard Hess, Prof. Marta Requejo Isidro, Dr. Pietro Ortolani, Dr. Stephanie Law, Vincent Richard, Janek Nowak and Martina Mantovani. Janek Nowak and Martina Mantovani joined the team in the summer of 2016.

3.2 National reporters

11. A network of experienced National Reporters, experts in procedural law and consumer protection law, were entrusted with the task of data collection and the drafting of National Reports. The Members of the Consortium acted as National Reporters for their respective home jurisdictions. An additional 14 National Reporters covered the remaining EU Member States.

3.3 The Advisory Board

12. An Advisory Board, composed of high-ranking stakeholders and experts in procedural and consumer protection law and representing the views of all relevant stakeholders (judiciary, legal professionals, consumer associations, business associations, debt collection agencies, bailiffs and financial institutions).[4] They assisted the Consortium in contacting practitioners and stakeholders in both procedural and consumer law, and provided feedback as to the accuracy, comprehensiveness and quality of the research carried out. The members of the Advisory Board also reviewed the draft version of the study and made recommendations for further improvement.

4. Methodology

13. The study was carried out by applying a complex, mixed methodology combining qualitative and quantitative paradigms of research: legal desk and archival research, online questionnaires, interviews and national reports were used in a complementary way.

4.1 Legal Desk Research and Archival Research

14. Legal desk research was conducted via a series of comprehensive investigations of the relevant national, European and international legal databases. All accessible and

[4] The member of the consortium were Karin Basenach (Head of the Consumer Protection Center Luxembourg); Fabio Guastadisegni (Clifford Chance, head of the Italian litigation practice); Professor Christian Kohler (University of Saarbrücken, former Director-General of the DG Library, Research and Documentation of the CJEU); Professor Hans Micklitz (European University Institute Florence) ; Ignacio Sancho Gargallo (Judge at the Spanish Supreme Court, Madrid); Professor Vassilios Skouris (former President of the CJEU, Luxembourg).

relevant national statutes and case law, as well as the pertinent legal doctrine, was identified by the National Reporters, and assessed by the Consortium.

15. Archival research was conducted by way of obtaining existing secondary quantitative data from the relevant national and international institutions in order to identify and qualify the frequency, geographical occurrence and seriousness of possible problems.

16. In every Member State, efforts were made to collect these statistics via research in all accessible databases, reports and other resources. At the European and international level, statistics were compiled from selected databases and institutional reports. However, it proved difficult to obtain specific data regarding the application of the individual legal instruments. The issue was discussed with the National Reporters and the European Commission during the first conference of the study, held in June 2016.[5] As a result, the Consortium decided to focus primarily on the two other key methods of data collection, namely the online questionnaire and interviews with stakeholders.

4.2 Online Questionnaire

17. Within its first month of activity, the Members of the Consortium drafted a questionnaire composed of both open and closed questions and covering both parts of the study.[6] The broad scope of the study led to a first version of the questionnaire which proved much too complex and long, generating the risk that potential respondents would be deterred from completing the questionnaire, or that they would provide inaccurate responses. Therefore, with a view to facilitating and accelerating the answering process, following discussions with the representatives of the European Commission the questionnaire was subsequently shortened and split into two parts (one per strand of the study). Accordingly, interviewees could decide whether they wanted to answer the whole questionnaire or only part of it. The

[5] See below, under 5.2.

[6] There were 53 questions in total for the mutual trust version of the online questionnaire and 43 questions in total for the consumer protection version. It should be highlighted that the consumer protection survey was also drafted so as to address a particular set of questions to different stakeholder groups (thus for example, a different set of questions were asked of lawyers than of consumers).

questionnaire was translated at the MPI into several EU languages (English, French, German, Italian, Spanish and Polish).

18. The online survey was addressed to and targeted at a wide range of stakeholders (judges, court clerks, lawyers, notaries, bailiffs, national authorities, business organisations, consumer associations, consumer ombudsmen, banks and other financial services providers, and academics) in all 28 Member States. The different number of inhabitants among the Member States was taken into account in order to ensure a balanced distribution of respondents.

19. The questionnaire was uploaded to a SurveyMonkey platform in month two (February) and kept open until month seven (July) of the Study. The platform allowed the respondents to select the questions corresponding to their individual expertise, thus rendering the questionnaire a manageable tool for both the respondents and the Consortium. The processing of the data was also made easier by the platform as it provided for the real-time collection of results, data filtering and the possibility to determine the statistical frequency of each relevant problem as well as its geographical distribution.

20. In total, the online survey received 848 sets of responses for both strands.

4.3 Interviews

21. In-depth interviews were conducted by the National Reporters on the basis of a common script drafted by the Members of the Consortium; these interviews were made either in person, by telephone or Skype.[7] Additional interviews were made by the research team of the MPI. When selecting the interviewees, preference was given to individuals with substantial practical experience in the fields of procedural law and consumer protection.[8]

22. Interviews followed a template similar to the structure of the online questionnaire, and were therefore based on open and closed questions in order to permit the interviewees to report broadly on their practical experience. In the course of the

[7] According to the contract, for each strand of the study at least 10 interviews had to be made with stakeholders. For obvious reasons, in small Member States this requirement was very difficult to meet.

[8] Practical problems are described below at para. 6.

study, the template was refined and shortened. The results of the interviews were summarized and translated. All interviews are available at the MPI Luxembourg.

23. The total number of interviews is 525. Of this, 279 correspond to the first strand of the study, and 246 to the second.

4.4. National Reports

24. Each National Reporter drafted a detailed report on both parts of the study for their own Member State. For this purpose, the National Reporters gathered data using a uniform template, drafted for each strand by the Consortium, in which all relevant statutes, case law and practices could be reflected. Moreover, thanks to their expertise in the fields under examination, the National Reporters provided indispensable insights as to how the analyzed legal institutions operate in practice.

25. The first drafts of the National Reports were collected in May 2016 and distributed to the Consortium for assessment. To facilitate the analysis and comparison of the National Reports the answers given to the questionnaires were compiled in a single master template designed and filled in by the MPI Luxembourg team. The National Reporters were invited to a meeting held in Luxembourg on the 13th of June 2016, where the reports were discussed and decisions made on whether more information or clarification was needed for specific points. After the conference, the National Reporters received specific recommendations on their reports from the MPI team and the Members of the Consortium. The final (improved) versions of the National Reports were delivered in October 2016.

5. The Development of the Study. Meetings and Reporting

5.1 Meetings

26. The Consortium discussed the methodology, the draft online questionnaires, the templates for interviews and for the National Reports, as well as the draft final report, on several occasions. To start with, the tender was circulated and discussed among the group before it was submitted to the European Commission. In January 2016, the MPI team elaborated the first drafts of the online questionnaires and circulated them within the Consortium and the Advisory Board for improvement and approval. The Consortium Members started working on the templates for the National Reports in

February 2016, always in close contact with the team of the MPI. In June 2016, the MPI organized the first on-site conference on the study, with the participation of the National Reporters (therefore also of the Consortium Members), the members of the Advisory Board and the representatives of the Commission.

27. A second on-site meeting of the Consortium took place in October 2016; at this time, the different chapters of the General Report were discussed. This meeting had been preceded by several skype conferences of the Consortium’s Members, in which the structure and the outcomes - in terms of possible policy proposals – of the final report were analysed. The draft chapters were delivered by the Members of the Consortium in December 2016. After a short (mostly linguistic) review the Draft Report was sent to the Commission on the 21st of December, 2016. At that time, the Commission and MPI agreed to extend the contract period until the 31st of January, 2017. Hard copy of the final versions of the chapters (two of them largely reworked in the meantime) were submitted to the European Commission on the 27th of January, 2017.

5.2 Reporting

28. Due to the reporting obligations, the elaboration of the Study was closely monitored by the European Commission. In January 2016, a kick-off meeting took place in Brussels, where the team of the MPI met the two units of DG Justice and Consumer Protection and discussed the methodology of the study in detail. The elaboration of the online questionnaire was made in the light of the comments obtained from the Commission after the first meeting. A 1st Report was submitted on the 28th of January 2016. A conference which took place in Rotterdam in February 2016 provided a second opportunity to discuss in detail the draft online questionnaires and the structure of the study with Norel Rosner. Jacek Gartska and Eric Degerbeck attended the June conference and discussed with the national reporters and the Consortium the problems encountered at that stage. The first interim Report of July/August 2016 summarized the data collection results and the findings of the national reports. It received comprehensive comments from the Commission, which were taken into account in view of the 2nd conference of the project in October 2016. A second interim Report was submitted to the Commission on 28 September 2016. In October 2016, Prof. Hess and the members of the MPI team working on the consumer strand

attended the European Consumer Summit in Brussels and made a presentation on the application of EU consumer law by the domestic courts of the Member States.

6. Difficulties Encountered

6.1 Overview

29. Studies on the application of EU instruments are usually based on empirical and statistical data. However, until today, specific statistics on civil proceedings are missing in most of the EU Member States. Apart from general information regarding the total number of civil cases, appellate proceedings and enforcement, specific data (i.e. on the number of cases under the specific EU procedural law instruments, precise numbers of cross-border cases etc.) are missing. In this respect it seems advisable that future EU instruments provide for an explicit obligation on the part of the EU Member States to collect and to publish more detailed statistics regarding their application.[9]

30. The collection of statistical data sometimes generated additional difficulties, including the unwillingness of some national ministries of justice or related organisms to permit access to data that was already in existence. Moreover, the collection of data via the European Judicial Network has not proved to be very effective.

31. As expected, the collection of empirical data (especially from the 848 responses to the online questionnaires and via 525 personal interviews) was the most valuable way of getting information. However, conducting interviews is time consuming; the average time of an interview is between 30 and 40 minutes. It was not easy to convince stakeholders to be interviewed; usually, only 1 in 5 persons approached agreed. Against this backdrop, it was not easy to obtain the required number of interviews, especially in small Member States where only a small number of stakeholders is involved in the topics of the study.

32. Additional impediments are recurrent. In particular, it must be highlighted that studies on the same or similar subjects are being conducted simultaneously. In this respect,

[9] This obligation is already found in several EU instruments, see Article 32 (2) European Payment Order Regulation; Article 53 (2) European Regulation on the Preservation of Bank Accounts.

a better coordination of research activities would lead to the collection of better quality data and reduce the risk of overlaps.

6.2 Timeframe and Content

33. A major obstacle for the elaboration of the study was the short timeframe. Assessing the judicial practice in 28 EU Member States for most of the EU instruments in civil and commercial matters within a one-year time period proved to be an almost impossible challenge. Without the infrastructure of the Max Planck Institute, and especially its international team, this task would have been impossible. Indeed, the tight schedule entailed that the team was working under permanent time pressure,[10] even if the number of collaborators dedicated to the project constantly increased. The heavy time constrictions impacted negatively on the review and assessment of interim steps (that is to say, the possibility for a constant refinement of the questionnaires, templates etc.)[11]. With regard to future studies, the provision of more relaxed timeframes, realistically matching the scope of the intended research, is of the essence. In our case, a timeframe of two years would have increased the quality of the study considerably.[12]

34. Content wise, the study addresses two totally different topics. Therefore, it proved to be necessary to split the Consortium and the Advisory Board into two sub-groups which addressed each strand separately. With regard to the National Reporters, it was neither possible to split nor to double their number. As a result, it proved to be difficult to retain National Reporters with specific expertise in both strands of the study. In this sense, the working program with regard to the two different strands was immense. The National Reporters were confronted with broad and comprehensive questionnaires and complex templates for their respective reports. In addition, time constraints related to one strand (the Consumer Refit program of the Commission)

[10] In order to cope with the timeframe, the MPI team started working at the very moment when it learned that its tender had been selected. Therefore, the team was able to “gain” six additional weeks for the preparation of the project.

[11] Nevertheless, the questionnaires and templates for interviews were refined (and shortened) two times, in order to facilitate the interviewing process and to give National Reporters more flexibility for the interviews.

[12] Interviews were conducted until January 2017 in order to attempt to meet the required figure of 280 for each strand.

had an (unnecessary) impact on the other. According to this experience, it seems advisable not to combine two different subjects within one study.

7. Conclusions and recommendations for the European Commission in terms of legislation/policy-making

35. The main results of the study can be found in the conclusions and recommendations. With regard to the first strand, the study did not disclose systemic deficiencies. Therefore, it proposes some targeted measures in order to improve the current situation and to overcome existing obstacles. The most urgent problems relate to the cross-border service of documents.[13]

36. In the second strand the study found considerable inequalities and shortcomings in the application of EU consumer law in the national judicial systems, Therefore, the Study proposes to enact an EU instrument (Directive) on Procedural Consumer Protection in order to improve consumers' access to justice, given that EU consumer protection law is not sufficiently enforced by the courts of the Member States.[14]

37. The elaboration of the study would not have been possible without the support of the core team of the Max Planck Institute Luxembourg which continuously dedicated energy, effort and passion to its elaboration. The team was composed of Dr. Pietro Ortolani and Dr. Stephanie Law acting as the coordinators of the two strands. Apart from acting as a member of the Consortium, Professor Marta Requejo Isidro conceived and reviewed many parts of the study. In the Strand on Mutual Trust, Vincent Richard elaborated on short notice the French national report and assisted the team in preparing the General Report. Martina Mantovani joined in Summer 2016 and helped in ascertaining the national reports and the interviews. Janek Nowak equally joined in Summer 2016 and assisted in the elaboration of the Strand on Consumer Protection.

38. Therefore, I would like to express my great appreciation and gratitude to the MPI team and to all colleagues and friends who invested much time and effort in the Study.

Luxembourg, 25 January 2017 *Burkhard Hess*

[13] Executive Summary of Strand 1: Mutual trust (English and French version).

[14] Executive Summary of Strand 2: Procedural Consumer Protection (English and French version).

Mutual Trust and Free Circulation of Judgments

Strand 1

Table of Contents

Organisational Structure 5

General Introduction 8
Methodology, Scope and Aim of the Study 8
1. Introduction 8
2. Object of the Study 8
3. Organisational Framework 9
 3.1 The Consortium 9
  3.1.1 Members of the Consortium 9
  3.3.2 Leadership 10
  3.2 National reporters 11
 3.3 The Advisory Board 11
4. Methodology 11
 4.1 Legal Desk Research and Archival Research 11
 4.2 Online Questionnaire 12
 4.3 Interviews 13
 4.4. National Reports 14
5. The Development of the Study. Meetings and Reporting 14
 5.1 Meetings 14
 5.2 Reporting 15
6. Difficulties Encountered 16
 6.1 Overview 16
 6.2 Timeframe and Content 17
7. Conclusions and recommendations for the European Commission in terms of legislation/policy-making 18

Executive Summary 28
1. Introduction 28
2. Methodology and Data 28
3. A Classic Cross-border Case: the Usual Situation in the First Instance 30
 3.1. Declaratory Stage 30
 3.2. Enforcement Stage 31
4. Default Procedures and Judgments in Cross-border Settings 32

5. Provisional Measures 32
6. Appeal and Third Instance 33
7. Specific instruments 35

Résumé 36
1. Introduction 36
2. Méthodologie et données 36
3. Un litige transfrontalier classique : la situation habituelle en 1ère instance. 38
   3.1. Instance directe 38
   3.2. Procédures d'exécution 39
4. Procédures et décisions par défaut dans un cadre transfrontalier 40
5. Mesures provisoires 40
6. Appel et troisième instance 41
7. Instruments spécifiques 43

Chapter 1: A Classic Cross-border Case: the Usual Situation in the First Instance 44
1. Declaratory Stage of the Action 44
   1.1 Approach of the research. Conclusions and Proposals. 44
      1.1.1 Standpoint 44
      1.1.2 General findings 45
      1.1.3 Policy options and proposals 46
   1.2. The National Rules on Competence in Cross-border Cases (e.g. is there a specialized judge in cross-border situations?) 50
      1.2.1 Status quo. Summary 50
      1.2.2 Problems and assessment 51
      1.2.3 Proposals/Possible improvements 52
   1.3 The Cross-border Service of the Lawsuit 54
      1.3.1 Status quo. Summary 54
      1.3.2 Problems and assessment 59
      1.3.3 Proposals/Possible improvements 76
   1.4 Legal Aid 83
      1.4.1 Status quo. Summary 83
      1.4.2 Problems and assessment 85
      1.4.3 Proposals/Possible improvements 93
   1.5 The Language of the Proceedings 95
      1.5.1 Status quo. Summary 95

1.5.2 Problems and assessment ... 98
1.5.3 Proposals/Possible improvements ... 100
1.6 The Rules on Representation Before the Court ... 100
1.6.1 Status quo. Summary ... 100
1.6.2 Problems and assessment ... 103
1.6.3 Proposals/Possible improvements ... 105
1.7 Scheduling of the Proceedings and Setting of Time Limits ... 106
1.7.1 Status quo. Summary ... 106
1.7.2 Problems and assessment ... 109
1.7.3 Proposals/Possible improvements ... 112
1.8 The Cross-border Taking of Evidence (including problems related to the translation of documents or interpretation during court hearings) ... 113
1.8.1 Status quo. Summary ... 113
1.8.2 Problems and assessment ... 116
1.8.3 Proposals/Possible improvements ... 122
1.9 Confidentiality Requirements in Court Proceedings ... 126
1.9.1 Status quo. Summary ... 126
1.9.2 Problems and assessment ... 128
1.9.3 Proposals/possible improvements ... 129
1.10 Motivation/reasoning of the Judgment ... 130
1.10.1 Summary. Status quo ... 130
1.10.2 Problems and assessment ... 130
1.10.3 Proposals/Possible improvements ... 133
1.11 The Decision on Costs ... 133
1.11.1 Status quo. Summary ... 133
1.11.2 Problems and assessment ... 135
1.11.3 Proposals/Possible improvements ... 137
1.11.4 Addenda: court fees ... 137
2. Divergence at the Enforcement Stage ... 138
2.1 Approach of Research. Conclusions and Proposals ... 138
2.1.1 Standpoint ... 138
2.1.2 General findings ... 139
2.1.2 Policy options and proposals ... 140
2.2 Enforcement Proceedings ... 141
2.2.1 Status quo. Summary ... 141
2.2.2 Problems and assessment ... 147

2.2.3 Proposals/Possible improvements 152
2.3 The Interface of Brussels I bis/National Systems 152
2.3.1 Status quo. Summary 152
2.3.2 Problems and assessment 157
2.3.3 Proposals/possible improvements 164

Chapter 2: Default Procedures and Judgments in Cross-border Settings 168
1. Introduction to the Chapter 168
2. The Perspective of the Member State of Origin 170
2.1. The Cross-border Service of the Lawsuit 170
2.1.1. Status quo 170
2.1.2. Problems and Assessment 170
2.1.3. Proposals and Improvements 172
2.2. The Translation of Judicial Documents 176
2.3. The Rules on Representation Before the Court 176
2.3.1. Status quo, summary 176
2.3.2. Problems and Assessment 178
2.4. Failure of the Defendant to Enter an Appearance and Declaration of Default by the Court 180
2.4.1. Status quo 180
2.4.2. Problems and Assessment 183
2.4.3. Proposals and Improvements 185
2.5. The Assessment (on Jurisdiction and/or on the Merits) Undertaken by the Judge in case the Defendant does not Enter an Appearance 187
2.5.1. Status quo 187
2.5.2. Problems and Assessment 192
2.6. Specific Situations where a Defendant will not be Permitted to Defend Himself although he is Present/Aware of the Case (i.e. contempt of court or debarment from defending) 195
2.6.1. Status quo 195
2.6.2. Problems and Assessment 196
2.6.3. Proposals and Improvements 198
2.7. Procedures to Oppose the Judgment in the Member State of Origin besides the Appeal 199
2.7.1. Status quo 199
2.7.2. Problems and Assessment 201
2.7.3. Proposals and Improvements 201
2.8. In Case the Defendant is Unable to Introduce his Recourse within the Time-limit, what Circumstances Allow Him to Introduce his Recourse outside of this Time-limit 202

2.8.1. Status quo ... 202
2.8.2. Problems and Assessment ... 205
2.8.3. Proposals and Improvements ... 207
3. Perspective of the State of Enforcement ... 208
3.1. Summary of Case Law on Grounds of Non-Recognition ... 208
3.2. Problems Pointed Out by Participants in the Online Survey ... 218
3.3. Interview Results ... 221
3.4. Proposals and Improvements ... 226

Chapter 3: Provisional Measures ... 229
1. Arrest/Provisional Attachment ... 229
1.1 Summary ... 229
1.1.1 Regulation (EU) No 655/2014 ... 229
1.1.2 Availability and Grounds for Provisional Attachment ... 231
1.1.3 Ex Parte Relief and Safeguards ... 235
1.1.4 Additional Procedural Divergences ... 237
1.2 Problems and Assessment ... 237
1.3 Proposals and Improvements ... 239
2. Provisional Payment ... 240
2.1 Summary ... 240
2.1.1 Improving the Efficiency of the Judicial System ... 241
2.1.2 Providing Financial Support to Impecunious Creditors ... 244
2.1.3 Favouring certain categories of parties ... 247
2.2 Problems and Assessment ... 247
2.2.1 Availability of Provisional Payment ... 247
2.2.2 Jurisdiction to Grant Provisional Payment under EU Regulations ... 250
2.3 Proposals and Improvements ... 254

Chapter 4: Appeal and Third Instance ... 256
1. First Appeal (Second Instance) ... 256
1.1. General Assessment of Appellate Proceedings ... 256
1.1.1. Parties ... 257
1.1.2. Substantive jurisdiction regarding where to lodge the notice of appeal and the particulars of the appeal ... 258
1.1.3. Content of the notice of appeal or particulars of appeal ... 259
1.1.4. Leave to appeal or certain value of the subject matter required for appeal ... 260

1.1.5. Gravamen ... 263

1.1.6. Problems and assessment ... 264

1.2. Time Limits ... 265

1.2.1. Beginning of the time limit ... 265

1.2.2. General length of the time limit ... 266

1.2.3. Extension or shortening of the time limit ... 267

1.2.4. Additional time limits ... 268

1.2.5. Problems and assessment ... 268

1.3. Representation ... 269

1.4. Scope of Review ... 271

1.4.1. Review of law ... 271

1.4.2. Review of facts ... 272

1.4.3. Admissibility of introducing new facts/evidence ... 272

1.4.4. New claims/modification of the complaint ... 275

1.4.5. Problems and assessment ... 276

1.5. Decision of the Appeal Court ... 277

1.6 Consequences on (Provisional) Enforcement ... 279

1.7. The Cross-border Context ... 282

1.7.1. Documents provided to a defendant abroad who lost her first instance case ... 283

1.7.2. Information of the parties about the judgment; the question of translation ... 285

1.7.3. Filing an appeal and time limits ... 285

1.7.4. Effects of the proceedings on the enforceability of the judgment ... 286

1.7.5. Problems and assessment ... 286

2. Second Appeal (Third Instance) ... 287

2.1. General Assessment of the Second Appeal Proceedings ... 287

2.2. Conditions / Admissibility of Second Appeal ... 288

2.2.1. Judgments subject to second appeal ... 288

2.2.2. Ratione valoris limitation ... 290

2.2.3. Other monetary and fiscal requirements ... 291

2.2.4 Ratione iudicati limitation ... 292

2.2.5 Leave to appeal ... 293

2.2.6. Problems and assessment ... 295

2.3. Time Limits ... 296

2.3.1. Beginning of the time limit ... 296

2.3.2. General length of the time limit ... 297

2.3.3. Extension or shortening of the time limit ... 298

2.3.4. Problems and assessment 300
2.4. Representation 300
2.5. Scope of Review 302
2.5.1. Typically a review of law 302
2.5.2. Problems and assessment 304
2.6. The Judgment of the Supreme Court 305
2.7. Consequences on Provisional Enforcement 306
2.8. The Cross-border Context 307
2.8.1. Documents provided to a party abroad who lost the second instance 310
2.8.2. Information of the parties about the judgment; the question of translation 312
2.8.3. Filing a second appeal and time limits 314
2.8.4. Effects of the second appeal proceedings on the enforceability of the judgment 316
3. Proposals and improvements 318
3.1. Information of the parties about the judgment; the question of translation 318
3.2. Information for the parties about legal remedies 319
3.3. Time limits 320
3.4. Provisional enforcement 321

Chapter 5: Specific Instruments 322
1. Introduction 322
2. The European Enforcement Order (EEO) 323
2.1 Implementation: Competence, Certification and Review 324
2.1.1 Competence for the certification 324
2.1.2 Certification as EEO 325
2.1.3 Review under Article 19 EEO 326
2.2 Problems and Assessment 328
2.2.1 General problems: rights of defense, review, and lack of familiarity and practice 328
2.2.2 Specific problems 330
2.2.3 Refusal of the certification and enforcement 332
2.3 Possible Improvements 334
3. The European Order for Payment Procedure (EOP) 334
3.1 Implementation: Competence, Assessment, and Review 335
3.1.1 Competence to issue an EOP 335
3.1.2 Assessment made by the competent (judicial) authority 336
3.1.3 Review under Article 20 EOP 337

3.2 Problems and Assessment 339

3.2.1 General problems: service and review, interaction with national law, lack of familiarity and practice 339

3.2.2 Specific problems: competence, assessment, forms and language 340

3.2.3 Refusal of enforcement 341

3.3 Possible Improvements 341

4. The European Small Claim Procedure (ESCP) 342

4.1 Implementation: Competence and Review Procedure 342

4.1.1 Competent courts 342

4.1.2 Review procedure 344

4.2 Problems and Assessment 346

4.2.1 General problems: lack of knowledge and limited use 346

4.2.2 Specific problems: competence, costs, assistance, time-limits, evidence, language, interest, service, and review 348

4.3 Refusal of Enforcement 353

4.4 Possible Improvements 353

5. The European Maintenance Procedure 354

5.1 Implementation: Competence, Financial Support, Legal Standing, Provisional Measures, and Review 355

5.1.1. Competence regarding maintenance claims 355

5.1.2. Financial support 356

5.1.3. Legal standing 357

5.1.4. Provisional measures 358

5.1.5. Review 358

5.1.6. Central Authorities 359

5.2 Problems and Assessment 359

5.2.1. Procedural problems 361

5.2.2. Difficulties for practitioners 362

5.3 Possible Improvements 364

6. Conclusion: General assessment of the application of these specific instruments 365

Executive Summary

1. Introduction

39. Strand 1 of the Study focuses on mutual trust and the free circulation of judgments, with the main purpose of assessing to what extent the attainment of these goals can be hindered by the discrepancies existing in the procedural laws of the European Union (EU) Member States.

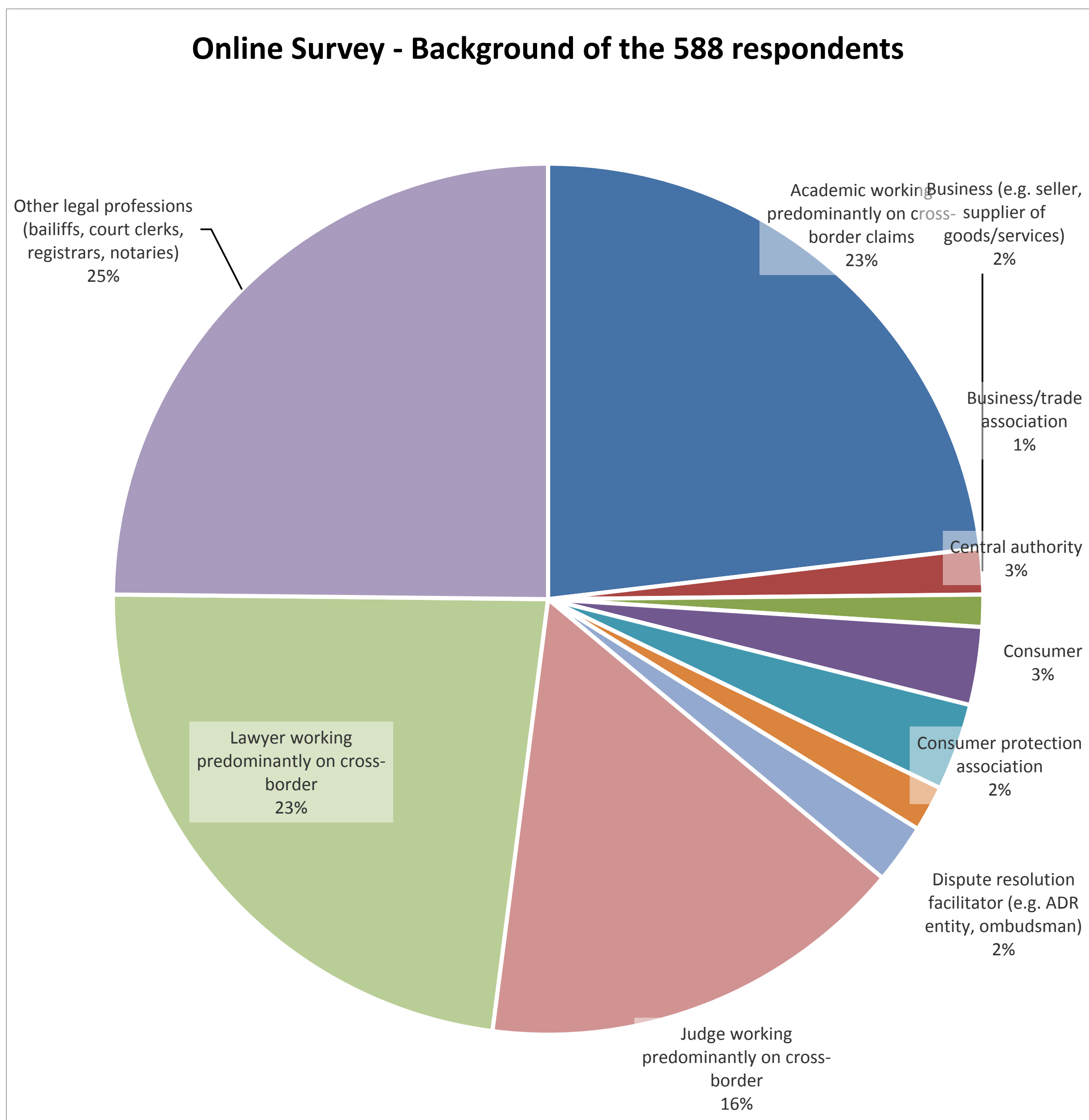
40. The last five decades have been marked by the rise of European procedural law: originating from the 1968 Brussels Convention, today this body of law comprises a host of different legal instruments, mainly (but not exclusively) aimed at allocating jurisdiction and ensuring the recognition and enforcement of judgments in different areas of litigation.

41. The importance of this legal development cannot be overstated: by implementing an efficient cross-border infrastructure for the protection of private rights, European procedural law plays a key role in guaranteeing the effectiveness of the fundamental freedoms within the Single Market and the protection of individuals in accordance with the EU Charter of Fundamental Rights. Yet, European procedural law can only achieve its objectives if it operates in synergy with the national procedural laws of the Member States. In light of this, Strand 1 of the Study aims at putting European procedural law in context, considering and comparing all those non-harmonized aspects of national civil procedure that interact with the EU instruments and may constitute an obstacle to their uniform and effective application.

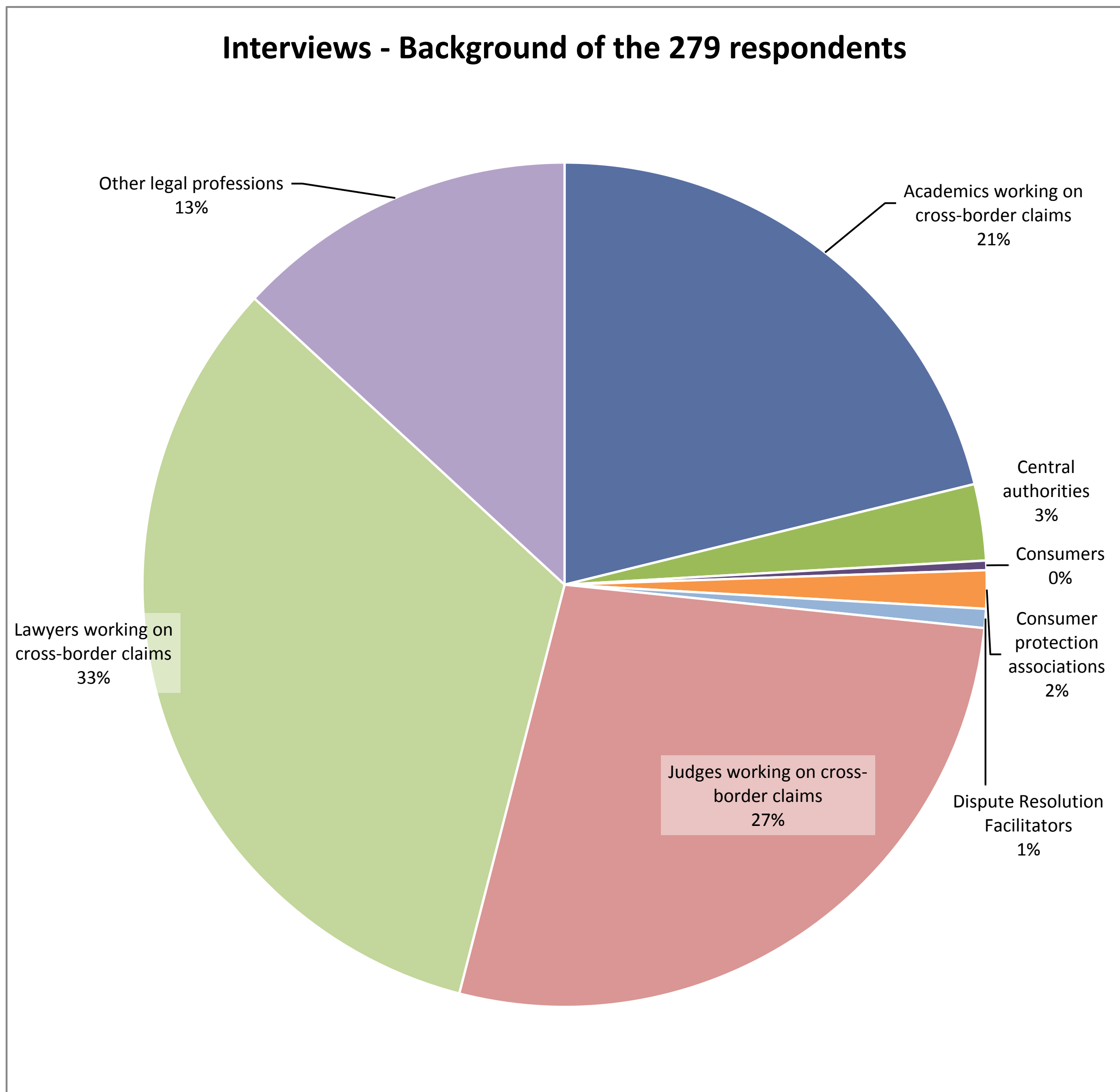
2. Methodology and Data

42. The Study adopts a distinctively comparative point of view: for each relevant issue of cross-border litigation, the Chapters of Strand 1 start by providing an overview of the legal landscape existing in the Member States. Against this background, the Study identifies the problematic aspects that could have a negative impact on mutual trust and/or prevent judgments from circulating across borders. Finally, for each of the identified problems, the Study formulates policy options and proposals (e.g. a targeted intervention, the establishment of minimum standards, a harmonization or the maintenance of the *status quo*).

43. The analysis carried out in Strand 1 is based on data collected through a mixed-methods approach, as described in the general introduction to the Study. The comparative description of the laws of the Member States is mainly based on the contents of the National Reports and the desk research. The relevance, frequency and distribution of the problems, instead, is based not only on legal sources and case-law, but also on the results of the online survey (hereinafter 'the survey') and the interviews conducted by the National Reporters (hereinafter 'the interviews'). For Strand 1, the survey was answered by 588 respondents and 279 stakeholders were interviewed, covering all EU Member States.



44.



45.

3. A Classic Cross-border Case: the Usual Situation in the First Instance

3.1. Declaratory Stage

46. The first part of Chapter 1 describes how the procedural laws of the Member States regulate the unfolding of a classic cross-border case, falling within the scope of the Brussels I (or I bis) Regulation. The Chapter assumes that the value in dispute is € 20.000 and the parties come from different jurisdictions and do not speak the same language. Where appropriate, however, the Chapter also takes into account the situation of a litigation between local parties, followed by an application for cross-border enforcement in another Member State. The main purpose of this comparative

exercise is to identify divergences that could lead to a denial of recognition and enforcement of the judgment.

47. According to our analysis, the main obstacle to cross-border litigation in the EU is the fact that, when national lawmakers design procedures, they pay attention to domestic cases only. For this reason, national civil procedure is not always well-equipped to deal with the additional complications arising out of the cross-border nature of the case. This lack of attention for the cross-border dimension is visible in many aspects of the procedural laws of the Member States, which have a potential impact on the free circulation of judgments.

48. Against this background, a number of policy proposals are put forth. First of all, Chapter 1 suggests a targeted intervention in two key areas: the service of documents and the taking of evidence, with modifications to the existing legal instruments. Furthermore, the Chapter advocates an approximation of the national laws and practices of the Member States, by way of setting uniform standards for specific aspects of cross-border litigation. In addition to service and the taking of evidence, these standards should address the recoverability of costs, the deadlines for the first reaction on the part of the defendant, and (although this point may be disputable) also legal aid.

3.2. Enforcement Stage

49. The second part of the chapter addresses some issues regarding the enforcement stage; although the enforcement stage was not the Commission's primary focus, we collected data which clearly suggest that national procedural laws regulating enforcement constitute a particularly fragmented field of law, with significant discrepancies among the Member States and consequences on the freedom of circulation of judgements within the EU. This Study, thus, should first of all pave the way for further in-depth comparative research, focusing exclusively on enforcement.

50. The divergences existing at the level of national civil procedure constitute a significant deterrent against enforcement, which is often perceived as complicated and risky. Like at the declaratory stage, the lack of attention for the cross-border dimension exacerbates the problem. Furthermore, and again due to the aforementioned divergence, the positive effects of the (limited) harmonization

achieved so far by the EU lawmaker to facilitate cross-border enforcement fade away when the European provisions are implemented or complemented by the national ones. In light of this, the Study highlights the desirability of focused research, ultimately leading to the harmonization of some essential aspects of the enforcement of foreign decisions.

4. Default Procedures and Judgments in Cross-border Settings

51. Chapter 2 is dedicated entirely to default procedures and judgments in cross-border settings, as this scenario often entails additional and specific obstacles to the circulation of judgments. The Chapter considers two complementary perspectives: the one of the Member State of origin, where the default proceedings have taken place, and the one of the State of enforcement.

52. The Chapter highlights the existence of divergences at several stages, such as the service of the documents instituting the proceedings, the time-limits for the defendant's reaction, the declaration of default, the consequences on the outcome of the litigation and the available remedies. The relevance of each issue on the international circulation of default judgments is subsequently gauged.

53. Of all the issues covered in the Chapter, the one which has the most direct impact on the cross-border circulation of default judgments is the service of judgments. For this reason, we advocate an enhancement of the use of electronic service and the abolishment of Article 19(2) of the Service Regulation, so as to ensure a uniform level of protection for defendants. It is also argued that EU law should introduce minimum and maximum time-limits for the filing of an appearance.

5. Provisional Measures

54. Chapter 3 analyses the possible challenges to mutual trust and the free movement of judgments arising out of differences in the national procedural laws regulation provisional measures. In some cases, the differences derive from the uneven availability of a certain measure, which may only be available in some jurisdictions. In other settings, the measure is available in all Member States, but it is regulated differently.

55. The Chapter mainly focuses on provisional attachment, provisional payment and the preservation of evidence. From the point of view of arrest/provisional attachment, the Chapter assesses the impact of Regulation 655/2014, establishing a European Account Preservation Order (EAPO), which entered into force on 18 January 2017.

56. As far as provisional payment is concerned, our comparative analysis demonstrates the existence of significant divergences in terms of availability of the measure functions pursued through it. Against this background, the Chapter proposes that provisional payments should be made more widely available, when they aim at assisting impecunious creditors and enhancing access to justice. This could be achieved by, for instance, by upgrading the existing instruments and introducing specific provisions, e.g. in the context of the Legal Aid Directive or the Maintenance Regulation.

57. As for the preservation of evidence, the Chapter highlights the problems arising out of the different perceptions of procedural fairness in expert proceedings. Therefore, in order to avoid the situation where such differences in perception affect the fairness of the proceedings and, ultimately, the free movement of the issuing judgment, the Chapter suggests that the appointed expert should subsequently be allowed to travel wherever necessary to carry out his/her task. To this end, a specific provision should be inserted in the Evidence Regulation.

6. Appeal and Third Instance

58. Chapter 4 focuses on appeals, scrutinizing how divergences in the national procedural laws of the Member States can have an impact on mutual trust and the free circulation of judgments. For the purpose of the comparative analysis, the Chapter proceeds in two main parts: he first part focuses on the remedies available against a first instance judgment, while the second part analyses remedies against a judgment rendered by an appellate court (third instance or second appeals). This comparative analysis confirms that the two types of remedies are different in many significant respects, in terms of structure, functions, procedural development and frequency of use. However, as far as the potential obstacles to the circulation of judgments are concerned, the problems evinced by the analysis generally concern both the second and the third instance. In light of this overlap, this executive summary will offer an overview illustrating the main problems as occurring in both

contexts, and differentiating between second and third instance only when necessary.

59. Having sufficient information about the judgment and available relief is crucial for the parties, in order to decide whether to introduce an appeal. This is particularly true for cross-border cases, where the interested party may not be familiar with the foreign legal system and the introduction of appellate proceedings often entails additional costs and practical complications. The comparative analysis shows that Member States regulate this issue in divergent ways. In some jurisdictions, the judgment is served on the parties *ex officio* by the court, while in other Member States the judgment is served only on initiative of one of the parties.

60. In some Member States the parties are informed about the legal remedies available against the judgment. Conversely, under other national procedural laws, no such information is provided when the judgment is served. In these cases, the foreign party who is not familiar with the system of civil appeals of the *forum* must necessarily rely on local legal experts, in order to learn whether the unfavourable judgment is final, or an appeal is possible at all. The empirical data confirms that foreign parties often have no clear knowledge as to the finality of the judgment that has been issued against them.

61. Time limits for the lodging of the appeal are a particularly sensitive issue for cross border cases, where the preparation of the appeal often entails additional complications, as compared with purely domestic cases. From this point of view, the national laws of the Member States diverge significantly: in the presence of a particularly short time-limit, hence, it may be practically impossible to prepare an appeal.

62. Chapter 4 addresses the aforementioned problems by proposing some minimum standards in specific areas of the national laws governing appeals. First of all, it is proposed that in cross-border cases the judgment should always be communicated to a foreign party by the court *ex officio*. Secondly, it is argued that foreign parties should be given clear, standardized information on the available remedies against the judgment. Thirdly, EU law should indicate minimum and maximum time-limits for the lodging of an appeal, so as to combine procedural fairness with efficiency.

7. Specific instruments

63. Chapter 5 focuses on four specific instruments in the area of judicial cooperation in civil matters: the European Enforcement Order (EEO), the European Order for Payment Procedure (EOP), the European Small Claims Procedure (ESCP), and the European Maintenance Regulation. It assesses how the instruments work in practice and, in particular, how they interact with the national systems of procedural law.

64. The overall assessment is that the instruments at hand work well and interact correctly with the legal systems of the Member States. However, the analysis also evinces the existence of some problems. Firstly, some instruments are not often used in practice, due to a lack of familiarity of practitioners and other relevant stakeholders. Secondly, the implementation of the instruments by some Member State has given rise to problems and uncertainties. Thirdly, the review mechanism provided for by some of the instruments may require an overall rethinking, in order to ensure adequate procedural guarantees. Fourthly, a correct functioning of the instruments requires a reliable system of cross-border service.

65. The Chapter advocates a better implementation of the instruments on the part of national lawmakers. The parties should be provided with more information on the instruments and guidance for their use. Ensuring the quality of the information published on the eJustice Portal would also play an important role in order to enhance the practical success of the instruments.

Résumé

1. Introduction

66. Le premier volet de l'étude porte sur la confiance mutuelle et la libre circulation des décisions de justice dans le but d'évaluer dans quelle mesure la réalisation de ces objectifs peut être entravée par les divergences existantes dans les droits processuels des États membres de l'Union européenne.

67. Ces cinq dernières décennies ont été marquées par la montée en puissance du droit processuel européen: ce corps de droit, historiquement issu de la Convention de Bruxelles de 1968, comporte aujourd'hui une multitude d'instruments juridiques, principalement (mais non exclusivement) destinés à permettre la reconnaissance et l'exécution des jugements dans différentes branches du droit.

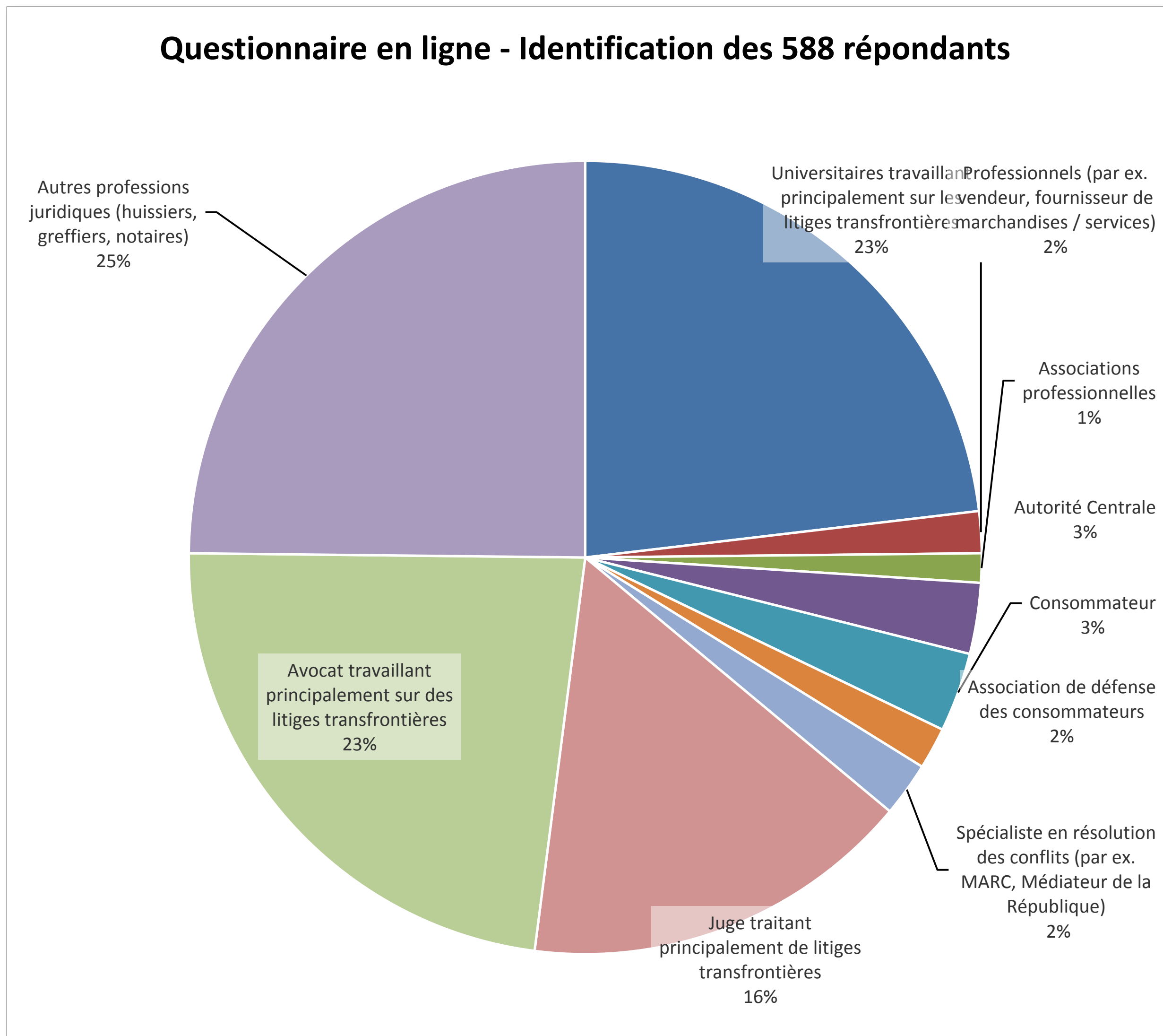
68. L'importance de ce développement juridique ne doit pas être sous-estimée : en mettant en place un cadre juridique efficace pour la protection des droits privés au niveau transfrontalier, le droit procédural européen joue un rôle essentiel pour garantir l'efficacité des libertés fondamentales au sein du marché unique et la protection des droits conformément à la Charte des droits fondamentaux de l'UE. Pourtant, le droit procédural européen ne peut atteindre ses objectifs que s'il fonctionne en synergie avec les procédures nationales des États membres. Le premier volet de l'étude vise à examiner l'application du droit procédural européen et à comparer tous les aspects non harmonisés des procédures civiles nationales qui interagissent avec les instruments de l'UE et peuvent constituer un obstacle à leur application uniforme et efficace.

2. Méthodologie et données

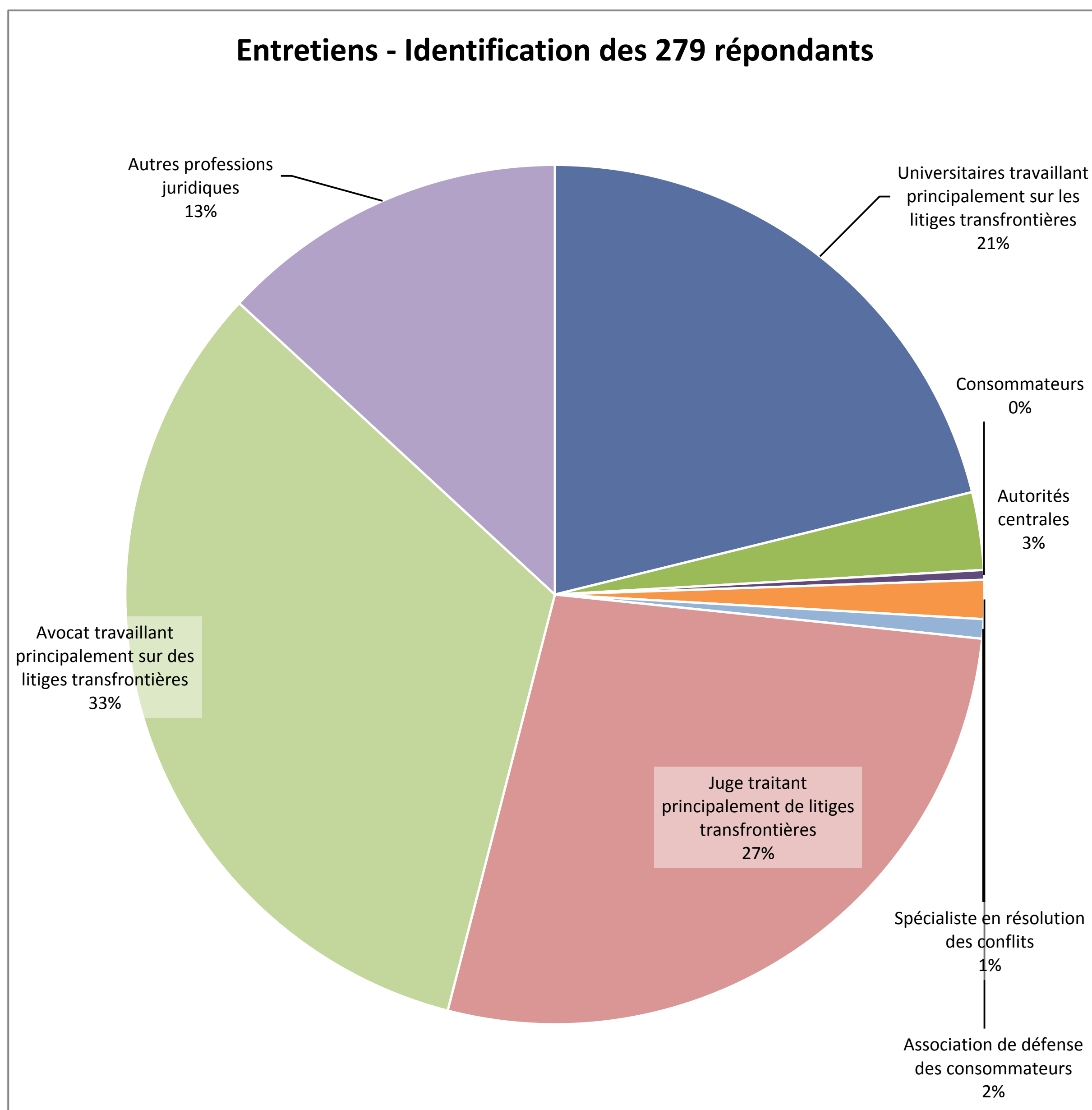
69. L'étude adopte un point de vue de droit comparé : les chapitres du premier volet commencent par donner un aperçu du régime juridique existant dans les États membres pour chaque question juridique susceptible de se poser dans un litige transfrontalier. Dans ce contexte, l'étude identifie les aspects problématiques qui pourraient avoir un impact négatif sur la confiance mutuelle et / ou empêcher les décisions de circuler à travers les frontières. Enfin, pour chacun des problèmes identifiés, l'étude formule des options et propositions politiques (par exemple, une

intervention ciblée, l'établissement de normes minimales, l'harmonisation ou le maintien du statu quo).

70. L'analyse effectuée dans le premier volet est basée sur des données recueillies au moyen d'une approche par méthodes mixtes, telle que décrite dans l'introduction générale de l'étude. La description comparative des lois des États membres se fonde principalement sur le contenu des rapports nationaux et de la recherche documentaire. La pertinence, la fréquence et la répartition des problèmes se fondent non seulement sur les sources juridiques et la jurisprudence, mais également sur les résultats de l'enquête en ligne (ci-après «l'enquête») et sur les entretiens menés par les rapporteurs nationaux («Les entretiens»). Pour le premier volet, 588 répondants ont participé au sondage et 279 personnes ont été interrogées, couvrant l'ensemble des États membres de l'UE.



71.



72.

3. Un litige transfrontalier classique : la situation habituelle en 1ère instance.

3.1. Instance directe

73. La première partie du premier chapitre décrit comment les lois procédurales des États membres régissent le déroulement d'un litige transfrontalier classique, soumis au règlement Bruxelles I (ou I bis). Le chapitre suppose que le litige porte sur un montant de 20.000 €, que les parties viennent de différentes juridictions et ne parlent pas la même langue. Le cas échéant, le chapitre tient également compte de la situation d'un litige interne entre des parties locales, suivi d'une demande d'exécution transfrontalière dans un autre État membre. Le but principal de cet exercice

comparatif est d'identifier les divergences qui pourraient conduire à un refus de reconnaissance ou d'exécution du jugement.

74. Selon notre analyse, les principaux obstacles au bon déroulement d'un litige transfrontalier dans l'UE résident dans le fait que les législateurs nationaux ne prennent en compte que les situations internes lorsqu'ils établissent des procédures. Pour cette raison, la procédure civile nationale n'est pas toujours bien équipée pour faire face aux complications supplémentaires découlant du caractère transfrontalier de l'affaire. Ce manque d'attention pour la dimension transfrontalière est visible dans de nombreux aspects des droits processuels des États membres ayant un impact potentiel sur la libre circulation des jugements.

75. Dans ce contexte, un certain nombre de propositions politiques sont présentées. Tout d'abord, le premier chapitre suggère une intervention ciblée dans deux domaines clés: la notification des documents et l'obtention des preuves, en modifiant les instruments juridiques existants. En outre, le chapitre préconise un rapprochement des législations et des pratiques nationales des États membres, en fixant des normes uniformes pour des aspects spécifiques des litiges transfrontaliers. En plus de la notification et de l'obtention de preuves, ces normes devraient porter sur l'aide juridique, la recouvrabilité des coûts et les délais pour la première réaction de la part du défendeur.

3.2. Procédures d'exécution

76. La deuxième partie du chapitre traite de la phase d'exécution. Nos données suggèrent clairement que les législations nationales en matière de procédures d'exécution constituent un domaine du droit particulièrement fragmenté, avec des écarts importants entre les États membres. Cette étude devrait dès lors ouvrir la voie à d'autres recherches comparatives approfondies, axées exclusivement sur le droit de l'exécution.

77. Les divergences existantes au niveau de la procédure civile nationale constituent un moyen de dissuasion important contre l'exécution, souvent perçue comme compliquée et risquée. En outre, le manque d'attention à la dimension transfrontalière exacerbe le problème. À la lumière de ce qui précède, l'étude

souligne l'opportunité d'une recherche ciblée, qui mène finalement à l'harmonisation de certains aspects essentiels de l'exécution des décisions étrangères.

4. Procédures et décisions par défaut dans un cadre transfrontalier

78. Le chapitre 2 est entièrement consacré aux procédures et décisions par défaut dans le cadre transfrontalier car ce scénario entraine souvent des obstacles supplémentaires et spécifiques à la circulation des jugements. Le chapitre examine deux perspectives complémentaires: celle de l'État membre d'origine, où la procédure par défaut a eu lieu, et celle de l'État d'exécution.

79. Le chapitre souligne l'existence de divergences à plusieurs étapes, telles que la notification des actes introductifs d'instance, les délais de réaction du défendeur, la déclaration de défaut, les conséquences sur l'issue du litige et les voies de recours disponibles. La pertinence de chaque question sur la circulation internationale des jugements par défaut est ensuite mesurée.

80. Parmi toutes les questions couvertes par le chapitre, celle qui a le plus d'impact sur la circulation transfrontalière des jugements par défaut est celle de la notification des jugements. C'est pourquoi nous préconisons une amélioration de l'utilisation du service électronique et l'abrogation de l'article 19, paragraphe 2, du règlement relatif à la notification, afin d'assurer un niveau uniforme de protection des défendeurs. Il est également avancé que le droit de l'UE devrait introduire des délais minimum et maximum pour la première comparution.

5. Mesures provisoires

81. Le chapitre 3 analyse les obstacles possibles à la confiance mutuelle et à la libre circulation des jugements découlant des différences entre les législations nationales en matière de mesures provisoires. Dans certains cas, les différences découlent de la disponibilité inégale d'une certaine mesure, qui n'est connue que de certaines juridictions. Dans d'autres cas, la mesure est disponible dans tous les États membres, mais elle est réglementée différemment.

82. Le chapitre se concentre principalement sur la saisie conservatoire, le paiement provisoire et la préservation des preuves. Du point de vue de la saisie conservatoire, le chapitre évalue l'impact du règlement 655/2014, portant création d'une

ordonnance européenne de saisie conservatoire des comptes bancaires (EAPO), entrée en vigueur le 18 janvier 2017.

83. En ce qui concerne le paiement provisoire, notre analyse comparative démontre l'existence de divergences importantes en termes de disponibilité de la mesure et des fonctions qu'elle poursuit. Dans ce contexte, le chapitre propose deux types d'interventions ciblées. Tout d'abord, les paiements provisoires devraient être rendus plus largement accessibles, s'ils visent à aider les créanciers sans ressources et à améliorer l'accès à la justice. Cela pourrait être réalisé en améliorant les instruments existants et en introduisant des dispositions spécifiques notamment dans le cadre de la directive sur l'aide juridique ou du règlement sur les obligations alimentaires.

84. En ce qui concerne l'obtention des preuves, le chapitre souligne les problèmes découlant des différentes perceptions de l'équité procédurale dans les procédures d'expertise. Par conséquent, nous préconisons l'introduction de normes minimales horizontales d'équité, à suivre dans toute l'Union européenne. En outre, le chapitre suggère que l'expert désigné devrait par la suite être autorisé à voyager dans la mesure du possible pour mener à bien sa tâche. À cette fin, une disposition spécifique devrait être insérée dans le règlement sur l'obtention des preuves.

6. Appel et troisième instance

85. Le chapitre 4 se concentre sur les procédures d'appel et examine comment les divergences entre les législations nationales des États membres peuvent avoir un impact sur la confiance mutuelle et la libre circulation des décisions. Basé sur une analyse comparative, le chapitre se divise en deux parties principales: la première se concentre sur les recours disponibles contre un jugement de première instance, la seconde examine les recours contre un jugement rendu par une cour d'appel (troisième instance ou deuxième recours). Cette analyse comparative confirme que les deux types de recours sont différents à bien des égards, notamment en termes de structure, de fonctions, de développement procédural et de fréquence d'utilisation. Toutefois, en ce qui concerne les obstacles potentiels à la circulation des jugements, les problèmes soulevés par l'analyse concernent généralement à la fois la deuxième et la troisième instance. À la lumière de ce chevauchement, ce résumé permettra d'avoir une vue d'ensemble illustrant les principaux problèmes qui se posent dans les

deux contextes et de ne différencier les deuxième et troisième instances que lorsque cela est nécessaire.

86. Il est crucial pour les parties de disposer d'informations suffisantes sur le jugement et les voies de recours dont elles disposent pour décider s'il y a lieu d'introduire un recours. Cela est particulièrement vrai pour les affaires transfrontalières où l'intéressé peut ne pas être familier avec le système juridique étranger et l'introduction de procédures d'appel entraîne souvent des coûts supplémentaires et des complications pratiques. L'analyse comparative montre que les États membres réglementent cette question de manière divergente. Dans certaines juridictions, le jugement est signifié aux parties d'office par le tribunal, tandis que dans d'autres États membres, le jugement n'est signifié qu'à l'initiative de l'une des parties.

87. Dans certains États membres, les parties sont informées des voies de recours disponibles contre le jugement. À l'inverse, en vertu d'autres lois procédurales nationales, aucune information de ce genre n'est fournie au moment de la notification du jugement. Dans ces cas, la partie étrangère qui n'est pas familière avec le système d'appel civil de l'instance doit nécessairement s'appuyer sur des experts juridiques locaux pour savoir si le jugement défavorable est définitif ou si un recours est possible. Les données empiriques confirment que les parties étrangères n'ont souvent aucune connaissance claire quant au caractère définitif du jugement qui a été rendu contre elles.

88. Les délais pour le dépôt du recours constituent une question particulièrement délicate pour les affaires transfrontalières car la préparation de l'appel entraîne souvent des complications supplémentaires par rapport aux affaires purement internes. De ce point de vue, les législations nationales des États membres divergent de manière significative: en présence d'un délai particulièrement court, il est donc pratiquement impossible de préparer un recours.

89. Le chapitre 4 aborde les problèmes susmentionnés en proposant des normes minimales dans certains domaines des lois nationales régissant les appels. Tout d'abord, il est proposé que, dans les affaires transfrontalières, le jugement soit toujours communiqué à une partie étrangère d'office par le tribunal. Deuxièmement, les parties étrangères devraient recevoir des informations claires et normalisées sur les recours disponibles contre le jugement. Troisièmement, le droit de l'UE devrait

indiquer des délais minimaux et maximaux pour le dépôt d'un recours, de manière à combiner équité procédurale et efficacité.

7. Instruments spécifiques

90. Le chapitre 5 se concentre sur quatre instruments spécifiques dans le domaine de la coopération judiciaire en matière civile: le titre exécutoire européen (TEE), la procédure européenne d'injonction de payer (IPE), la procédure européenne pour les petits litiges (PL) et le règlement obligations alimentaires. Il évalue la manière dont les instruments fonctionnent dans la pratique et, en particulier, leur interaction avec les procédures nationales.

91. Le résultat global de l'étude est que les instruments susmentionnés fonctionnent bien et interagissent correctement avec les systèmes juridiques des États membres. Cependant, l'analyse montre également l'existence de plusieurs problèmes. Premièrement, certains instruments ne sont pas souvent utilisés dans la pratique, en raison du manque de familiarité des praticiens et des autres parties prenantes concernées. Deuxièmement, la mise en œuvre des instruments par certains États membres a soulevé des problèmes et des incertitudes. Troisièmement, le mécanisme de réexamen prévu par certains règlements peut exiger une révision générale afin d'assurer des garanties procédurales adéquates. Quatrièmement, le bon fonctionnement des instruments exige un système de notification transfrontalier fiable.

92. Le chapitre préconise une meilleure application des instruments par les législateurs nationaux. Les parties devraient recevoir davantage d'informations sur les instruments et sur comment les utiliser. Assurer la qualité de l'information publiée sur le portail eJustice jouerait également un rôle important afin d'améliorer la réussite pratique des instruments.

Chapter 1: A Classic Cross-border Case: the Usual Situation in the First Instance

FERNANDO GASCÓN INCHAUSTI & MARTA REQUEJO ISIDRO

1. Declaratory Stage of the Action

1.1 Approach of the research. Conclusions and Proposals.

1.1.1 Standpoint

93. This section discusses and evaluates the information gathered through the national reports, questionnaires, interviews, and statistical data, about the unfolding before a court of a EU Member State (MS) of a classic cross-border procedure falling within the scope of the Brussels I (or Ibis) regulation, against a defendant domiciled in another MS. Following the instructions given by the European Commission the analysis aims to identify "divergence of national procedural laws which may in certain situations create an obstacle to achieve the goal of mutual trust and the free circulation of judgments"[15]. Obstacles to the mutual trust and the free circulation of judgments are best perceived on the occasion of a request for the recognition/enforcement of a foreign decision; therefore, specific attention is given to that stage in this part of the Report, and to the evidences provided in this regard by the data collected. However, the analysis has led us to detect national procedural rules and practices which (to the best of our knowledge and in the light of the materials) have not yet been put to the test through an application for the recognition/enforcement of a decision in another MS, but which have nevertheless a clear potential to negatively affect the free movement of decisions among the Member States. Therefore, this section of the General Report describes how the national procedural rules and practices of the MS operate in cases with a cross-border element and evaluates whether they fit to the particularities originating in the cross-border nature of the situation or whether, on the contrary, they have triggered or are likely to trigger rejection at the stage of recognition/enforcement in another MS where the claim would have been treated differently, should it had been filed there.

[15] Tender Specifications, p. 8.

94. It should be noted that, unless otherwise stated, for the purpose of the study we have assumed a standard situation in which the claim is for the payment of 20.000 €, a court in the Member State of origin has jurisdiction over the case and every step of the procedure goes according to plan between loyal parties. We have also assumed that the defendant does not speak the language of the Member State in which the procedure is taking place, thus translations and interpretation in oral court proceedings are necessary. When appropriate, besides the case of a defendant domiciled abroad we have also envisaged pure domestic situations -i.e., situations where the judgment is issued between local parties- followed by an application for cross-border enforcement in another Member State: for instance, when one of the parties moves abroad after the judgment in the court of origin has been delivered.

1.1.2 General findings

95. The leitmotiv of the Study undertaken by the Consortium is to give an answer to the question whether national procedural diversity is an obstacle to cross-border litigation in civil and commercial matters. In this context, *no differences exist regarding general procedural principles and safeguards*, *such as the adversarial and the equality of arms principles.*

96. When national procedural laws address the design of proceedings, however, *some differences appear*, especially in the way the principles of *party autonomy* and *disposition* are conceived and applied, and *the consequential roles of judges and parties*. Some jurisdictions show models of strongly empowered courts, entitled to undertake ex officio factual or legal inquiries that would not be allowed in other jurisdictions. Those differences in the scope and content of the courts' powers, nevertheless, do not seem to translate as such into hurdles for the smoothness of cross-border litigation, nor for the recognition and enforcement of foreign decisions.

97. It is mainly at the level of the *procedural technicalities that the solutions really differ*. The national reports, interviews and questionnaires show substantial disagreement in the way a claim is served on the defendant, the deadlines granted to the defendant to react, or the issues of costs and legal aid, among others. Unlike the divergence mentioned in the preceding paragraph, the ones addressed here *have a potential to trouble the free circulation of judgements*, either per se, or (more frequently) because of its intimate interweaving with a typical feature of the national procedural rules: the

disregard for the cross-border element of the process. In other words, because the cross-border dimension of a case is neglected in the local rules governing civil and commercial litigation, legitimate doubts arise as to the compliance of the national systems (and/or its application) with the right to access to justice as applied in cross-border constellations; difficulties thereto related come up at the stage of recognition (or, in the light of the collected data, there is reason to believe they would come up, should the rule or practice at stake be tested then).

98. To summarize, in the light of the materials we have concluded that today's biggest challenge for the European area of justice, security and freedom regarding civil litigation does not lie with the lack of uniformity, i.e. the absence of a pan-European common procedure, as such, but in combination with the lack of sufficient attention of most national procedural systems to the specificities created by the cross-border element(s) of a case.

99. It is worth noting that the numbers representing cross border litigation from 2013 to 2016 do not support reaching the conclusion that any obstacle originating in the above described phenomena can be seen as either *structural* or *systemic, or geographically localized*. At the same time, the occurrences cannot be considered as isolated; as a matter of fact some problems are recurring themes within the materials.

1.1.3 Policy options and proposals

100. The conclusion that national regulations and their dissimilarities may entail serious challenges to the fairness of the proceedings and/or to the free circulation of judgments leads to the question of how to tackle the situation in the most efficient manner. According to the Tender Specifications, a number of policy options are available; additional ones can be imagined. At any rate, the strategy or strategies to be followed (including also the selection of the appropriate instrument: regulation, directive, recommendation; formative actions, etc) will vary so that in each case they really respond to the problem at hand.

1.1.3.1 Keeping the status quo

101. This option entails essentially resorting to the existing grounds for refusal of recognition and enforcement of foreign judgments rendered in violation of procedural law standards in the requested Member State. **No EU action would be required**.

102. A) *Public policy*. The materials analyzed, in particular interviews and questionnaires, point to the public policy clause as a ground which is often argued against the recognition/enforcement of a foreign judgement but only for strategic reasons, or/and as a way to show discontent with the judicial decision. Evidences show lack of success as a common outcome.

103. Still, in the light of the National Reports and the case law reproduced the General Reportershave concluded that the public policy exception plays a role in practice. Besides, preliminary questions have been referred not so long ago to the CJEU;[16] and it seems to gain momentum as well in literature.[17]

104. Regarding the objections raised under the public policy clause, the survey respondents stressed the relevance of defences based on the circumstances that 'The court of origin did not properly apply fundamental procedural rights' (successful in 22.45% of cases where it was raised) and 'The procedural law in the Member State does not correspond to the procedural standards in the Member State of enforcement' (successful in 19.51% of cases where it was raised). National case law underpins this finding, i.e., the so called "substantive" public policy law is seldom used. Besides, regarding procedural issues, the materials point to certain occurrence as frequent, to the point they may justify EU action.

105. Therefore, having recourse to the public policy clause as it is currently foreseen in the Brussels I bis regulation –i.e., keeping the status quo-, may still prove a sufficient solution for a range of apparently problematic situations. This would be the case for the lack of courts specialized in cross-border litigation when it unfolds into a biased decision; the absence of motivation of a judgments can be dealt with as well in this way. Conversely, other situations require a harder or more "invasive" strategy. This is unmistakably the case of the service of the claim.

106. B) *Service of documents* instituting the proceedings. Different types of interventions are needed regarding this aspect so essentially linked to the right to a due process, in light of the specificities of cross-border litigation. We explain them in detail below and in the document itself, under 1.3.

[16] See Case C-681/13 *Diageo Brands*, EU:C:2015:471 ; Case C- 559/14 *Meroni*, EU:C:2016:349.

[17] M. Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Erasmus University Rotterdam 2016, pending publication).

1.1.3.2 Targeted intervention (different levels of).

107. This policy option would entail **targeted interventions**, in areas where a need has been spotted because procedural law divergences do undermine mutual trust. In our view, targeted interventions aiming at **upgrading the current instruments, either amending the current provisions or/and adding new ones,** are required regarding the **Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, as well as the Council Regulation (EC) no 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.**

108. A second measure of targeted intervention would consist in setting up new instruments**.** However, we have not met sufficiently convincing arguments to support a whole new instrument.

1.1.3.3 Horizontal minimum standards/full harmonization of procedural law

109. The creation of a uniform cross-border procedure, similar to the ESCP but with a wider scope of application and more detailed rules, could be of course envisaged as a possibility to get rid of hurdles. However, in view of the data collected we consider this too radical and unnecessary and, therefore, a disproportionate step.[18] The current state of affairs justifies rather an **alignment of the national provisions/practices regarding precise aspects of cross-border litigation** (i.e., some targeted harmonized or uniform rules), by way of setting minimum standards. This would be the preferred approach to **some issues connected to the service of process; the recoverability of costs; the deadlines for the first reaction on the defendant's side; the grounds to refuse cooperation in the taking of evidence; and (although this point may be disputable) legal aid**. Regarding the law making options, a legal instrument could be drafted embracing all the standards under the title "Miscellanea"; alternatively, each single standard should be integrated into the already standing EU instruments.

[18] Additionally, should a common European cross-border procedure be adopted, a further question to be addressed would be whether such an instrument should be optional or compulsory.

1.1.3.4 Other

110. Besides the above mentioned actions, the EU should at any rate continue f**unding and promoting formative and training activities of judges, court staff and other professionals**. A clear outcome of the present Study is that lack of familiarity or direct ignorance still accounts for the difficulties encountered in cross border litigation.[19] If possible, the EU should advice the MS as to the compulsory contents of specific master studies, or of further studies imposed on the future main actors of the judicial systems.

111. The EU should continue to make use of the European Judicial Network in Civil and Commercial Matters, as well as of the European Judicial Training Network in order to foster awareness of the EU civil justice instruments as well as could propose to the MS the adoption of measures for domains still beyond the reach of EU competences. In particular, a Recommendation should be made regarding the lack of specialization of the judiciary, and to take up good practices or rules already existing in some MS aiming at easing cross-border litigation before them by way of flexible attitudes (such as for instance those identified in the field of legal aid, or regarding the language of the documents presented to the court).

112. The EU and its Member States shall monitor closely the contents, quality and continual actualization of any information publicly accessible through the websites disseminating information relevant for cross-border litigation.[20]

[19] Very clear indications in this sense have been given by the interviewees, even of the “older” MS; as posited by a Belgian judge with 3 years of experience, who represents the voices of many other, ‘Judges, court clerks and judicial personnel should be more intensely trained to handle these instruments’. See also below, under the heading ’Lack of specialization’.

[20] Again, this is a concern shared by many interviewees, who ask for a more visibility regarding how EU instruments are implemented in their own national systems, as well as in the systems of the other MS.

1.2. The National Rules on Competence in Cross-border Cases (e.g. is there a specialized judge in cross-border situations?)[21]

1.2.1 Status quo. Summary

113. Allocation of jurisdiction between MS in cross-border cases is performed by EU regulations (Brussels I bis, Brussels II bis, Maintenance, Successions and, in the future, matrimonial property regimes and property consequences of registered partnerships). National reports show there is a direct application of the unified rules and that no particular difficulties or issues apart from those related to the interpretation of the rules, which is at any rate unavoidable.

114. As a general rule, there are in the MS no specialized judges in cross-border cases; nevertheless, internal rules on case-load distribution among courts could take account of this factor (as described, for instance, in some national reports: e.g., Belgium, Germany or Poland).

115. Interestingly, in several MS some limited experiences of having specific courts to address cross-border litigation are being tested:

- The Danish Maritime and Commercial Court, for cases where business and international business knowledge is of significant importance. The court will hear the case if it is requested at least by one of the parties.
- The International Chamber of the Paris Commercial Court (created in 2010), staffed with judges competent in English, German and Spanish.
- The Netherlands Commercial Court (starting on 1 January 2017), a special chamber of the Amsterdam District Court (operating in English).
- The Commercial Court in London, a specialist court within the Queen's Bench Division of the High Court of Justice, handling complex national and international business disputes.

116. As a matter of fact, those experiences are not exclusively or even directly connected to the cross-border nature of the case, but rather to the fact that the case at hand is an international commercial case, which entails that a cross-border element will be present. Regarding the International Chamber of the Paris Commercial Court and of

[21] The information was retrieved from: National Reports, question 2.1.1. and online survey, question 5..

the Netherlands Commercial Court, the main purpose seems to be overcoming the language barrier, more than concentrating in a single court the competence to deal with cross-border cases.

117. Additionally, some EU Member States, like Germany, Finland and The Netherlands, have decided to concentrate in a single court part of the cross-border litigation, corresponding to a specific EU procedural regulation. In the case of Germany and The Netherlands, this concentration applies only to the European Order for Payment Procedure (with exclusive jurisdiction of the Amtsgericht Wedding in Berlin and of the District Court of The Hague, respectively). In Finland the District Court of Helsinki has exclusive jurisdiction to deal with both European Order for Payment Procedure and European Small Claims Procedure regulations.

1.2.2 Problems and assessment

118. The survey did not address explicitly the consequences of the lack of specialization. The issue did not arise during the interviews or in the questionnaire's open questions. However, the lack of sufficient knowledge of judicial actors regarding the European *acquis* was frequently commented by stakeholders and interviewees, irrespective of their MS of origin.[22]

119. Indeed, the absence of judges specialized in cross-border cases does not create *per se* a hurdle to cross-border litigation. However, it may translate into longer proceedings, as well as in judgments of a poorer quality or into decisions that do not meet reasonable expectations of the parties, thus having a deterrent influence - stakeholders will hesitate before engaging into litigation or, one step backwards, even before engaging in a commercial relationship with a foreign partner.

120. In the worst case scenario the lack of specialization in cross-border cases may turn into disrespect for the alien element leading to decisions where EU rules on the merits fail (EU conflict of law rules leading to the application of a foreign law, which remains non-applied in the case at hand), or even worse, to biased decisions (judges

[22] Needless to say, lack of knowledge or of awareness about the EU instruments (including the forms and certificates), affects both the declaratory and the enforcement stages. Interestingly, how long the MS has been in the EU does not seem to make a difference in this regard in the perception of the interviewees: interviewees from The Netherlands; Luxembourg or Romania, for instance, complain about it. More training and other actions leading to familiarity with the EU regime is asked for by academics and – more relevant- by all sorts of practitioners as well.

deciding *pro domo sua*). The proscription of the *revision au fond* will usually mask the former phenomenon, and therefore it will not transpire to the phase of recognition/enforcement; besides, even if it did, it would seldom be considered as a ground to refuse recognition or enforcement. On the contrary, a biased decision is more difficult to conceal, and as impartiality of the judge is a fundamental value in all EU MS, it will likely affect mutual trust and the free circulation of judgements.[23]

121. The problems, nevertheless, are difficult to detect and to measure from an empirical point of view. There is, indeed, a previous question to elucidate, namely what "specialization in cross-border cases" means. It is here submitted that it should at least include a good theoretical and practical knowledge of the procedural tools when applied to such cases (e.g., how to serve abroad the document instituting the proceedings, how to manage the taking of evidence abroad, how to fill in a EEO-certificate or an Article 52-certificate of the Brussels I bis regulation); and the same for the rules governing the conflict of laws. It is less apparent whether specialization requires as well that judges are competent in other languages (or at least in English?), in some specific areas of law (international contracts, international family law, for instance) or if they should possess comparative law skills (having in mind that partial or superficial knowledge might turn out dangerous). Defining the scope of "cross-border specialization" is basic when addressing the issue of additional training (see below).

1.2.3 Proposals/Possible improvements

1.2.3.1 To address the lack of specialization

122. No direct intervention appears to be possible regarding the difficulties originating in the absence of judges specialized in cross-border cases, as the judicial organization and the structure of the judiciary remains within the competence area of the MS and no legislative action could be undertaken by the EU. Besides, to identify and agree on the cross-border elements relevant to orientate the specialization of a court may prove a difficult task.

[23] The application of the Brussels II bis Regulation regarding the return of children has shown in some critical cases a tendency of the national authorities to rule in favour of the national parent. See Lara Marini's petition to the Commission, no 0460/2013. It is not an isolated petition: the complaints against Germany are repeated, as reflected in the Committee on Petitions document of the meeting held on May 4 and 5, 2015, PETI_PV (2015) 242_1.

123. In light of it, we would suggest that a Recommendation on the structure of the judiciary and the formation of judges be drafted. The existence of courts with experience in cross-border cases is indeed a good practice that strengthens the confidence in the court system of a country. It is also advisable for particularly complex subject matters giving rise to high value claims, where disputes usually involve a cross-border element. training activities for judges and other judicial actors should continue. In particular, the European Judicial Network in Civil and Commercial Matters, as well as of the European Judicial Training Network should be increasingly used in order to foster awareness of the EU civil justice instruments, as well as to take up good practices or rules already existing in some MS aiming at easing cross-border litigation before them by way of flexible attitudes (such as for instance those identified in the field of legal aid, or regarding the language of the documents presented to the court). The difficulties in determining the meaning and scope of "cross-border specialization" should be solved with a broad approach as opposed to a restrictive one.

1.2.3.2 To address the specific issue of bias and lack of impartiality

124. Lack of specialization, lack of an open-minded approach to cross-border situations and lack of comprehension of the very notion of "mutual trust" might entail, in very specific and exceptional situations, the risk of biased decisions in favour of the "national" party.[24] Should a decision be tainted with partiality due to this fact, the public policy exception should be enough to react to it. Nonetheless, it might not always be a perfect solution:

125. On the one hand, the requirement of exhaustion of recourses in the MS of origin, present in the latest ECJ decisions on public policy,[25] might endanger the effectiveness thereof.

126. On the other hand, there might be in practice a risk of "retortion" (or even retaliation) when the court of the MS of enforcement has to decide on a public policy exception on this basis. This could be the case if the foreign party had unsuccessfully challenged the decision in the MS of origin on lack of impartiality grounds; should an

[24] See (n 21).

[25] See (n 16).

application for enforcement of that decision be filed in the MS of the nationality of that party, there might be a risk for refusal of recognition/enforcement on the same grounds of lack of impartiality that were originally unsuccessful. In other words, if all courts involved in the case decide *pro domo sua*, the public policy exception could also be misused in favour of the national party.

127. In such extreme cases only recourse to the ECJ would provide for the possibility for a "neutral" assessment, via a direct claim against the MS of the court that produced the biased decision(s), to the extent that such situations are recurring and constitute a systemic problem.

1.3 The Cross-border Service of the Lawsuit[26]

1.3.1 Status quo. Summary

128. National reports tend to be quite scarce on this point: there is a general referral to the Service Regulation, accompanied sometimes with an explanation of the Regulation's main provisions.

1.3.1.1 Application of the SR

129. The Service Regulation (SR) is applied in different ways in the MS: some show preference for post service with acknowledgment of receipt (see, for instance, Finland, Germany, Luxembourg, Poland, Spain or Sweden); others prefer recourse to the central bodies (Greece, Malta). Optional methods of service are not accepted uniformly: direct service of documents is not allowed in all MS (see for instance, Bulgaria or Latvia); the same applies to transmission by consular or diplomatic channels (it is not admitted in Italy or Spain, unless addressed to nationals of the other MS concerned). The role of bailiffs and judicial officers as national authorities is also considered differently. Indeed, who is to be considered as transmitting and receiving authority may differ: the courts themselves in most MS, but also bailiffs in some jurisdictions (France, Italy, The Netherlands, Belgium) and/or public prosecution offices (Greece, Belgium).

[26] The information was retrieved from: National Reports, questions 2.1.1. and 4.1, on-line survey, questions 3, 7, 9, 10, 12, 41 to 43 and interviews.. Focus is on service of the lawsuit; incidentally also service of other relevant documents is addressed.

- Regarding time. The general perception is that, more often than desirable, the SR does not work smoothly; this would be the case especially of some MS. On the other hand neighbour countries such as the Nordic countries and the Benelux seem to encounter less trouble to cooperate among each other.
- Regarding language (Article 8). Practice in MS differs. Some MS require or encourage claimants to provide a sort of “precautionary” translation of the relevant documents before accepting them to be sent to the requested MS – e.g., Denmark, Germany, Romania or Spain. In other MS the court itself will translate the writ of summons (Finland, Slovakia). It is not always clear to what extent the annexes to the complaint have to be translated, although they might be very voluminous (the practice in Denmark, for instance, is to request the plaintiff to procure a translation for these documents, if perceived as necessary); finding translators in some MS of the official languages of other MS might prove to be difficult some times.
- Regarding costs. There are jurisdictions where bailiffs or *huissiers de justice* are responsible to perform service of documents sent from another MS and are entitled to charge their fees (Belgium, The Netherlands, Luxembourg and France; paying the fees, additionally, is in many cases troublesome for foreign residents) whereas in other MS the performance of service in the requested MS is free.

1.3.1.2 Beyond the SR

130. In the context of a request under the SR (and also outside it), the first service of the document instituting the proceedings on the defendant must be carried out according to the national procedural regulation of the requested MS. The national reports show that performance of the notification of the documents instituting the proceedings differs from one MS to another. In many MS service is directly made by the court using a variety of methods, among which post –also electronic- and personal service are clearly the predominant methods - although national peculiarities recurrently appear as well here. In other MS service of the claim is attributed in full –with very limited exceptions- to bailiffs (e.g., France, Belgium, The Netherlands), with significant consequences regarding costs.

131. More specifically, it has to be noted how MS react in the face of the following difficulties:

- How to locate the domicile of the addressee, especially when the address given proves to be incorrect or outdated. Although for internal situations most of the legislations of the MS establish the duty of the serving authority to make specific efforts in order to locate the domicile of the addressee, many interviewees claim that, when SR is applied, such an effort is not always done and forms are turned back to the requesting authority, either as unsuccessful or as incorrect.[27] It does not seem to be, thus, a legal issue, but rather a problem of (bad) practice.
- Who can be served instead of the defendant. All national procedural regulations accept substituted service, although with slight differences:
- When the addressee is a natural person, members of the household (although with minimum age differences: most MS require full age, but there are quite a few exceptions: 14 years: Hungary, Italy, Spain; 15 years: Luxembourg, Finland; 16 years: Belgium) and employees working there are generally admitted, but neighbours seldom are (France, Croatia, Hungary, Italy); when service is tried at the workplace, then employers or co-workers (Croatia, Denmark, France, Spain, Sweden); and even doorkeeper, for both domicile or workplace (Italy, Poland, Romania, Spain); some MS explicitly exclude opponents (Germany, Bulgaria, Lithuania, Poland).
- When the addressee is a legal person: service on representatives or members of the management is the rule (UK seems to limit to someone holding a “senior position” in the company), although service on employees is also (subsidiarily) admitted in most MS (Denmark, Bulgaria, Finland, Malta, The Netherlands), namely at the register or administrative office of the corporation (Belgium, Latvia, The Netherlands)

[27] Issues concerning this problems were described by two judges from Austria; a lawyer and an academic from Cyprus; an academic from the Czech Republic; a judge from Finland; a German academic and two German judges; a Greek judge; a Latvian judge; a judge from Lithuania; two lawyers from Luxembourg; a lawyer/academic from The Netherlands; a Romanian lawyer; a judge from Slovakia; a Slovenian judge.

- Electronic service of documents. It is a field in which divergences are also significant. In some MS it is still not a real possibility (Belgium, Greece, Luxembourg, Malta, The Netherlands). In most MS where electronic service is possible it remains still an option conditioned by the parties' willingness to use it (Croatia, France, Hungary, Latvia, Poland, Romania, Slovakia); the use of secured electronic signature is a common requirement. Some MS have created specific platforms to perform electronic exchange of judicial documents in a secure way (ERV in Austria, Digital Post in Denmark, DE-Mail in Germany, Liteko in Lithuania, LexNet in Spain, for instance), and, among them, a few have established its use as mandatory, at least for lawyers and other legal professionals (Austria, Spain). This policy option is also consistent with the obligation of businesses, lawyers and other professionals to have a certified e-mail address that can be used for judicial proceedings or to be registered at the relevant official platform: it exists only in a few MS (Austria, Croatia, Denmark, Italy, Lithuania and Spain).

- The possibility of serving the claim on the defendant electronically is not envisaged in most MS, although it is possible in a few of them (Denmark and Spain –but only effective if there is acknowledgement of receipt-; Finland, in an indirect way –recipient receives a notice indicating that the documents are available at a specific server-; Germany, if the addressee has expressly agreed to – however, indication of the email address solely on the letterhead is not sufficient).

- Fictitious methods of service. They are admitted in all MS, since they are necessary to the claimant's right to access to the court. Two situations trigger recourse to such methods: when the domicile or address of the defendant is unknown (normally, after having carried out diligent efforts to identify it) and when the addressee has refused to receive service (although this situation should raise less concern, since the addressee is at least aware of the existence of the judicial claim against him).

- When the address is unknown (or no longer valid) the most frequent system is service by publication, although differences arise concerning the sort and the place for such a publication: official journals, court boards, court's websites,

town halls or even newspapers. In some MS, fictitious service is followed by the appointment of a curator to defend the defendant's position, although it is not a common practice (Austria, Romania).

- Apart from service by publication, other frequent methods of fictitious service are envisaged by the legislation of some MS: sending the document to the public prosecutor (Belgium, Italy); posting the notification on the door or in the mailbox of the respondent (Bulgaria, The Netherlands, Slovenia); sending letters (normal and with acknowledgement of receipt) to the last known address (France, Luxembourg).

- Some MS have introduced specific precautions and limits to fictitious service when the addressee is domiciled abroad: Denmark accepts service by publication if the relevant foreign authority denies or fails to comply with a request to serve the document abroad; in Finland fictitious service is not available to serve documents in proceedings that are being carried out outside Finland; Germany only admits fictitious service within the country and in proceedings where the Service Regulation does not apply.

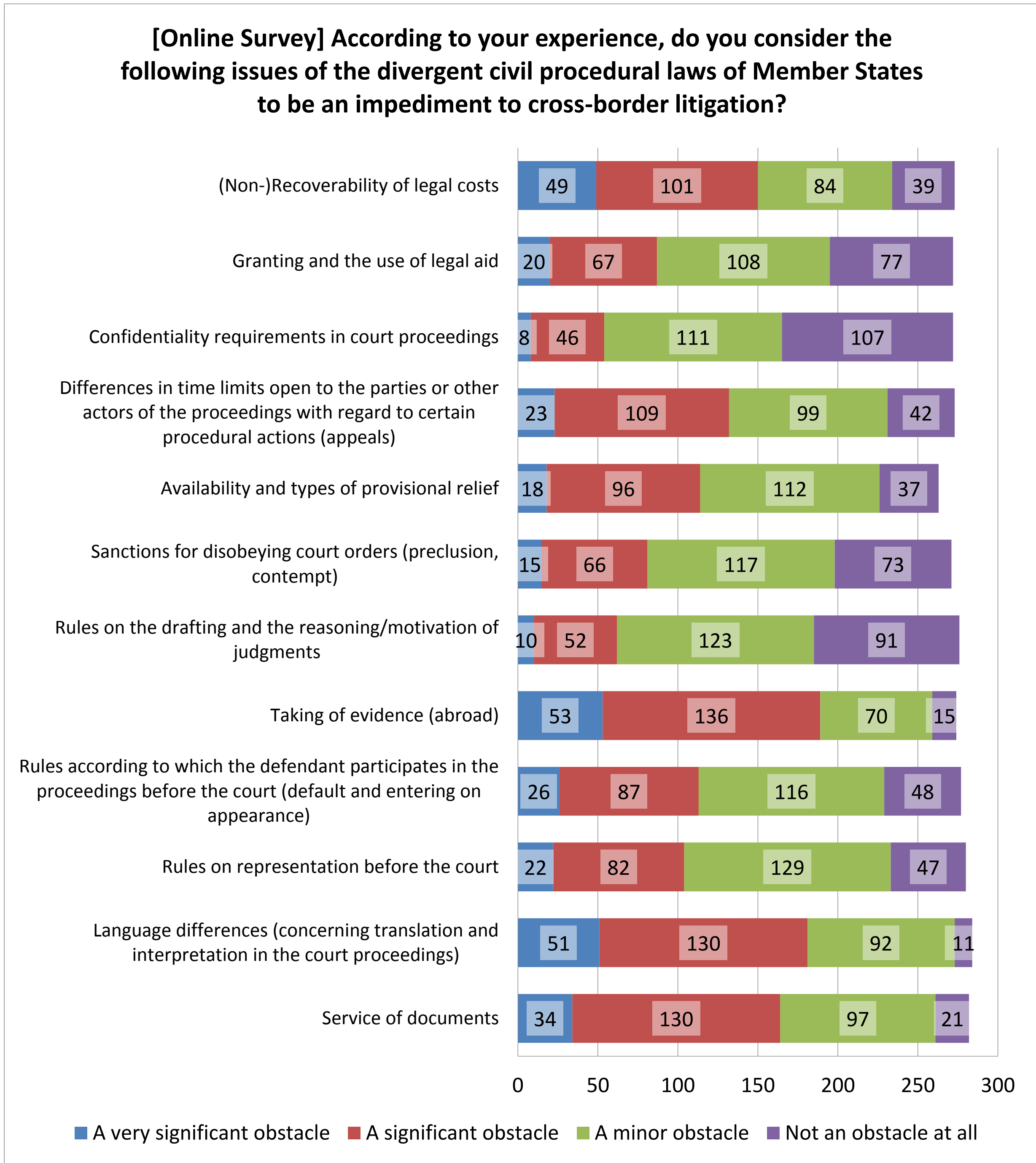
- Information given to the defendant when he/she is served. Countries practices are as different as the national proceedings themselves; actually, it is an issue directly linked to the structure of proceedings, in particular to the contents that should be included in the claim (more or less complete) and the first reaction to the claim (submitting a written answer –more or less complete-, appearing at a first hearing). According to national reports it is common feature to all legal systems that the first service of the claim is accompanied by a summons instructing the defendant about the steps expected from him/her afterwards. Nevertheless, such information is only fully understandable –even if translated– in a context of complete comprehension of the whole procedural system of the MS where the procedure is taking place, which cannot be presumed to be the rule for a "domestic" defendant and even less for a defendant domiciled abroad.

1.3.2 Problems and assessment

132. The data compiled through the questionnaires, interviews and national reports (comprising national case law) show relevant information on the issue of service of process for the purposes of the present Study.

1.3.2.1 Result of Survey

133. The way service of the lawsuit is performed on the defendant in a different MS has been acknowledged by the respondents to the questionnaire as certainly apt to create clear hurdles for the defendant's right to a fair trial which, at the end of the day, also impede the circulation of the judgment.



134. Actually, the materials analysed point to the service of the document instituting the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his defence as the most common and the most successful grounds against the recognition/enforcement of a foreign judgement (article 34 no. 2 Brussels I Regulation). Case law and interviews also suggest a high rate of success, when

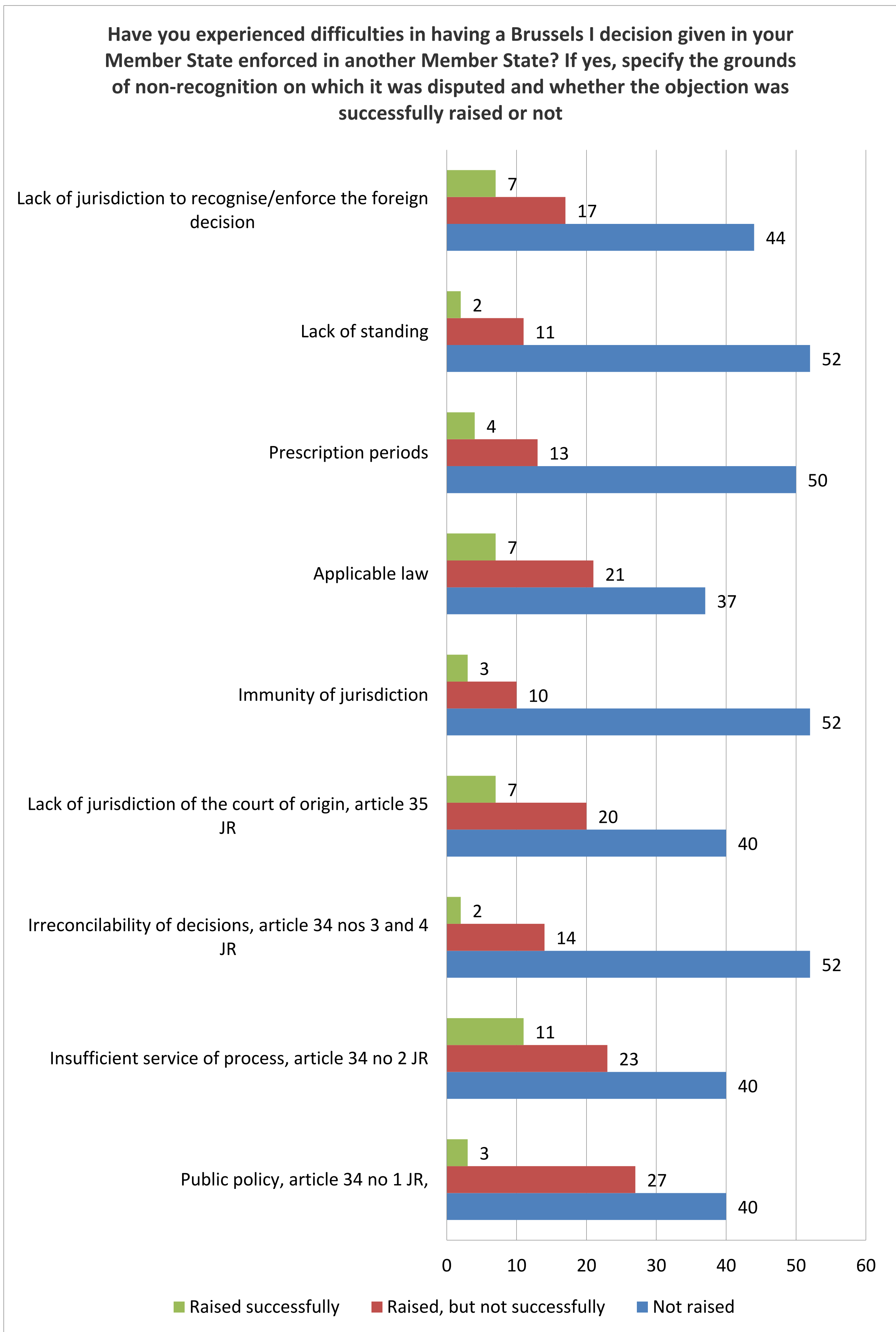
compared to other strategies tending to prevent free circulation of judgments on the basis of the divergent procedural rules of the MS.[28]

135. According to the online survey,[29] of all respondents who experienced difficulties in having a Brussels I decision enforced abroad, 45.95% reported that an exception under Article 34 no. 2 was raised; 32.35% of this subset of respondents reported the success of the attempt to have the recognition denied. A further confirmation of the seriousness of the problem at hand can be found in the survey results concerning the typical objections raised by defendants in default of appearance under Article 34 no. 2 of the Brussels I Regulation.[30] In particular, 52.81% of respondents reported that defendants in default typically argue that 'the documents initiating the proceedings were served, but not in a sufficient time for the defendant to organize his or her defence'. According to 42.55% of this subset of respondents, the objection was successful.

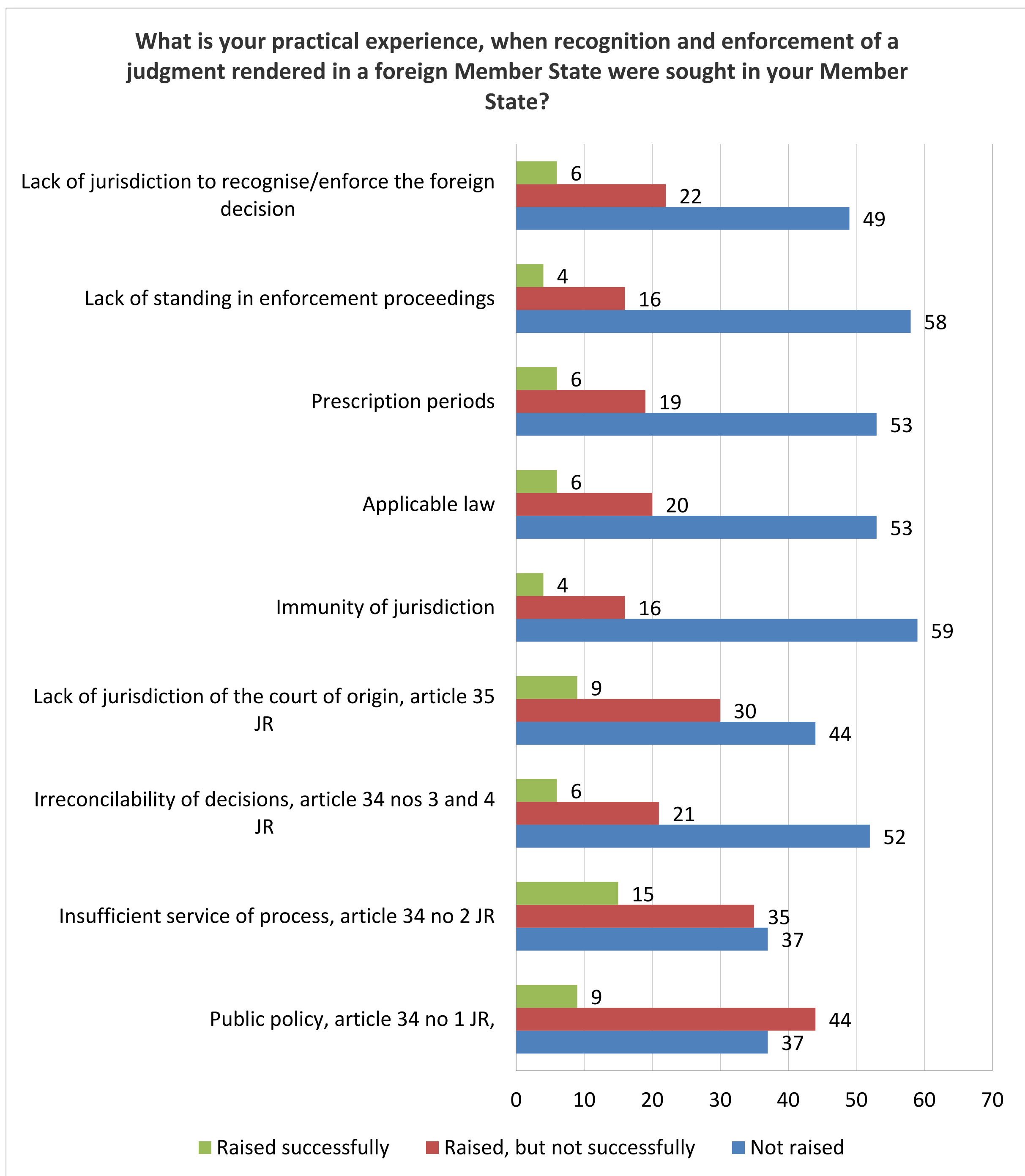
[28] See below, under the following paragraphs.

[29] Overall, the question was answered by 78 respondents.

[30] Overall, the question was answered by 96 respondents.



136.



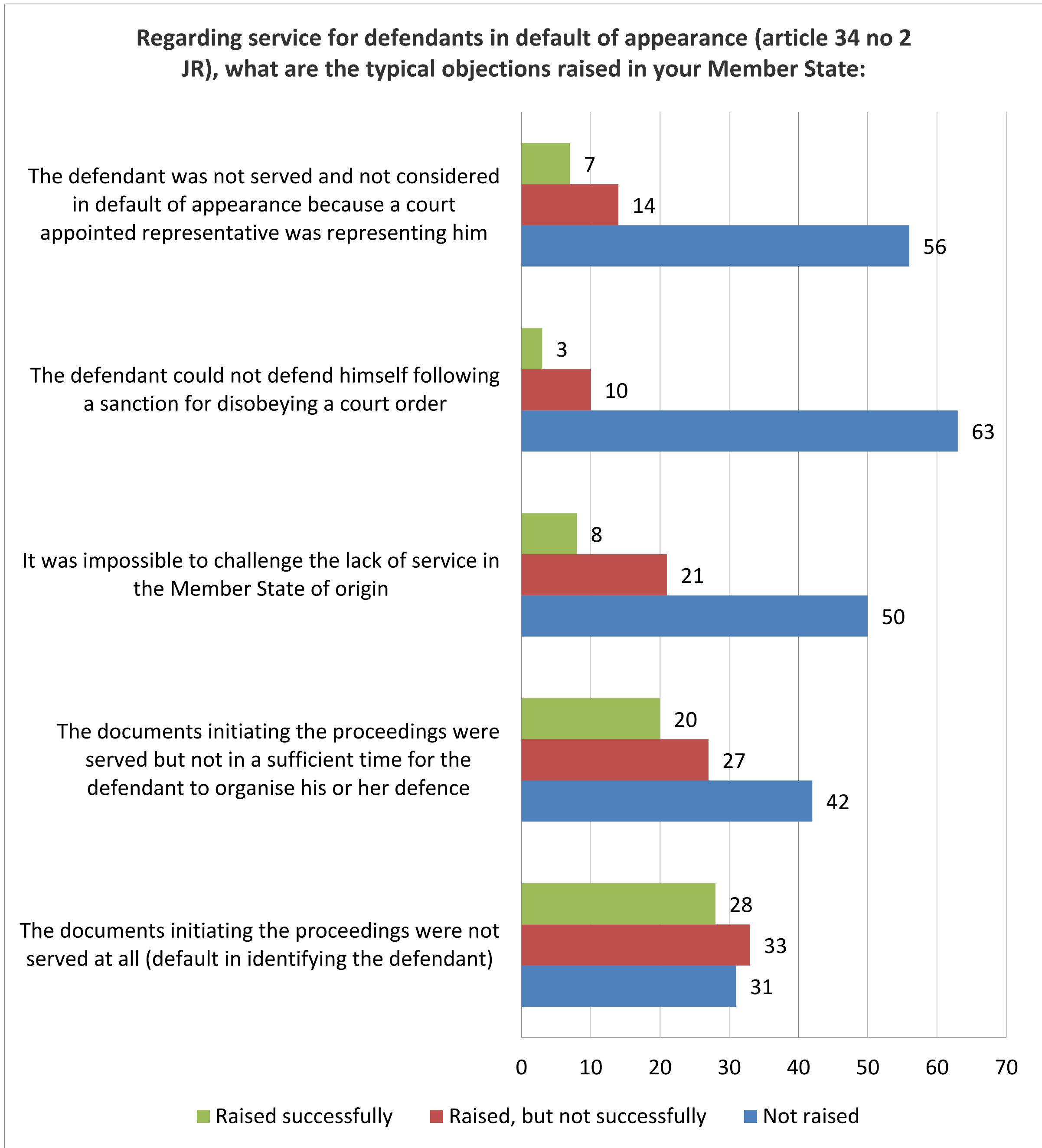
137. To the question, which the usual objections regarding insufficient service of process are, the responses to the questionnaires indicate that:

- The most frequently raised objection (with the highest rate of success as well) is that the documents initiating the proceedings were not served at all, due to a default in identifying the defendant. The second most frequent objection (and also the second most successful one) is that the documents

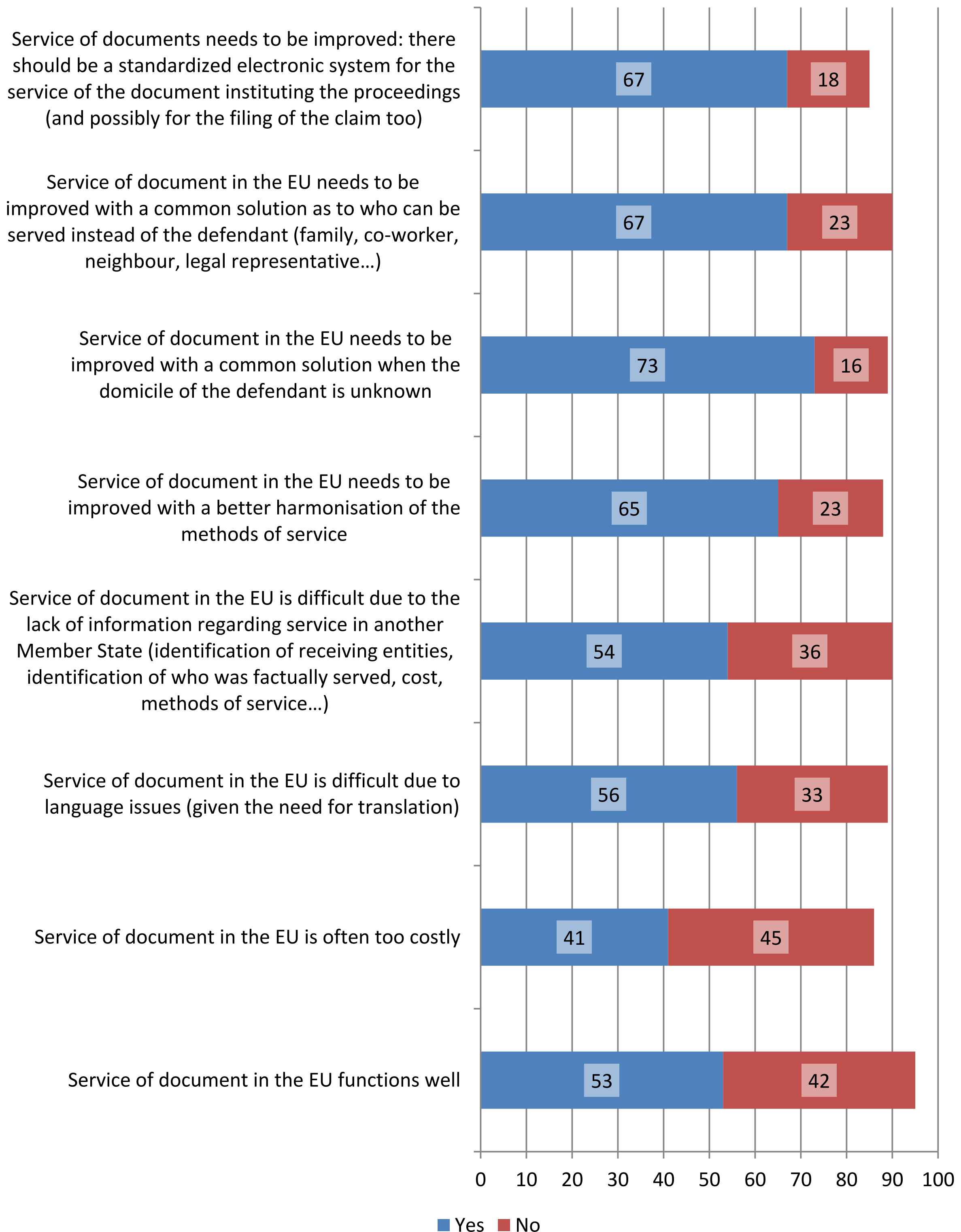
initiating the proceedings were actually served, but not in a sufficient time for the defendant to organise his/her defence.

- Less frequently adduced (and rarely successful) are these other objections: it was impossible to challenge the lack of service in the MS of origin; the defendant was not served and not considered in default of appearance because a court-appointed representative was representing him/her; the defendant could not defend him/herself following a sanction for disobeying a court order.

138. The crux of the matters lies, clearly, in situations of a real involuntary lack of appearance by the defendant, originated in turn by an inexistent or non-effective service of the documents instituting the proceedings.

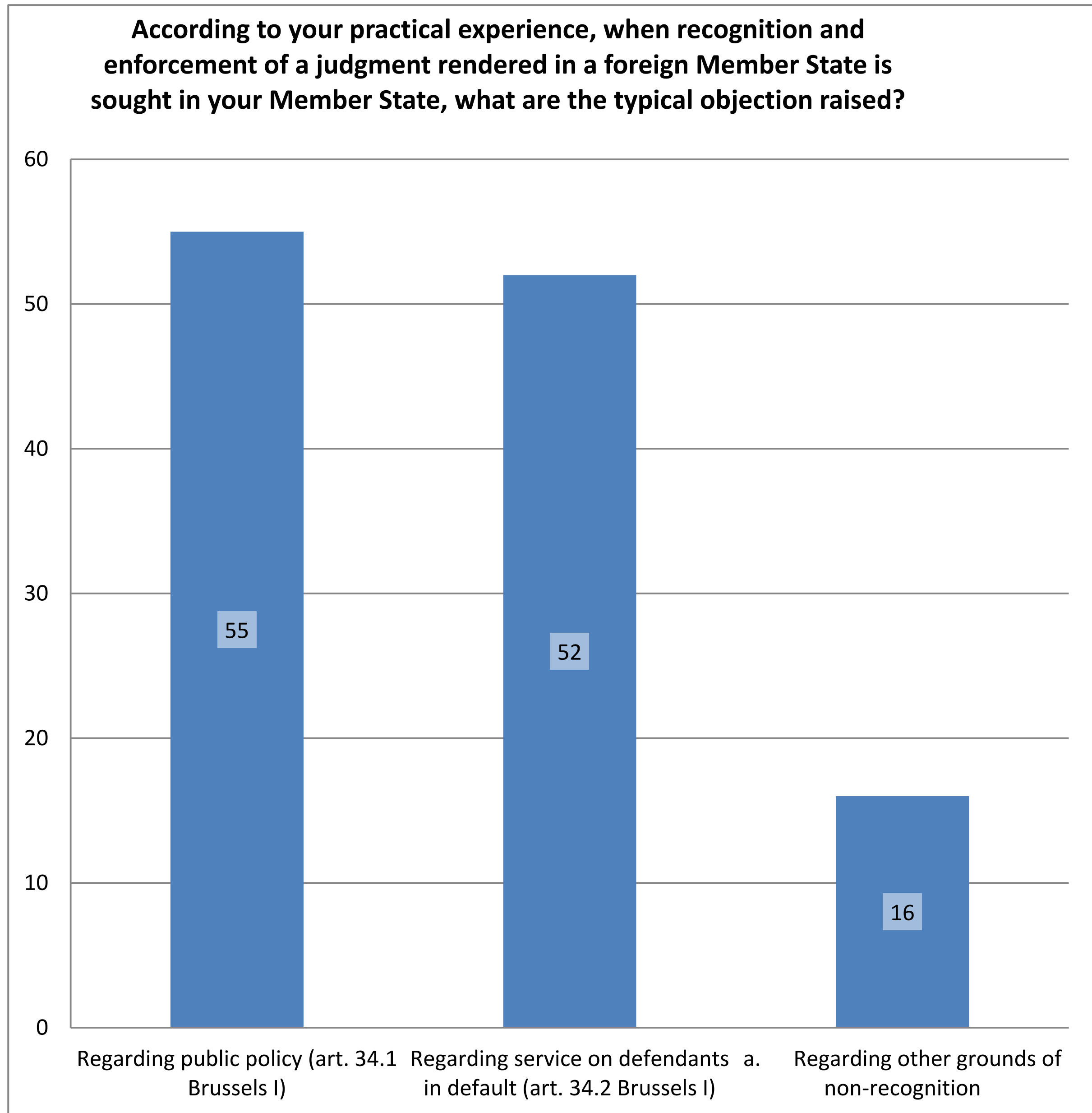


139. Besides, the following chart points to aspects of service where action is needed.


What is your experience regarding the service of judicial and extrajudicial documents between different Member States: How serious do you evaluate the following problems regarding service of document within the EU?
Service of documents needs to be improved: there should be a standardized electronic system for the service of the document instituting the proceedings (and possibly for the filing of the claim too)
67
18
Service of document in the EU needs to be improved with a common solution as to who can be served instead of the defendant (family, co-worker, neighbour, legal representative...)
67
23
Service of document in the EU needs to be improved with a common solution when the domicile of the defendant is unknown
73
16
Service of document in the EU needs to be improved with a better harmonisation of the methods of service
65
23
Service of document in the EU is difficult due to the lack of information regarding service in another Member State (identification of receiving entities, identification of who was factually served, cost, methods of service...)
54
36
Service of document in the EU is difficult due to language issues (given the need for translation)
56
33
Service of document in the EU is often too costly
41
45
Service of document in the EU functions well
53
42
0
10
20
30
40
50
60
70
80
90
100
Yes
No

1.3.2.2 Interviews

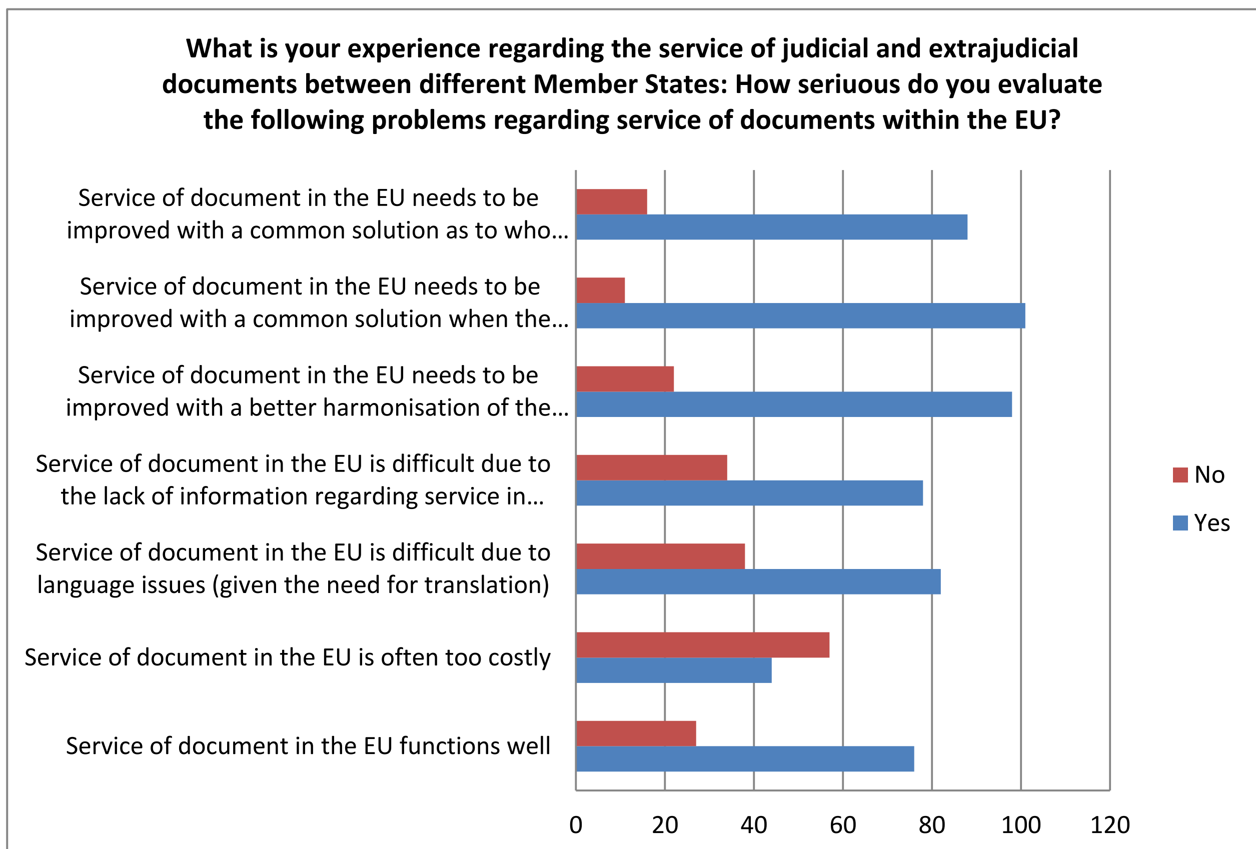
140. The answers to the interviews -closed questions- confirm the survey. See table below:[31]



141. It is true that the assertion "Service of documents in the EU functions well", received 76 positive answers and only 27 negative ones. In a similar vein, the assertion

[31] The public policy objection, often raised but seldom successful, is usually based on procedural grounds –substantive public policy is rarer. Sometimes objections that should, or arguably could have been discussed under Art. 34.2 are presented as pertaining to Art. 34.1 Brussels I Regulation.

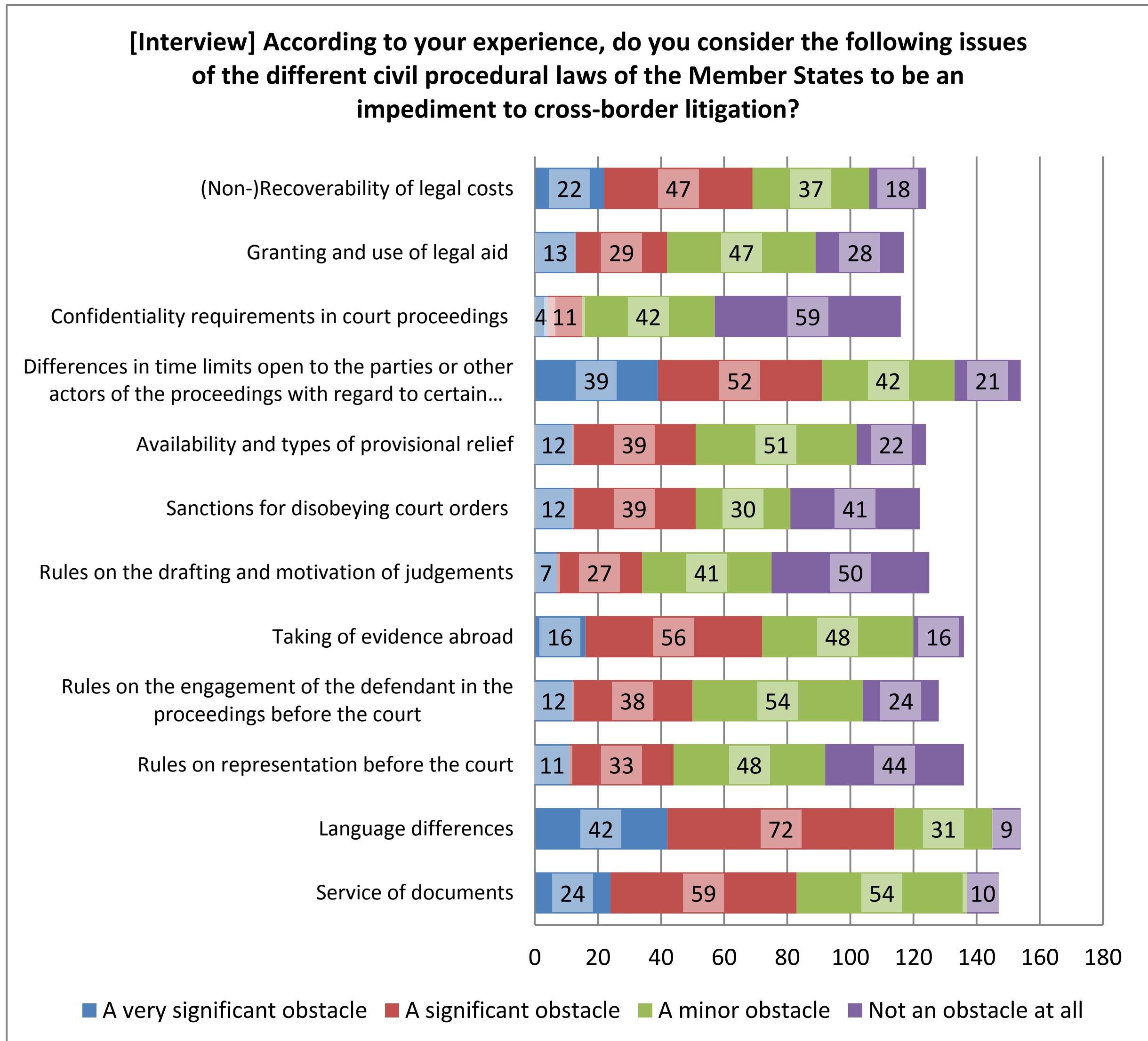
"Service of document in the EU is often too costly" was confirmed by 44 respondents against 57. However: to the question "Service of document in the EU is difficult due to language issues (given the need for translation)", 82 respondents gave a "yes" answer, against only 38. 78 affirmative answers underpin the assertion "Service of document in the EU is difficult due to the lack of information regarding service in another Member State", whereas only 34 go in the opposite direction. 98 respondents support that "Service of document in the EU needs to be improved with a better harmonisation of the methods of service", against 22; 101 answers favour the idea that "Service of document in the EU needs to be improved with a common solution when the domicile of the defendant is unknown", against only 11 contrary opinions; finally, 88 respondents believe that "Service of document in the EU needs to be improved with a common solution as to who can be served instead of the defendant", whereas only 16 do not.



142.

143. Additionally, to the question "According to your experience, do you consider the following issues of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?", service of documents qualifies as a very

significant obstacle for 24 interviewees, a significant obstacle for 59, a minor obstacle for 54, and not an obstacle at all for 10.



144.

145. Regarding the practice, some interviewees criticize a certain degree of lack of reliability: documents might have been lost in some occasion[32], and, much more frequently, acknowledgment of receipt is not always sent back or correctly filled in[33]; or it does not include any or sufficient information on how service was effected,

[32] Austria, judge with 5 years of experience.

[33] Austrian judges (2); Croatian legal advisor; Finnish judge; Dutch judicial officers (2); German judge; Luxembourg lawyers (2); Polish academic; Slovenian judge; Spanish academic.

especially when service was unsuccessful (e.g., which methods of service were tried or what the court did to locate the person)[34].

1.3.2.3 National reports, case law

146. The above mentioned conclusions are ratified by the case law provided by the national reports, the analysis of which points to the following as the core difficulties raised under art. 34.2 BI (or, as the case may be, art. 34 no 1):

- service of the claim: fictitious (Austria[35]- defendant should know about the possibility of being served in a fictitious way; Spain;[36] France[37]); not sufficiently official (Germany);[38] not to his seat (Portugal)[39]. Lack of certainty about how service was made, plus lack of precision of certificate as to the notification date, leading judge to the conviction defendant was not served (France)[40]
- language (Luxembourg[41]; France;[42] too legalistic a language (Denmark);[43]

[34] Austrian judge; lawyer from Cyprus; Finnish judge (2); Greek judge; Lithuanian judge; Luxembourg lawyer; Slovakian judge; Spanish academic.

[35] The Austrian Supreme Court decided that the rights of defence of the defendant in terms of Art. 34(2) of the Brussels I Regulation are not sufficiently preserved when the notification takes place publicly on the court's notice board and the defendant is not informed about it in any other way. The court went on to state that such "fictitious" notifications do not per se affect the rights of defence of the defendant; it is, however, necessary to inform the defendant about it so that he can take notice of the document instituting the proceedings in an objective manner. Therefore, the court concluded that in this case the fictitious notification which took place pursuant to § 185 of the German Code of Civil Procedure was not sufficient for the defendant to take notice of the action against him (Supreme Court of Austria, 21 January 2015, 3 Ob 232/14k,AT:OGH0002:2015:0030OB00232.14K.0121.000).

[36] Judgment of the Court of Appeal of Madrid, 12 February 2002 [AP de Madrid (Sección 13ª), JUR\2002\132026]: first service of proceedings was carried out in Germany in a fictitious way, due to the fact that, at that time, the defendant had already changed his domicile to Spain; and the judgment was also served on him by publication. The court of appeal sets aside the declaration of enforceability.

[37] CA Riom, 4 October 2016, n°15/02034, service by public notice. CA Nancy, 11 June 2013, n°12/02657, service at working place, not in person.

[38] A notice by an ordinary letter by one of the parties to the other one alone is not sufficient (LG Trier, 17 October 2002, 7 HKO 140/01, NJW-RR 2003, 287-288).

[39] This defence was successfully raised in the case decided by the ruling of the Court of Appeal of Lisbon, 21 January2016, no. 5007/13 (summons wrongly sent by the Commercial Court of Paris to an address in Cascais, Portugal, that was not the defendant's seat).

[40] CA Metz, 19 April 2016, n°14/00029.

[41] Court of Appeal of Luxembourg, 19 December 2013, no 37613). Belgian default judgment against a defendant domiciled in Kazakhstan. The defendant has initiated a challenge of the default judgment in Belgium which is still pending. The Luxembourg court finds that there is no evidence that the document which instituted the proceedings was ever provided to the defendant. Return documents which should have been signed upon receipt are not signed. Furthermore, the document was in Dutch

- time to prepare the defense (Germany)[44]

147. The materials also allow inferring that the diversity among the MS on the rules and practices governing service of process is -at least to some extent- accountable for the above expressed outcome.[45] In the case of non-appearance of a defendant domiciled in a MS different from the one where the proceedings are taking place,[46] art. 26.2 Brussels I regulation/Art. 28 Brussels I bis imposes on the court seized a duty to stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.[47] One can reasonably believe that the court resumes the proceedings because it is convinced that one or the other requirement has been properly fulfilled in the case at hand. If the right to be heard is systematically successfully invoked by the judgement debtor later, i.e. at the MS of recognition/enforcement, it may be concluded that there is a serious divergence regarding the rules or, more frequently, practices concerning service of process and/or the diligence required to carry it.

148. In a broader perspective - i.e., looking beyond the specific cases where a request for recognition/enforcement was actually denied - the data collected lead to identify

language. Enforcement of the judgment in Luxembourg is denied pursuant to Art. 34.2 of the Brussels I Regulation.

[42] Cass. Com, 3 April 2013, n°11-19.000.

[43] High Court of Western Denmark, order of 29 June 2012, (U 2012.3152 V). This case concerned the enforcement of two German default judgments of 14 June 2010. The defendant stated that he/she had received a lot of correspondence, and that most of this correspondence was in German, which the defendant had not understood, whereas a minor part of the correspondence had been translated into a legalistic Danish language, which was also impossible to understand. Against this information, the German creditor provided no documentation to show how the claim form had been served on the defendant. Under these circumstances, the High Court found that the two German judgments were unenforceable under Art. 34(2) of the Brussels I Regulation (44/2001).

[44] See below, under 1.7.

[45] Courts are only sometimes explicit about the general admissibility/inadmissibility of a mechanism for the service of process which is unknown in their own jurisdiction. It should be recalled as well that Arts. 34.2/45.1.b are applied in a functional way, meaning that as a rule what actually matters is whether the defendant had the possibility to arrange for his defence.

[46] Situations falling outside the duty to stay: defendant domiciled in the same Member State - case may also be cross-border but the likeliness of an infringement of the right to a fair trial is lower; defendant domiciled in a third State; defendant of unknown domicile. The obligation to stay has been extended to the latter when there is no evidence that defendant is domiciled outside the EU, see Case C-292/10 *G* EU:C:2012:142, combined reading of paras 42 and 52 ff.

[47] See also art. 19 Service Regulation.

some bad practices as well as recurrent problems related to the service of documents.

1.3.2.4 Recollection of problems and consequences thereof

149. Having in mind possible policy options (see below, under 1.3.3), we have singled out the most relevant complications of cross-border service and their consequences. For the sake of clarity we will split the problems into two categories: those associated to the SR; those stemming from the national rules when applied to service on a defendant domiciled abroad.

150. A. Standpoint: the Service Regulation

151. Almost ten years after the enactment of the SR[48] the general functioning of the system should be sufficiently known by its users and long-term experience exists. However, the compilation of data discloses some bad practices as well as unsatisfactory situations. Many of them are mostly practical issues. This does not mean, however, that they cannot be corrected through recommendations or even hard rules.

- Regarding the use of forms established in the SR: the filling of them in an illegible handwriting or using an unsuitable language.
- Regarding time: performance of service on the defendant domiciled abroad may take too long, without any legal consequence being attached to unjustified delays. It entails lack of certainty as to the timeframe in which the service will be carried out.
- Regarding reliability. Difficulties described regarding acknowledgement of receipt amount to lack of certainty regarding whether service may be deemed to have been effected, in order to make use of the provisions of Article 19 SR and 24 Brussels I/26 of the Brussels I bis Regulation.
- When the requesting judicial authority needs to analyse how service was effected in the requested MS, there is no or too little information, since the

[48] The Regulation (EC) 1393/2007 applies from 13 November 2008. It repels Council Regulation (EC) no 1348/2000.

form does not require to report with sufficient detail on this (which, nevertheless, is crucial to apply the provisions of Article 19 SR).

a. Language and translation for the purposes of service: it is the obvious crux of the system, due to the practical difficulties stemming from Article 8.

b. Cost, particularly when bailiffs or *huissiers de justice* are involved, the cost of their services is sometimes considered too high; additionally, in such cases, it is not always easy to handle the payment of these costs, there is no procedure to do so from the requesting State (and it is also unclear who should be obliged to pay).

152. B) Standpoint: beyond the Service Regulation

153. Matters not covered by the SR itself, including the specific procedure to perform service, are sources for difficulties regarding the cross-border service of the claim on the defendant. Here are some of the issues addressed by most national reports and interviewees:

- Finding the domicile of the addressee, especially when the address provided proves to be incorrect or out of date (note that the SR provisions would not be applicable in case of unknown domicile of the addressee).

- Lack of uniformity on who can be served instead of the defendant: national legislations admit different possibilities, as it has already been pointed out.[49]

- Lack of possibility of performing service in an electronic manner, from two different points of view: directly from the requesting MS to a defendant domiciled in another MS and just in the requested MS, as a means to perform service *per se*.

- National regulations or practices are sometimes too lenient in admitting fictitious methods of service of the claim (including national rules on the determination of a party's domicile which allow the treating as purely domestic of procedures that should be considered as cross-border). This is

[49] See above, under 1.3.1.2.

a critical point that will also be addressed in the part of this report devoted to the specific topic of default judgments.[50]

- Diversity also exists concerning the information that is given to the defendant when he/she is served, regarding what it is expected from him/her as a first step (sometimes it is a full defence that has to be submitted from the very beginning). The lack of awareness about those steps advocates for more clear and adapted information, as well as for more flexible deadlines to react. The radical diversity in the way proceedings are structured *in concreto* is actually at the origin of this difficulty, since the first reaction of the defendant is very differently regulated in the MS: written answer, personal appearance, full or just generic reaction are some of the possibilities reflected in the national reports. Therefore, even if the information is considered as sufficient, the steps described in the writ of summons (or equivalent document), no matter whether translated into the addressee's language, may still not be fully understood unless the defendant has in mind the structure of the whole procedural system of the MS where the procedure is taking place. This cannot be presumed to be the rule for a defendant domiciled abroad.
- Others. In some occasions, domestic law implementing the SR is the source of some problems: that is the case in Greece, where the certificate of service issued by the foreign authority, once received by the Greek transmitting agency, is not in turn notified to the claimant, who therefore has himself the burden to get informed thereupon.

154. C) Consequences

155. Quantitatively speaking, the deficiencies related to the service of process leading to a breach of the mutual trust are relevant. It is still nevertheless interesting to note that some interviewees also acknowledged that Article 34.2 Brussels I regulation (current Article 45.1 b Regulation Brussels I bis Regulation) is frequently employed as a strategy to gain time.[51]

[50] See below, Chapter 2 of the Study, by P. Oberhammer.

[51] This view has been expressed by academics and lawyers in Malta, as well as by a Croatian judge, an academic in Poland and a lawyer in Spain.

156. The qualitatively relevance of bad practices and actual failures of service are obvious. Amongst others, they lead to:

- frustration of the purposes of litigation: on the side of the defendant, due to the violation of the right to a fair trial; on the side of the claimant, due to the non-recognition/non enforcement of a judgement.
- uncertainty on:

157. time (to react, on the side of the defendant; on the side of the claimant, deterrent of entering into cross-border litigation/cross-border commercial exchanges).

158. claimant has to be aware that different diligence standards may apply at the declaratory stage and at the enforcement stage as regards the steps to be taken to ensure that the defendant has been able to receive the document instituting the proceedings.

159. defendant has to be aware that different diligence standards may apply at the declaratory stage and at the enforcement stage as regards his diligence for the purposes of Art. 34 no 2/ Art. 45.1 b).

- Increased costs and length of the proceedings.[52]
- litigation has to start anew in a different MS. The previous judgement is not annulled, thus several, perhaps irreconcilable decisions may co-exist within the EU.

160. Finally, it should be highlighted that whereas some problems derive from practical difficulties in the application of the existing legal framework, others result from the legal framework itself. In this regard, it is worth noting that most of the difficulties encountered are to be found in the requested MS, not in the requesting one[53]; also, that some of them stem from the SR, and others from domestic legislation.

[52] Confirmed by interviews: an Estonia lawyer with 6 years of experience had to go all the way to the Supreme Court of the required MS due to a formal mistake in the service at the MS of origin. This allowed the debtor a considerable extra time for concealing his assets.

[53] Some, nevertheless, remain in the requesting MS: this would be the case of an incorrectly filling-in of the form sent to the requested authority. Another example is the translation of documents.

1.3.3 Proposals/Possible improvements

161. In the light of the foregoing, we would like to propose the following actions for the Commission to consider:

1.3.3.1. To address the difficulties arising from the SR

162. Our proposals would be:

- Formative and training actions of judicial actors on the SR. Many problems seem to be a consequence of misuse or of a bad application of the existing provisions.
- The targeted upgrading of the current instrument. To the extent that improvements and amendments to the SR may have been the object of a different Study and that the SR as such does not fall within the main scope of the current Study, we would limit ourselves to a few suggestions, starting by recalling that some still-in-force national procedural rules (that would be the case of Poland[54]), and national practices (Romania) [55]run counter ECJ case law. A transposition into hard law is advised to ensure compliance.

163. Three further particular issues must be addressed in the light of the data collected in the Study.

- The SR should mandate that the authorities in the requested MS provide much more detailed information on the way service was performed, expressed in sufficiently clear terms for the requesting judicial authority to be able to assess with certainty whether the claim was properly served on the defendant.
- Regarding the issue of the information to be given to the defendant, MS should be asked to prepare a comprehensible "chart of steps to be undertaken" in their corresponding jurisdiction, providing for as many procedural charts as types of proceedings are available in the MS (for instance: a chart for ordinary proceedings; another one for simplified

[54] According to article 1135(5) PCCP, a party who does not have a place of stay or residence, or registered address in the Republic of Poland or another Member State of the European Union and who has not appointed a court representative domiciled in the Republic of Poland shall appoint a representative ad litem in the Republic of Poland. If a representative for service is not appointed, judicial documents addressed to that party shall be left in the case files and considered duly served. This rule was considered unacceptable by the CJEU in case C 325/11, ECLI:EU:C:2012:824.

[55] See below, footnote **Error! Bookmark not defined.**.

proceedings; another for each kind of specialized proceedings, in case they exist). This "chart" should be drafted in plain and clear language, having in mind that their potential addressees are likely to be individuals who are unfamiliar with the legal system. An "official version" of the "chart" should exist in all official languages of the EU. The authority requesting service in another MS would join the chart to the writ of summons.

- The form in Annex II to the SR makes it possible for the addressee of a document, in a situation where he/she refuses to accept it because it is not drafted in or accompanied by a translation in a language which he understands or in the official language or one of the official languages of the place of service, to indicate the language or languages which he/she understands. This possibility should be upgraded to an obligation. The court at the requested MS would nonetheless remain free to decide whether the defendant's knowledge of the language of the document served is sufficient.

1.3.3.2. To address the difficulties arising from domestic legislation

164. They are linked to the existing diversity among legal systems. As long as the right to be heard of the defendant is at stake, European common minimum standards could be proposed as a solution to some specific issues, namely: identity of substitute recipients; the minimum enquiries on the defendant's domicile; and the minimum number of attempts to serve before having recourse to fictitious methods.[56]

1.3.3.3. Other

Role of the court before which the claim is filed.

165. In order to prevent obstacles related to service being raised at the stage of recognition/enforcement, and in particular, to deter strategic behaviours on the side of the judgement debtor- i.e., that they contest recognition/enforcement on the bases of an alleged impossibility to arrange timely defence with the sole purpose of gaining time- we would propose that the task of the court intervening at the declaratory stage is reinforced. Such courts should not be too quick in resuming a case when a domiciled-abroad defendant or a defendant whose domicile is unknown does not

[56] See below, conclusion of Chapter 2 of the Study.

appear in court[57] – of course, at the same time the claimant has a right of access to courts; therefore, resuming the proceeding should require a balanced check by the court of the efforts made in order to serve proceedings on the defendant and/or to identify his domicile. In return, once the assessment regarding service has been made at the declaratory stage, a reassessment at the MS of recognition should be kept limited. Moreover, when performing such re-evaluation the court before which the application for recognition/enforcement has been filed should be -as a rule- bound by the findings of fact which led the court of origin to conclude that service had been correctly made.

166. By way of an example: a defendant refuses to accept document instituting proceedings on the grounds of art. 8 Service Regulation; the court seized in MS A decides, after the examination of the circumstances, that the defendant has been properly served for he has enough language skills. This assessment, duly performed and explained, should create a strong presumption for any other court in a different MS, should the issue be raised at a later stage (e.g., in the context of enforcement proceedings).

Enhanced value of certificates.

167. Certificates issued according to EU regulations, such as the one in Annex I of the Regulation Brussels I recast-, including a mention to service, should be vested with a strong presumption that service has been performed. The margin for reassessment of the mentions in the certificate should be limited; nevertheless, as pointed above this should be coupled with a reinforcement of the task of the authorities at the MS issuing of the certificate. At any rate, the possibility to oppose to recognition, as

[57] See interview of a Romanian judge with 12 years of experience: "I only check whether the service procedure was carried out in accordance with the legal provisions applicable. When I have the certainty that the service was legally carried out, the procedure continues. The first service is the most important in order to make sure the party is aware of the procedure. We also have the provision in the new Code of Civil Procedure on which the defendant is informed of the duty to choose premises in Romania for following communication of documents. In case they do not comply, the following communications will be sent by registered post with acknowledgement of receipt. At this stage, for me it is sufficient to know that the letter was sent by the court to consider the party was legally summoned, we do not even wait to receive back the acknowledgment of receipt". It can be argued that this way of acting is hardly compatible with the rule underpinning the ECJ decision in case C-325/11 *Alder* EU:C:2012:824.

established by the ECJ case law[58], as well as by national case law,[59] shall not be removed.

Electronic communication.

We would also suggest that the EU promotes the use of electronic communications, , in particular at cross-border level, so that in the medium-term communications are performed mainly electronically, the SR should be amended correspondingly. First service of the claim on the defendant should always be undertaken electronically (at least at a first attempt) when the addressee is a legal person or a natural person under the duty to have an official and active e-mail account. In domestic cases, the court/bailiff should always have the possibility to address the documents instituting proceeding to the official electronic address of the defendant, with acknowledgment of receipt. Lack of receipt might induce the court/bailiff to engage in subsidiary (non-electronic) methods of service. A legal decision should be taken on the issue whether automatic receipt should be sufficient (probably not). In cross-border cases the same should apply under the possibility of direct cross-border service. The SR should include mechanisms to gather information on "official e-mail addresses" of natural or legal persons established in other MS.

Easing the tracing of the defendant

168. In order to *ease tracing the defendant***,** parties should be advised by local law to bind themselves -whenever possible, for instance in contractual relationships- reciprocally with the obligation to communicate to each other the change of domicile in cross-border relationships. Sophisticated parties may even require the counterparty to indicate a place/representative for the purposes of legal notifications in the MS of the other party, and agree it can be used as alternative/subsidiary to domicile.

---

[58] See above all case C-619/10 *Trade Agency*EU:C:2012:531, at 35 and 45. Besides, see Case C-78/95 *Hendrikman*EU:C:1996:380, at 18; case C-522/03, Scania Finance FranceEU:C:2005:606, at 29; Case 228/81 *Pendy Plastic* EU:C:1982:276 at 13; Case 166/80 *Klomps* EU:C:1981:137, at 21.

[59] See, ex multis, Cass civ 16 July 2014 No 16272, in *Foro It. Mass*. 2014, 561; Cass. 24 February 2014, No. 4392, in Foro It. Mass., 2014, 151; Cass. 23 May 2008, No. 13425, in Giust. civ. Mass. 2008, 5, 802; Cass. 9 May 2008, No. 11628, in Foro It. Mass. 2009, 12, I, 3460; Cass. 22 July 2004, No. 13662, in Riv. Dir. Int. 2005, 516; C. Tuo, *La rivalutazione della sentenza straniera nel regolamento. Bruxelles 1: tra divieti e reciproca fiducia* (CEDAM 2012) , 292.

Good practices

169. *Good practices* relating to apparently “minor” technicalities, which nevertheless happen to have a great impact on an optimal functioning of the system, should be given publicity and fostered. This applies especially to the care to be paid to the filling-up of the official forms, both regarding contents and language. Attention should be paid as well to the quality of translations submitted to comply with the requirements set in art. 8 SR.

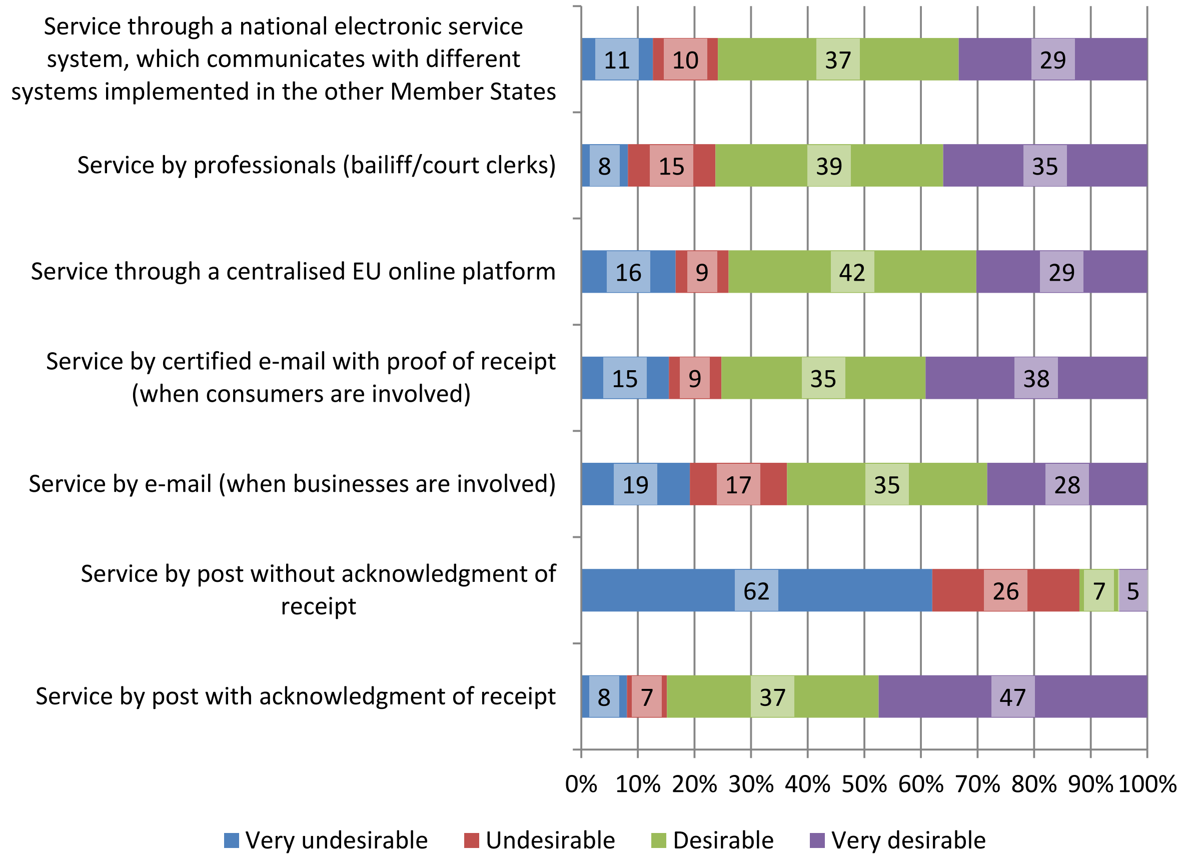
Cross-border cooperation

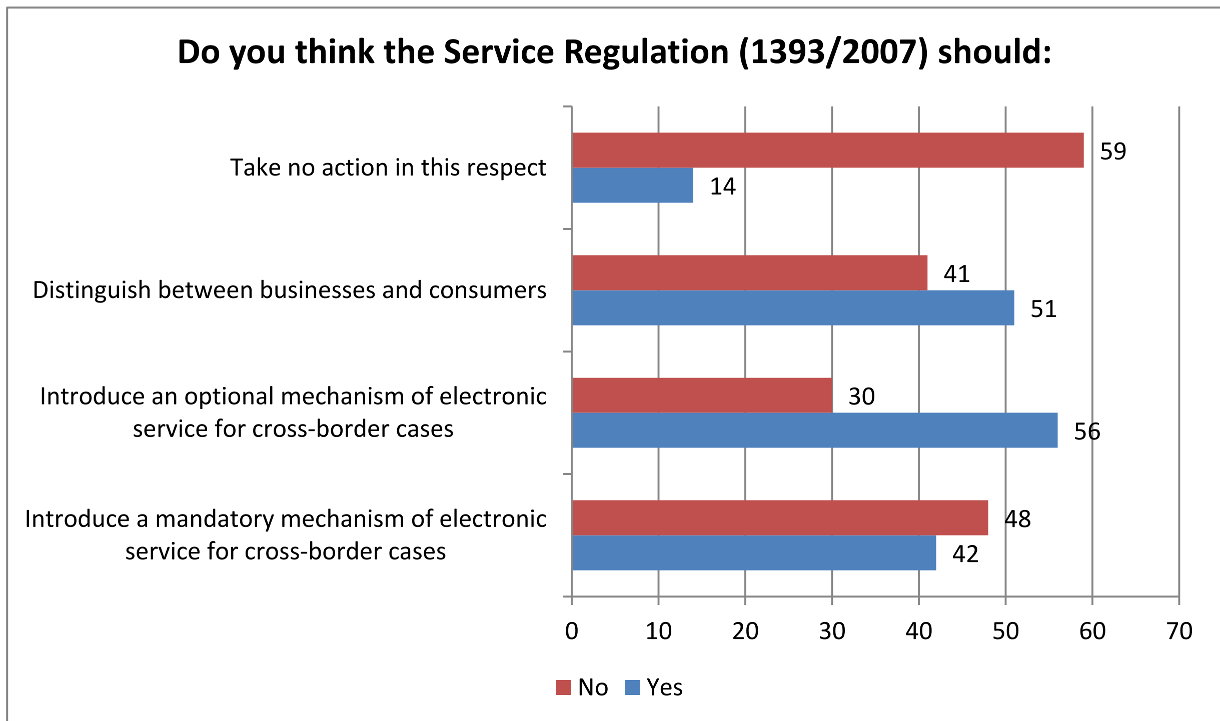
170. Cross-border cooperation in order to trace (unknown domicile but presumably still somewhere in the EU) and to reach the defendant (whose domicile is known) must be strengthened. Tax and criminal authorities should cooperate too. In this regard the experiences in the domain of child abduction should be analysed in order to be imitated or discarded.

1.3.3.4. Assessment of the policy options

171. Some of the suggested options were already considered as a possible outcome at the time when the questionnaire and the interview templates were drafted, and therefore answers on them have been collected. The following charts and tables reflect the degree of approval of the options.

172. As to the survey:


Please evaluate the use of the following mechanisms of service of documents instituting the proceedings in civil justice, also in light of costs and their recoverability:
Service through a national electronic service system, which communicates with different systems implemented in the other Member States
11
10
37
29
Service by professionals (bailiff/court clerks)
8
15
39
35
Service through a centralised EU online platform
16
9
42
29
Service by certified e-mail with proof of receipt (when consumers are involved)
15
9
35
38
Service by e-mail (when businesses are involved)
19
17
35
28
Service by post without acknowledgment of receipt
62
26
7
5
Service by post with acknowledgment of receipt
8
7
37
47
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%
Very undesirable
Undesirable
Desirable
Very desirable



173. As to the closed questions in the interviews, 98 respondents support that "Service of document in the EU needs to be improved with a better harmonization of the methods of service", against 22; 101 answers favour the idea that "Service of document in the EU needs to be improved with a common solution when the domicile of the defendant is unknown", against only 11 contrary opinions; finally, 88 respondents believe that "Service of document in the EU needs to be improved with a common solution as to who can be served instead of the defendant", whereas only 16 do not.

174. To the question "Please evaluate the use of the following mechanisms of service of documents instituting the proceedings in civil justice, also in light of costs and their recoverability", in particular "service by e-mail (when business are involved)", 41 respondents considered it very desirable and 48 desirable, whereas 25 think it is not desirable but only 11 are absolutely against. Regarding "Service by certified e-mail with proof of receipt (when consumers are involved), it is very desirable for 45 respondents and desirable for 52, whereas only 15 reject it as not desirable and 9 as very undesirable.

175. Regarding electronic service, no action at all on the side of the EU is unmistakably not an option for the respondents to the interviews: 79 would reject inaction, and only

8 would agree. As to what such action should be, to the question “Do you think that the SR should introduce a mandatory mechanism of electronic service for cross-border cases”, 71 answers go for “no” while 44 would support it; the figures underpin electronic service clearly as optional, and non-mandatory, as shown by the 99 voices in favour against only 23 against. It is suggested that a distinction should be made between consumers and professionals (91 voices in favour, 32 against).

1.4 Legal Aid[60]

1.4.1 Status quo. Summary

176. Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, has already forced MS to put EU citizens-residents on an equal footing in cross-border cases. There does not seem to be, or it does not transpire from the national reports, that a defendant domiciled abroad would be treated differently from a local one. In the same lines, as a rule a claimant is not entitled to a diverse treatment either when the claim includes cross-border elements. It is worth noting though that some countries have explicitly taken into account the international element (Malta, costs for the assistance of a local lawyer until the application for legal aid has been received in the Member State where the court is sitting as well as costs for translation of the application when it is submitted before the Member State where the court is sitting; Poland, application may be written in English; Belgium, if the foreign party entitled to legal aid does not speak the language of the proceedings, the Bureau for Legal Assistance will appoint a lawyer who speaks this language; Finland: although in domestic cases legal aid will not be granted for cases of little importance, in cross-border disputes it is usually granted even in such simple cases).

177. In spite of the foregoing, National Reports still show strong divergences concerning requisites, extent, amount and procedure for the granting of legal aid. Indeed, the extent to which legal aid is available usually depends on the prerequisites of national law. The Maintenance Regulation (Regulation (EC) 4/2009) constitutes a partial

[60] to the information was retrieved from: National Reports, question 2.1.1.; on-line survey, questions 3, 44 to 47; interviews.

exception to this general rule, as it lays down self-standing rules governing legal aid at Articles 44-47.

- Concepts taken into account when deciding on a legal aid application diverge. Some systems consider the overall economic position of the individual concerned (i.e., also properties: Malta; income and wealth, excluding cases of little importance: Finland; properties, income, debts: Sweden; income and disposable assets: Ireland; income, capital, benefits expected from claim: the Netherlands); others only consider the annual income (Austria, Belgium, France, Greece, Hungary, Italy, Spain). The soundness of the claim/the proof of reasonable grounds to be a party to the proceedings may also be an issue (Austria, Estonia, Germany, Malta, Slovakia, Spain).
- Cap not to be exceeded in order to have the right to claim legal aid vary: Austria, 1000 €/month; Belgium, € 1250 per month; France, less than 1000 euros/month (for a person without children); Greece, annual family income less than 2/3 the minimum annual personal pay; Lithuania, 3800 euros yearly for one person; Luxembourg, 1340 e./month; Italy, 11.369 euros yearly; Slovakia, income no higher than 1,4 times the sum of "minimum subsistence"; Spain, 15.000 euros (for an individual) up to 22.500 euros (for a family); The Netherlands, 26.000 euros (an individual) up to 36.800 (a two-person household).
- Legal aid is sometimes restricted to natural persons (Belgium, Sweden). In some MS it is limited in scope as well, albeit the concretions of the maximums may vary: in Finland and Sweden legal aid is limited to a ceiling of 80 or 100 hours –respectively-, which can be extended at the court's discretion. In Ireland the applicant must make a contribution ranging from 30 to 150€ for advice, and from 130 to 3750 € for aid, depending on his/her income but irrespective of the sums in dispute. In The Netherlands, depending upon income, a (small) contribution by the applicant is required. In Sweden legal aid is linked to insurance (or the burden to have one if the income reach a specific cap).

- Legal aid may take the form of exemptions from payment, or of instalment payment of expenses (only case of phased expenses: Portugal).
- The system to grant legal aid may differ substantially in relevant points such as the competent authority to grant it (the court: Germany; the Bar; specific Bureaus: Belgium, Bulgaria, Finland, Spain); the deadlines to decide (Ireland reports waiting times up to 33 weeks); and the procedure itself (judicial or administrative nature, usually linked to the competent authority).

1.4.2 Problems and assessment

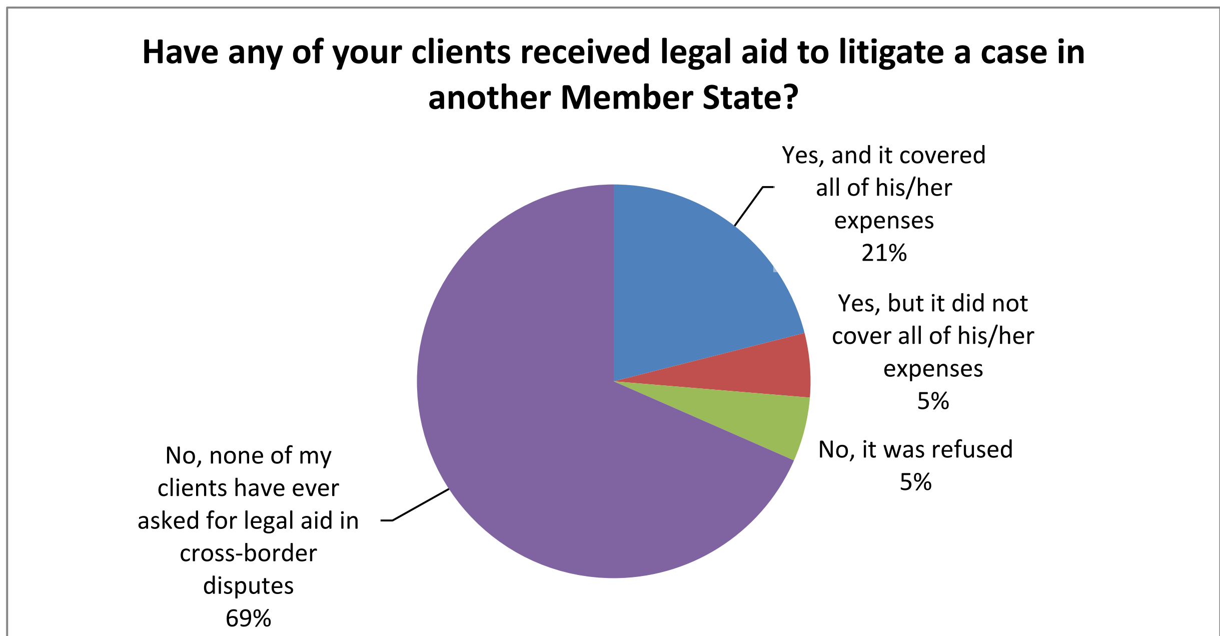
178. The data compiled through the questionnaires, interviews and national reports (comprising national case law) show relevant information on the issue of legal aid for the purposes of the present Study.

1.4.2.1 Survey

179. 7.63% of Survey respondents qualified the ‘Granting and use of legal aid’ as ‘A very significant obstacle’ to cross-border litigation, while another 25.19% described it as ‘A significant obstacle’.[61]

180. It is important to stress that there is a widespread unawareness of the right to legal aid in cross-border cases, contributing to the seriousness of the problem: the surveys show a very low use of legal aid in cross-border case. Hereunder are the answers to the question: "Have any of your clients received legal aid to litigate a case in another Member State?", the answer “Yes, and it covered all of his/her expenses” was given by 4 respondents; “Yes, but it did not cover all of his/her expenses” was the answer of 1 respondent, while another one clicked on “No, it was refused”. 13 respondents submitted that none of their clients have ever asked for legal aid in cross-border disputes. However, given the very limited number of respondents to this question no meaningful conclusion as to the use of legal aid in cross-border case can be drawn.

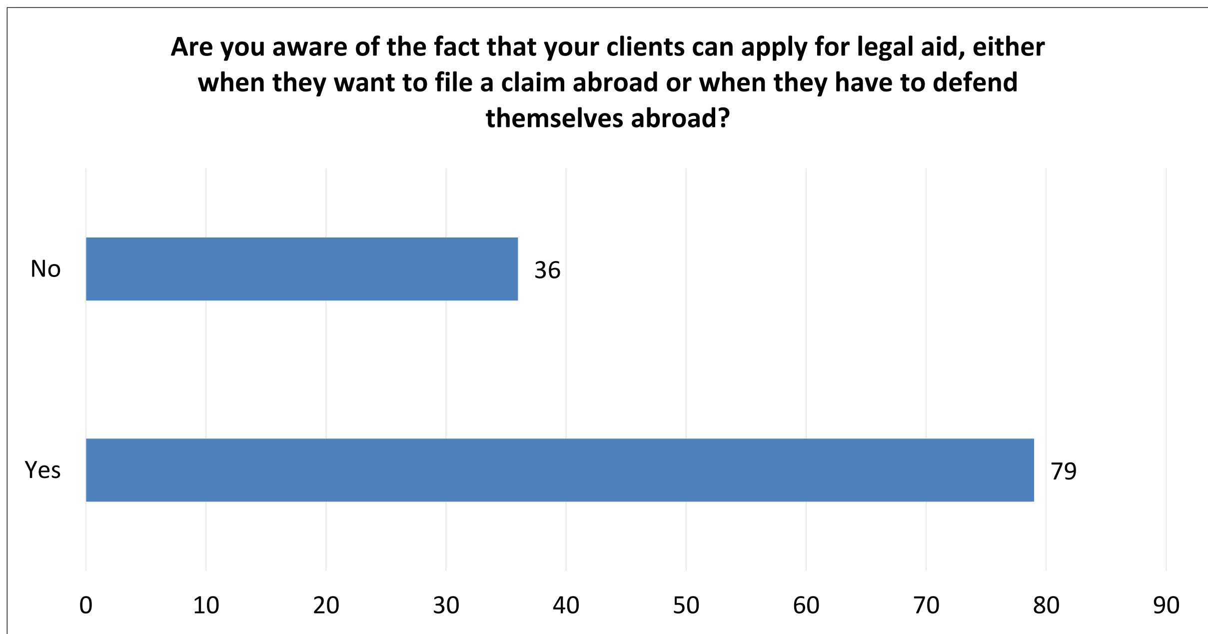
[61] Overall, the question was answered by 296 respondents.



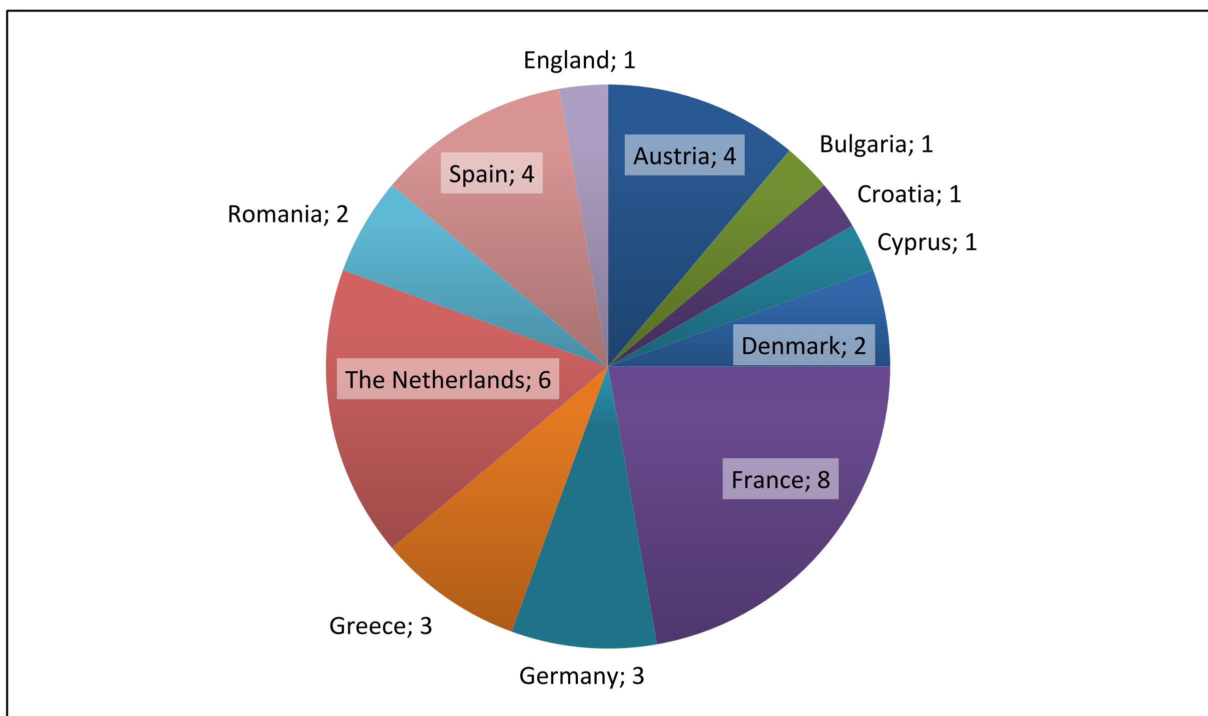
181. One of the Survey questions was ‘Are you aware of the fact that your clients can apply for legal aid, either when they want to file a claim abroad or when they have to defend themselves abroad?’ Interestingly, 31.30% of respondents answered ‘No’.[62] Given this pervasive lack of awareness even within a rather specialized group of respondents, it is unsurprising that parties do not commonly request legal aid. Namely, 78.89% of Survey respondents reported that none of their clients have ever asked for legal aid in a cross-border dispute.[63]

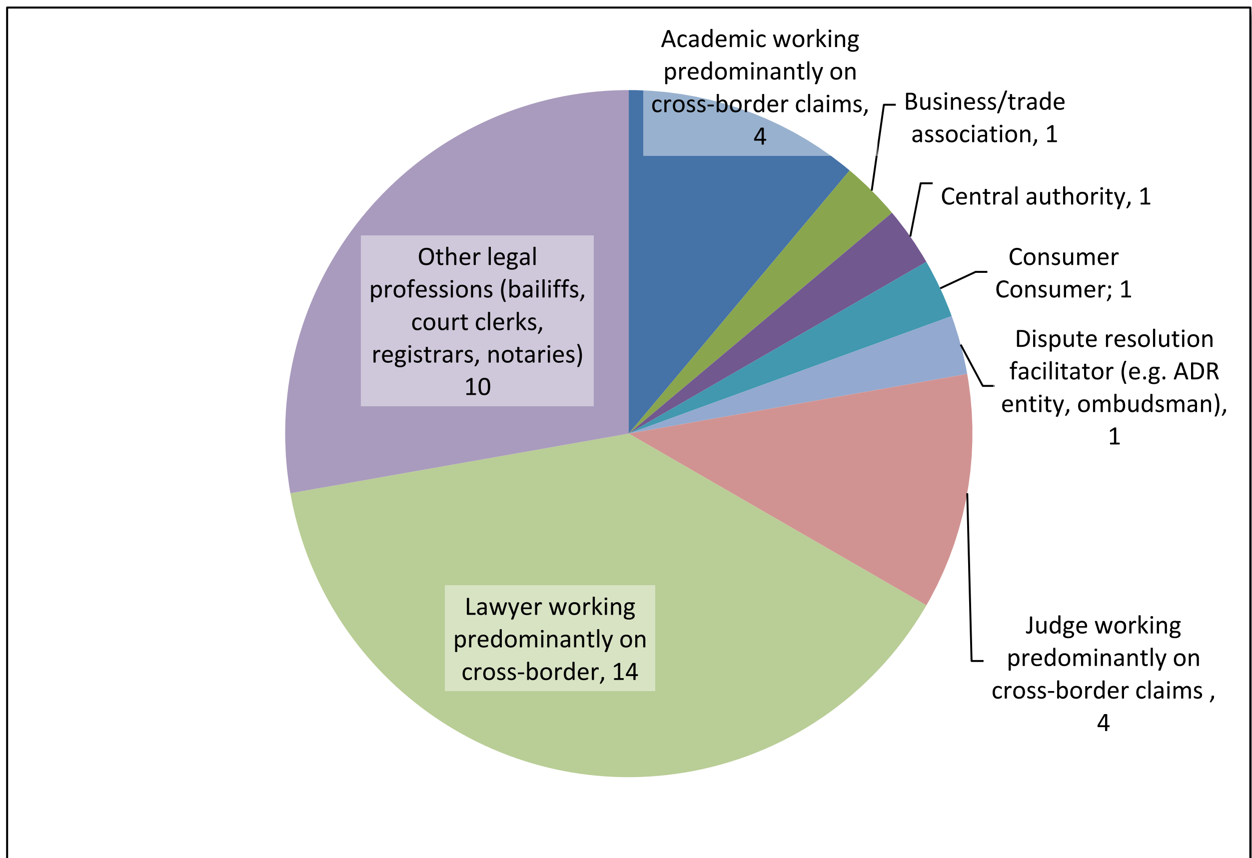
[62] Overall, the question was answered by 115 respondents.

[63] Overall, the question was answered by 85 respondents.



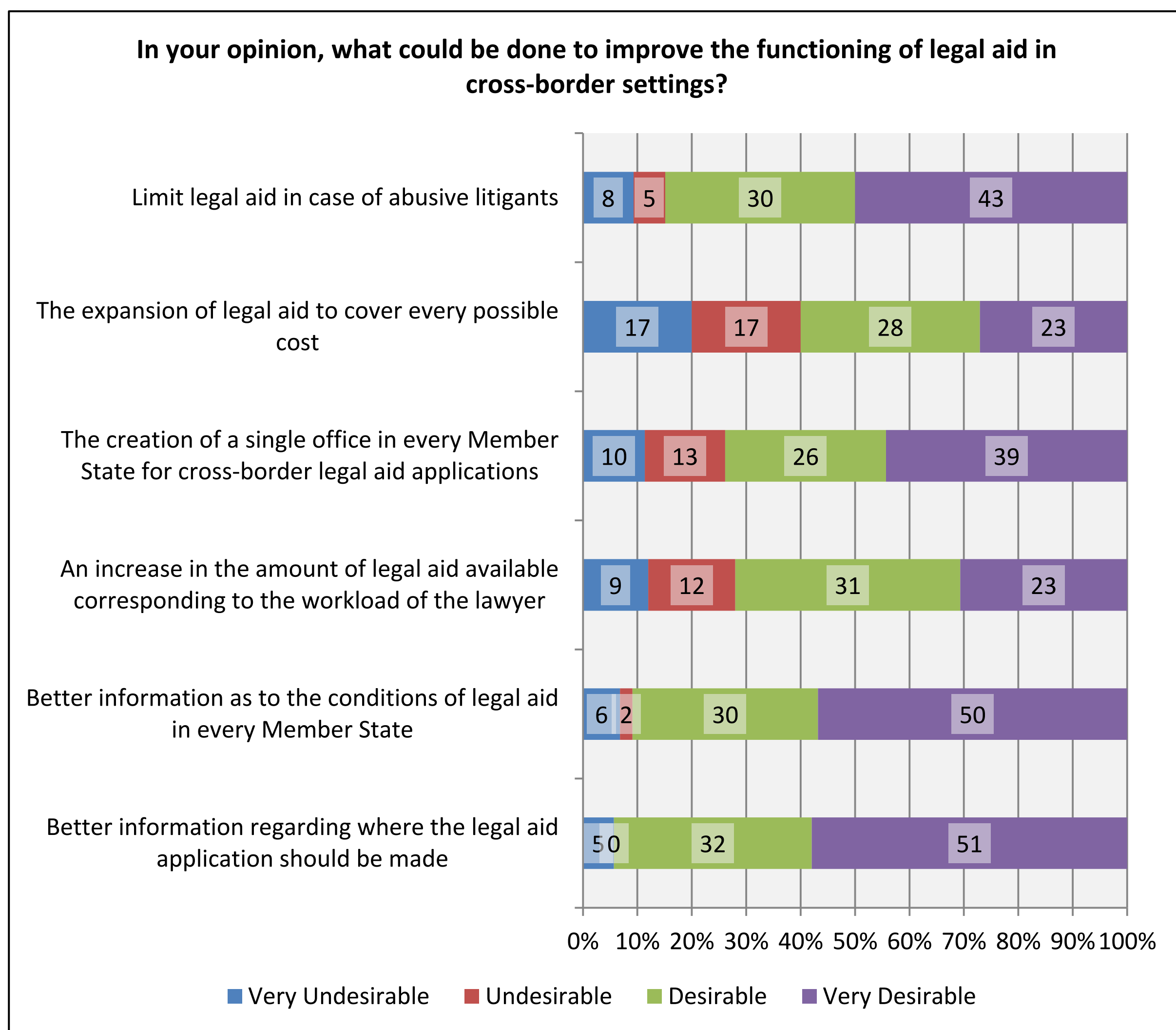
182. The charts below show the geographic distribution and professional background of the 36 respondents (31,30% of the total sample) who answered 'No'.





183. When asked to evaluate specific policy recommendations, the answers given by the respondents clearly evince that the need for better information stands out as a priority for stakeholders.[64]

[64] Overall, the question was answered by 92 respondents.



184. At present, acquiring information on legal aid through the e-Justice portal offers the possibility, under the section 'European Judicial Atlas in civil matters', to obtain (basic) information in English for a number of Member States[65]. More comprehensive information is available under the 'Legal Aid' section: in this case, in fact, the user is redirected to the page of the European Judicial Network in civil and commercial matters, with the warning, however, that the data provided therein may be obsolete.[66]

[65] Namely Belgium, Estonia, Spain, Greece, Hungary, Luxembourg, the Netherlands, Romania, Sweden, United Kingdom.

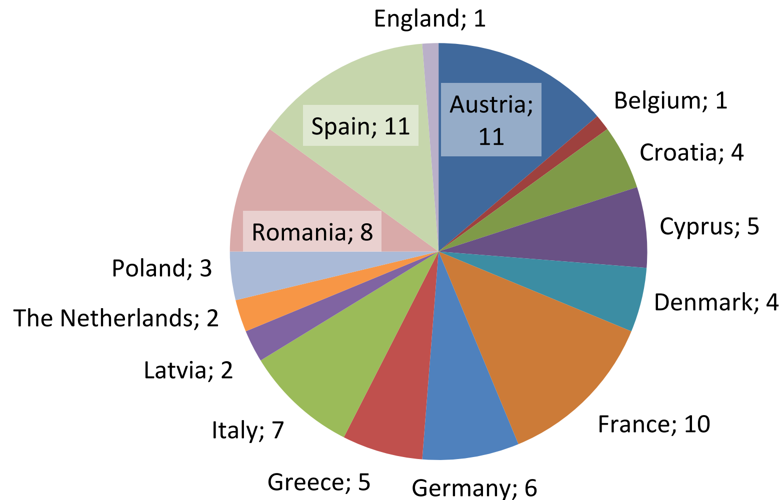
[66] The e-justice page itself has been last updated on 24.02.2016 (see https://e-justice.europa.eu/content_legal_aid-293-en.do?clang=en), whereas the last update of the dedicated EJN was on November 4, 2009. Both sites have been last visited 04.04.2017.

185. Moreover, if we take into account the geographic distribution of the respondents asking for improvements in this respect,[67] it results that the problem is not strictly limited to the countries where a total lack of awareness has been evidenced:

[67] Overall, the question 'In your opinion, what could be done to improve the functioning of legal aid in cross-border settings' was answered by 92 respondents.

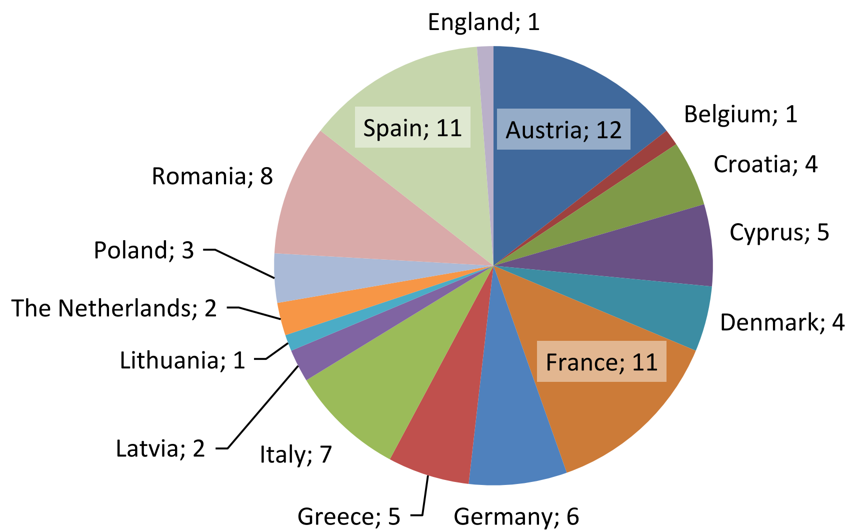
Question 47: In your opinion, what could be done to improve the functioning of legal aid in cross-border settings? **Option**: 'Better information as to the conditions of legal aid in every Member State'

Geographic distribution of respondents who answered **'Des**



Question 47: In your opinion, what could be done to improve the functioning of legal aid in cross-border settings? **Option**: 'Better information regarding where the legal aid application should be made'

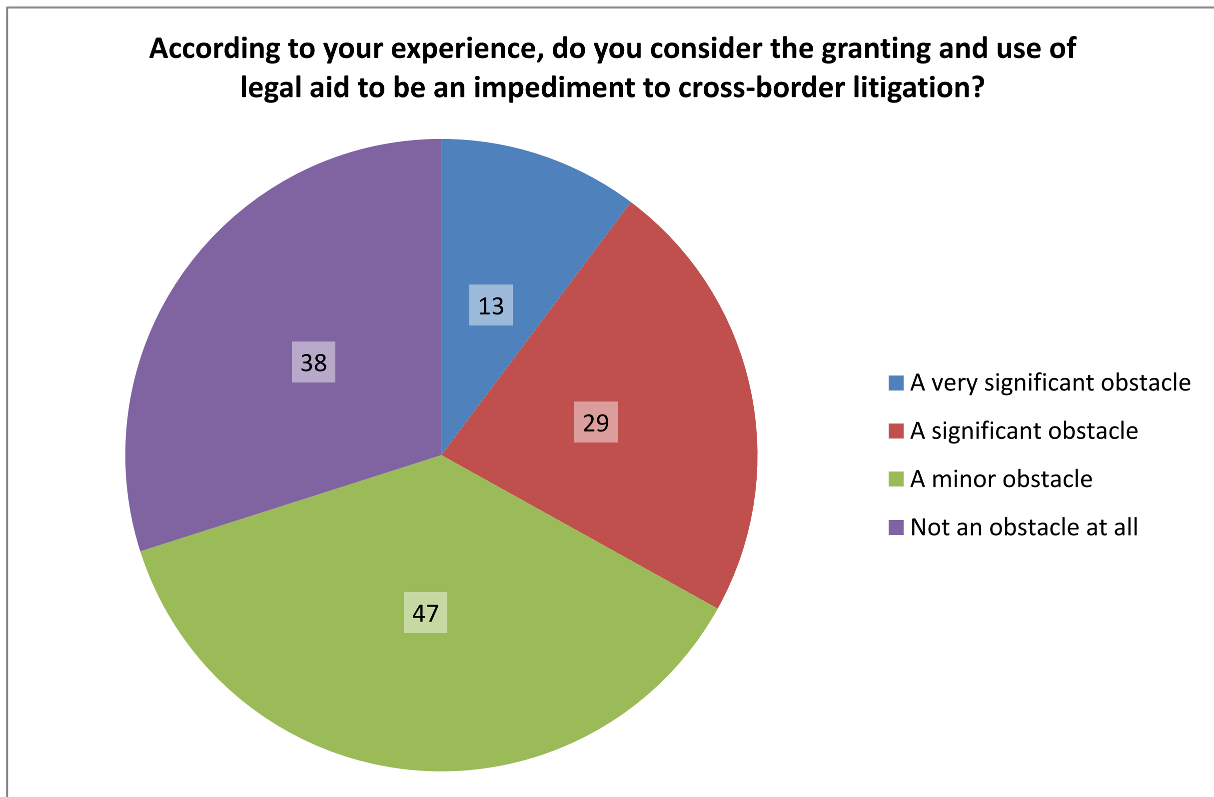
Geographic distribution of respondents who answered **'D**



1.4.2.2 Interviews

186. To the question "According to your experience, do you consider the following issues [Granting and use of legal aid] of the different civil procedural laws of the Member

States to be an impediment to cross-border litigation?", the answers are distributed as follows.



187. Further questions regarding legal aid were addressed to the interviewees as open questions.

188. The first one was formulated in these terms: "Have you ever used (or has any of your client) used or requested legal aid to litigate a case in another Member State? If yes, please describe what was done and how it worked". The interviewees massively answered no. Exceptions were scarce and not always accurate: a member of the Finnish central authority, with 15 years of experience, confirmed the deterring effects of costly proceedings, especially in cross-border family matters[68]; a Latvian lawyer with 7 years of experience resorted to it several times and found it worked satisfactorily[69]; a Lithuanian lawyer informed of clients residing abroad who received legal aid in Lithuania covering translation and representation in court[70]; a Dutch judicial officer reported having seen some cases, but claimed that sometimes

[68] Interview conducted by the Finnish National Reporter.

[69] Interview conducted by the Latvian National Reporter

[70] Interview conducted by the Lithuanian National Reporter

requests coming from other Member States are not complete or the wrong forms are used; a Luxembourgish lawyer with 15 years of experience described how in the past the bar used to deny legal aid to foreign domiciliaries and how it has changed recently (although another Luxembourgish lawyer affirms that many of his clients have asked for it and never got it granted)[71]; a Spanish judge confirmed having seen it in court in some occasion and, in her opinion, it had functioned smoothly, since the Spanish Bar Associations take legal aid seriously, regardless of whether the case is cross-border or not.[72]

189. The second question ("According to your experience, what are the main problems when applying the [legal aid directive], what could be done to improve the situation or solve these problems?") received very few answers. The attaché of the Belgian central authority noted that sometimes the documents that are necessary for a legal aid request are outdated because they have to be translated[73]. A member of the Estonian central authority with 7 years of experience suggests that there should be a time limit as to how long the request will be assessed. A Greek lawyer with 21 years of experience criticised a rather domestic issue, concerning the selection of the lawyers engaged in legal aid for cross-border cases. In a connected vein, a Maltese academic stressed the need of more training in this area[74]. Finally, a Luxembourgish lawyer with 15 years of experience considered that the basic rules themselves should be changed in order to have the Legal aid directly granted to any European citizen by the country in which he wishes to file a claim in Court without any reference to his domicile.

1.4.3 Proposals/Possible improvements

190. Although the availability of legal aid does not directly impact on the recognition and enforcement of judgments, it can have a fundamental effect on the parties' choice to pursue cross-border litigation and, subsequently, to enforce the judgment abroad.

[71] Interviews conducted by the Luxembourgish National Reporter

[72] Spain, judge with 25 years of experience. From a different perspective, a German lawyer/academic with 5 years of experience described that one of his clients obtained litigation funding from a litigation funder in London at very high participation rates to claim substantial amounts of money (he considered that this person would have remained without legal protection without it.

[73] Interview conducted by the Belgian National Reporter

[74] Interviews conducted by the Maltese National Reporter

Costs of litigation generally play a crucial role in shaping the parties' incentives to (or not to) initiate legal proceedings. In the case of cross-border litigation, however, this issue is particularly evident, as international cases entail additional complications and may result in the need to litigate abroad, with a possible further increase in costs. These problems are exacerbated by the general lack of awareness concerning the availability of legal aid for cross-border litigation.

191. The most feasible policy option consists in raising awareness about the possibility to ask for legal aid: "traditional" training activities might not be suitable, since their usual targets are lawyers (not always interested in working as legal-aid lawyers) and judges and court staff (and they are not in direct contact with persons that might need legal aid). Therefore broadening the targeted groups by addressing as well consumer associations, social services servants, associations and NGOs involved in helping family law cases, seems appropriate.

192. Further harmonization as to the contents (what is covered) –apart from what was already reached by the 2003 Directive- and expanding harmonization as to the amounts is difficult to envisage, due to budgetary implications. Still, and even if the scarce amount of available data would not support far reaching changes in the existing European solutions, we believe these would improve if consensus was reached regarding some additional minimum standards: namely, the relevant elements to decide on the financial capacity of a person –beyond the general provision set in Art. 5.4 of the 2003 Directive, or the extent to which cross-border linked contents should be covered –beyond the boundaries of Art. 7 of the Directive.

1.5 The Language of the Proceedings[75]

1.5.1 Status quo. Summary[76]

193. Proceedings are generally conducted in the official language/s of the court, leading, in cross-border settings, to the need to translate documents and to use interpreters in hearings. This may be, on turn, a source of extra costs and of the need for extra-time.

1.5.1.1 Documents. Translators

194. A) *Documents*. Ordinarily, documents drafted in a non-official language of the MS where the claim is to be heard will have to be translated. The general rule is that the parties will have the duty to provide the translation of the documents they produce to the proceedings and, therefore, to bear the costs (Austria, Belgium; Croatia; Denmark; Finland; France; Germany; Ireland; Latvia; Poland; Portugal; Spain; Slovenia; England and Wales).

195. Some MS, nevertheless, show a different and more flexible approach. In Sweden the decision on the translation of documents is left to the discretion of the court. In Denmark the translation requirement may be waived if both parties agree and the court believes that it has sufficient command of the foreign language. In Estonia documentary evidence should in principle be translated, unless translation is unreasonable considering its contents or volume, and other participants in the proceedings do not object to accepting the evidence in another language. In Luxembourg, apparently translation is not required at all. In Italy some relevant documents need to be drafted or produced in Italian (ad. ex., the claim or the judgment), but for others the judge is allowed to use his personal knowledge of the foreign language)[77]. A similar situation is described for The Netherlands, where documents supporting the claim -not official ones, such as the claim- are frequently admitted if produced in English (also, to some extent, in German or French). France

[75] The information was retrieved from: National Reports, questions 2.1.1. and 4.1; on-line survey,; interviews.

[76] The issue of translation of the document instituting the proceedings for the purposes of service abroad according to the SR has already been dealt with above (see 1.3).

[77] The court cannot refuse to examine a piece of evidence alleging the mere fact that it is drafted in a language other than Italian: Cass. 17-18 February 2015, No. 10125.

and Germany (although in practice very rarely) accept the possibility of not using translations if the language of the document is sufficiently mastered by the court and the parties.[78] In Germany, indeed, solely the plaintiff can decide whether the documents are to be translated prior to service, although the court has to instruct him/her on the consequences, if he/she refrains from doing so.

196. The situation between the Nordic countries is special: a national of another Nordic country may submit documents drawn up in his/her own language; the court will then cause the document to be translated into its official language where so demanded by the opposing party or deemed necessary by the court. The costs of such translations are payable by the Treasury.

197. The translation of the documents by the court seems to be possible in some MS, like Lithuania (where big courts have own translator services for Polish, English or Russian) or Sweden (but they will be considered as costs and will be later charged to the party). In the Czech Republic there seem to be two “cross-border friendly” rules: the defendant has the right to have the contents of evidentiary hearings and evidence translated into his/her mother tongue; the judgment is translated into the mother tongue of the defendant.

198. B) *Translators*. The issue of the qualification of the translator has been addressed by many national reports. Although flexibility appears to be the general rule, some MS require a sworn translator (Romania) or a translator with a master's degree in translation or similar (Denmark); in Hungary there is a very specific monopoly on translations of foreign documents (OFFI being the only agency licensed to prepare certified translations; the costs of translation shall be advanced by the State on behalf of the party entitled to use his native language or the language of its region of nationality).

199. The problem of the poor quality of the translation of the documents served on the defendant was addressed in two reports (Denmark and Poland) when commenting judicial decisions in cases of appeal against exequatur; but it appears recurrently in

[78] In France, this is a consequence of art. 23 of the Code de Procédure Civile, established for interpreters but apparently extended to documentary evidence. Conversely, this discretional power also means that evidences can be dismissed by the judge if a translation is not provided (C.Com, 27 Nov. 2012, nº 11-17.185,FR:CCASS:2012:CO01177).

many national reports when addressing issues related with language (e.g., filling of forms under different EU regulations).

1.5.1.2 Hearings

200. When it comes to hearings, the general rule is the use of interpreters for parties, witnesses and experts that are not competent in the language of the proceedings. Some MS accept the possibility of not using interpreters if the language of the person is sufficiently mastered by the court and the parties (France, Germany), but this practice seems to be still exceptional. In practice, the more recurrent issue are the costs (it is normally the court system that will pay the interpreter; however, in some MS it is the parties who shall bear the costs: Latvia), together with the difficulties in finding interpreters (in some cases, as reported for Greece, due to the low fees they are allowed to charge).

1.5.1.3 Recollection of valuable experiences

201. Two experiences of general flexibility regarding the link of the proceedings to the official language have been reported. The most inspiring is the *Netherlands Commercial Court*, which was established in Amsterdam as from 1 January 2017, specialized in international trade disputes and where proceedings will be conducted in English (although by Dutch judges and according to Dutch procedural law).[79] In France, the *Tribunal de Commerce de Paris* launched already in 2010-2011 an international division (*3ème chambre*), with judges speaking foreign languages and able to read documents written in foreign languages.[80]

202. MS with more than one official language show some experience in handling language diversity (Belgium, Finland, Hungary, Slovenia, Spain). Although the language issue in each of them is linked to different peculiarities, good practices can

[79] The Netherlands Commercial Court will reside in the Amsterdam District Court. See the –unofficial– information provided by some Dutch law firms on this issue, like https://www.blenheim.nl/netherlands-commercial-court. Apparently, some pilot experiences of this kind had already been developed in other Dutch courts, like the Rotterdam District Court, conducting in English some cases involving maritime and transport law and international sale of goods (see, again unofficially, http://www.debrauw.com/newsletter/dutch-district-courts-introduce-english-language-proceedings/#).

[80] For more information, see also http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/. The basis for such possibility is Article 23 of the French Code of Civil Procedure, pursuant to which the judge is not obliged to use an interpreter if he knows the language used by the parties (“Le juge n'est pas tenu de recourir à un interprète lorsqu'il connaît la langue dans laquelle s'expriment les parties”).

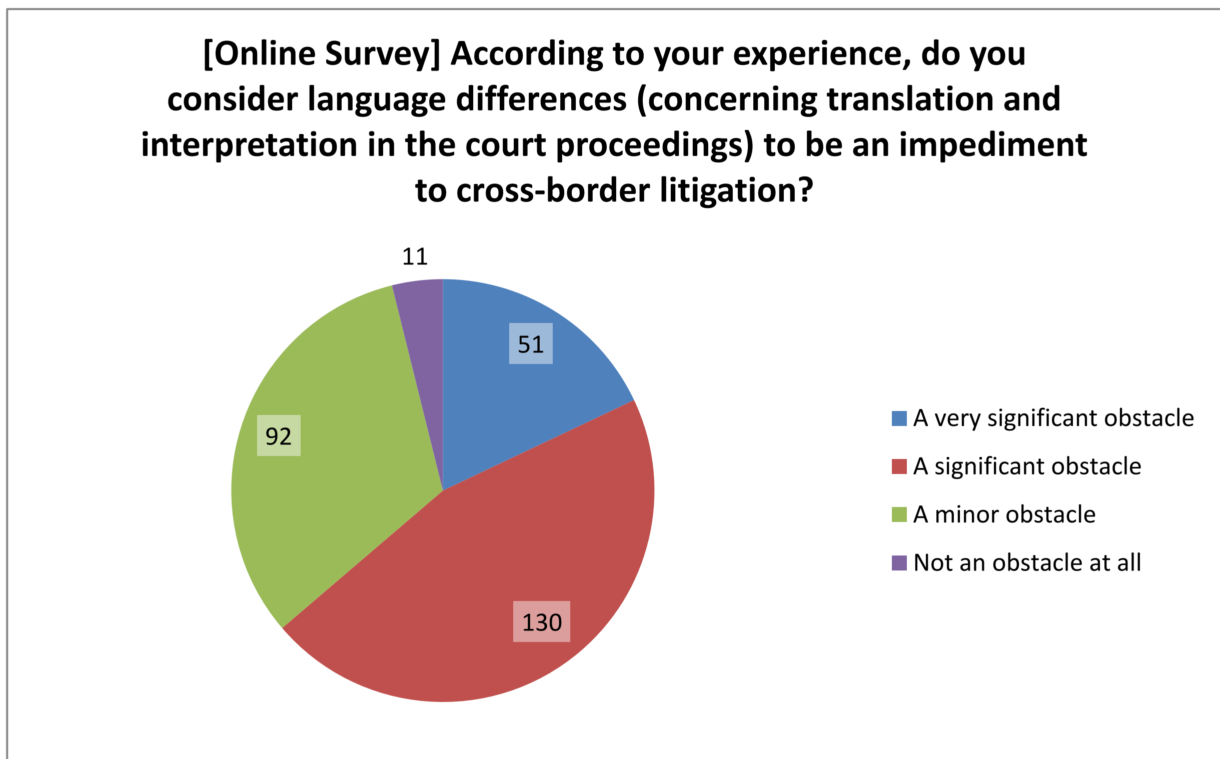
be extracted, also in the sense of flexibility (translation tends to be unnecessary if the court and the parties are competent in the official language of a different region/part of the MS or in the language of a minority).

1.5.2 Problems and assessment

203. The data compiled through the questionnaires, interviews and national reports (comprising national case law) show relevant information on the issue of language of the proceedings for the purposes of the present Study.

1.5.2.1 Survey

204. The survey shows clearly that language differences amount to one of the most relevant obstacles for a smooth functioning of cross-border litigation, as may be inferred from the following chart.

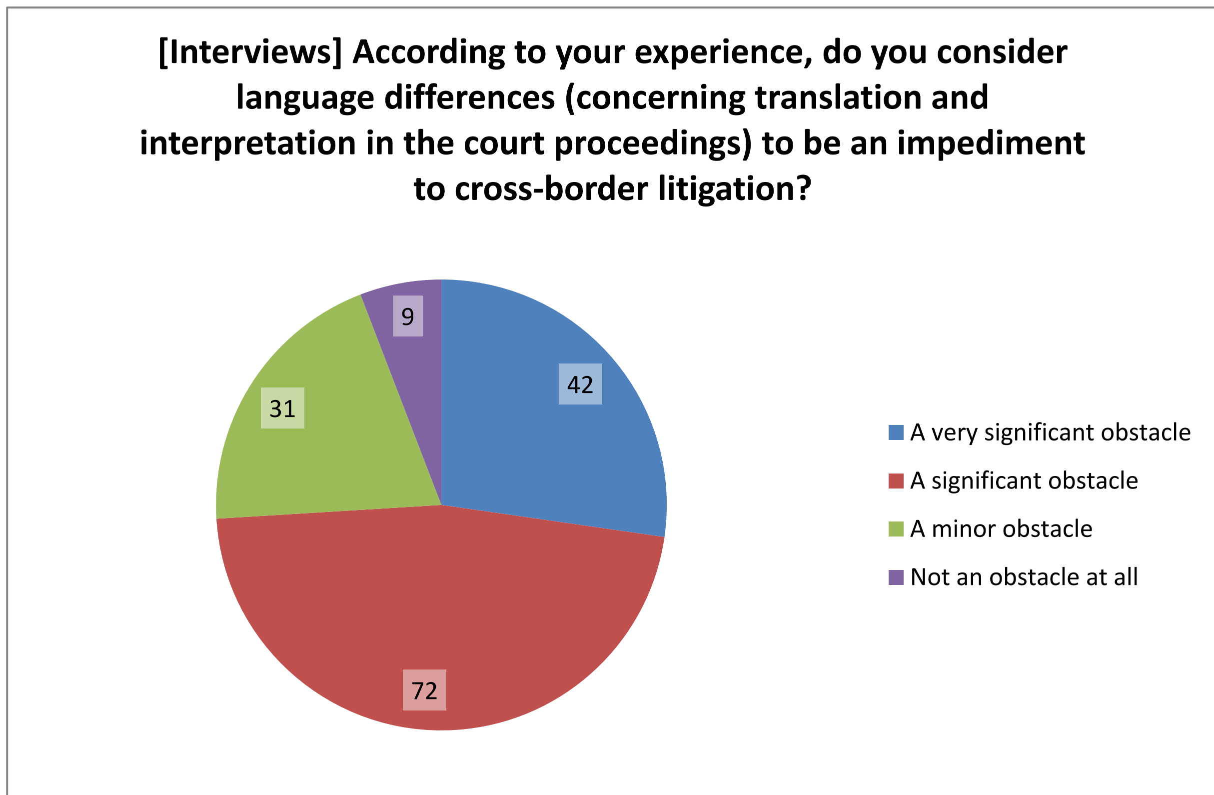


205.

1.5.2.2 Interviews

206. The interviews also show the concern of cross-border litigation actors. To the closed question on this "According to your experience, do you consider the following issues

of the different civil procedural laws of the Member States *[language difference]* to be an impediment to cross-border litigation?", the following answers were given.



1.5.2.3 National reports

207. Apart from the general information concerning the need (or not) to translate documents, the more specific problem of the poor quality of the translation of the documents served on the defendant was addressed in two reports (Denmark and Poland) when commenting judicial decisions in cases of appeal against exequatur.

208. Additionally, the problems raised by language differences is an issue that appears recurrently in many national reports (and interviews) when addressing very different issues related with language: e.g., filling of forms under different EU regulations;[81]

[81] Regarding the Service Regulation, see National Reports, question 4.1.1: France and Latvia; Interviews: 2 Austrian judges; Croatian legal advisor; Finnish judge; Dutch judicial officer; Slovakian academic; 2 Slovenian judges; UK lawyer. Regarding the Evidence Regulation, see National Reports, question 4.2.1: Italy, Belgium, Greece, Latvia, Slovenia; Interviews: Bulgarian lawyer; Bulgarian judge; Finnish judge; Italian lawyer; Latvian ministerial officer; Spanish court clerk.

difficulties in direct cooperation among judicial authorities due to the impossibility to communicate in the same language.[82]

1.5.3 Proposals/Possible improvements

209. There are some interesting experiences with the functioning of the court in English (Netherlands Commercial Court) or with greater flexibility towards foreign languages in documents (not being needed of translation, like in the *Chambre internationale du tribunal de commerce de Paris*), which should be given publicity and recommended to the MS.

210. Apart from ensuring translation and interpretation in the scope of legal aid and from promoting good practices (including more intensive training of judges, court clerks and court officers in the field of linguistic skills), not much can be done as language harmonization does not match with EU basic principles.

211. We would as well recommend a non-formalistic interpretation of "proceedings" for the purposes of the compulsory use of the national language, or the need for translation. It is here submitted that only the procedural activities and actions which are essential to the process must be drafted in the official language of the court: ancillary or preparatory activities should not. This differentiation, borrowed from the field of cross-border insolvency law, where communication between judges and IPs is foreseen, may have some utility in other civil and commercial matters, especially when it comes to complex litigation.

1.6 The Rules on Representation Before the Court[83]

1.6.1 Status quo. Summary

212. Rules on representation before the courts have tight links to the procedural culture and the legal history of each MS. Therefore National Reports show a great variety of situations.

[82] Regarding the Service Regulation, see National Reports: Bulgaria, Finland, The Netherlands; Interviews: Finnish judge; German lawyer; Irish member of a consumer protection association; Latvian lawyer; Lithuanian judge. Regarding the Evidence Regulation, see National Reports: Bulgaria, Finland, Spain; Interviews: Finnish judge with three years of experience.

[83] The information was retrieved from: National Reports, question 2.1.1.; online survey, questions 3 and 7; interviews.

1.6.1.1 As far as the mandatory nature of legal representation is concerned

213. There are several MS where legal representation is always required or, at least, where it is required if the value of the claim goes beyond a specific threshold and/or has to be brought to a specific court in the first instance. This is the case of Austria, for claims before Regional Courts (*Landgerichte*), for disputes above 15.000 euros. It is also the case in France for proceedings before the *High Court (tribunal de grande instance),* although with relevant exceptions for specific disputes (commercial rent, familial affairs, payment order, and *référés*); on the contrary, parties can be unrepresented in front of most of the others first instance courts including the Commercial Court and the enforcement judge (*"juge de l'exécution"*). In Germany representation by an attorney is required before the Regional Courts (*Landgerichte*) and the Higher Regional Courts (*Oberlandesgerichte*), but not before District Courts (*Amtsgerichte*). In Hungary legal representation is mandatory in actions of the first instance before the regional court, during all stages of the proceedings. In Greece, representation by a lawyer is mandatory before all courts, except before the Justice of the Peace with regard to small claims or in cases of imminent danger (nevertheless, even in those cases, the court has the power to order the party to hire a lawyer). In Italy, the representation and assistance of a party by a lawyer is mandatory in civil proceedings before courts of first instance (*tribunali*), Courts of Appeal and the Court of Cassation. In Luxembourg, representation by a qualified lawyer is mandatory in proceedings before the main first instance court (*Tribunal d'arrondissement*); by contrast, it is not before lower claim courts (Justice of the peace) and Labour courts (*Juridictions du travail*). In the Netherlands, for claims that come under the jurisdiction of the District Court representation is compulsory (but it is not if the case can be heard before the sub-district sector of the court, which has jurisdiction for claims up to €25.000 and some specialized issues, incl. consumer credit up to €40,000 and (all) consumer sales). In Spain, legal representation is required for claims above 2.000 €.

214. By contrast, in many other MS legal representation is not required at all: this is the case for Denmark, Finland, Ireland, Latvia, Lithuania, Malta, Romania and Sweden. In the specific case of Denmark, it has been reported that the district courts have an obligation to guide individuals who are not legally represented by a lawyer.

215. Finally, in another group of MS legal representation is not required at all in the first and the second instance, but turns to be mandatory for cassation or similar remedies before the Supreme Court: Belgium (Court of cassation), Bulgaria (second appeal), Croatia (Supreme Court), Czech Republic (cassation procedures), Estonia (Supreme Court); Poland (Supreme Court) and Slovenia (extraordinary remedy procedures).

216. In many of the MS where legal representation is not necessary, however, the judge can order the party to engage one if it considers the litigant in person unable to plead the case properly: this possibility has been explicitly reported for Belgium, Denmark, Malta and Sweden.

1.6.1.2 Person entitled to represent a litigant before court

217. There are also important differences regarding the person who is entitled to represent a litigant before court. In most MS the legal representative must be a lawyer (usually, a lawyer registered in the relevant bar association). Nevertheless, legal representation is open to other possibilities in quite a relevant number of MS: in Bulgaria it seems not to have been restricted to lawyers; in Hungary there is a wide range of permitted legal representatives (including, e.g., party's relatives), provided they have a law degree; in Sweden there is no monopoly of the bar, so the representative does not have to have a legal education or be a member of the Swedish Bar Association.

218. In some MS only special lawyers are allowed to plead cases before the Supreme Court: this is the case, for Belgium, France ("*avocats au Conseil d'Etat et à la Cour de cassation"* who need to pass a specific examination), Germany and Italy.

1.6.1.3 Requirement of domicile/representative

219. Some MS oblige any foreign party to choose a domicile in the MS or the appointment of a representative, usually for the purposes of communication with the court. Having an address or a proxy to receive documents from the court should be considered as necessary from the point of view of the plaintiff's right to proceedings in a reasonable time and, more broadly, for the proper functioning of the procedure. Usually the presence of lawyers solves the issue: however, their intervention is not always mandatory. In Croatia, if a foreign claimant does not appoint a representative for receiving court communications, his/her action will be dismissed; if it is the foreign

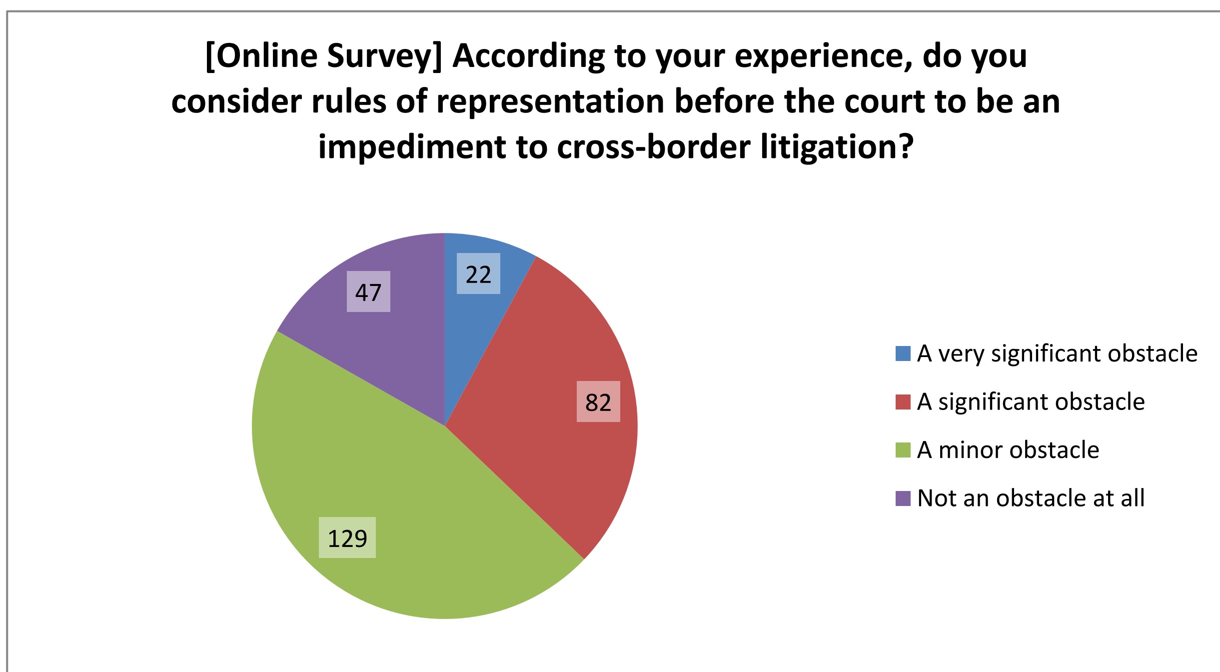
defendant who fails to comply with this duty, the court will appoint one at her or his expenses. In Lithuania the consequences are more severe: all procedural documents will be retained in the file, but deemed delivered.[84] In Romania further communication will be effected using post with acknowledgement of receipt.

1.6.2 Problems and assessment

220. The data compiled through the questionnaires, interviews and national reports show that representation before the court is not considered as one of the most relevant obstacles to cross-border litigation.

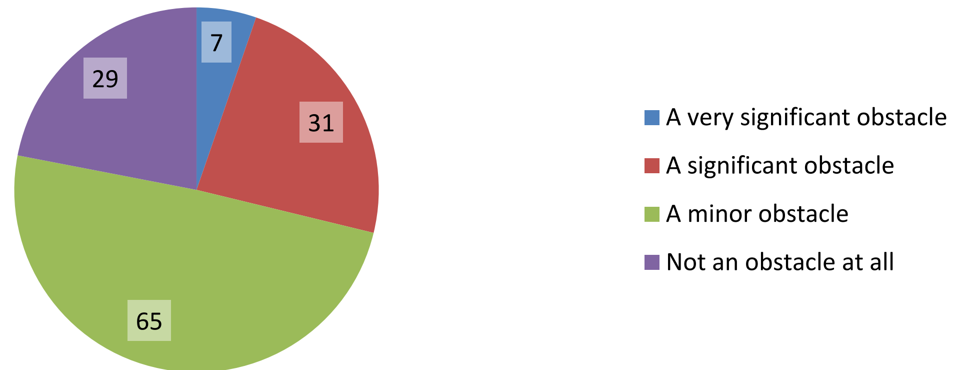
1.6.2.1 Survey

221. Rules on representation before the court are not perceived as an extremely relevant hurdle, although still around a third of the participants to the survey qualified them as a "very significant" or a "significant" obstacle.



[84] It is doubtful, nevertheless, if such practice is compatible with the ECJ ruling in case C-325/11 *Alder* EU:C:2012:824, according to which Article 1(1) of the SR must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to appoint a representative who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place.

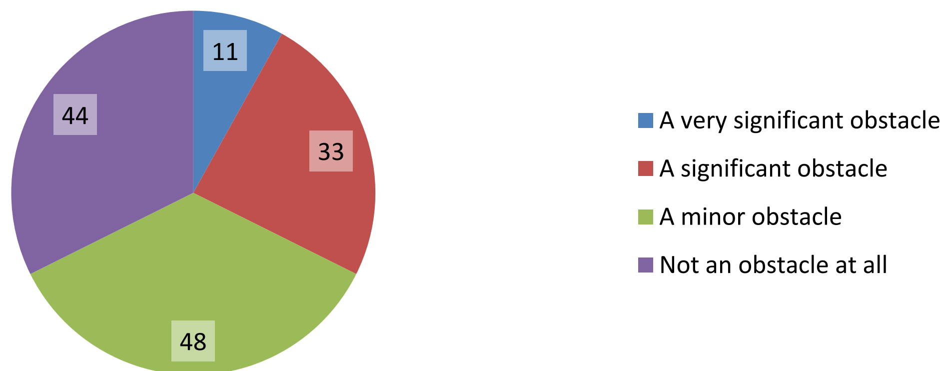
[Online Survey] Evaluate whether rules of representation before the court constitute a significant obstacle to cross-border proceedings and to the free movement of judgments under the Brussels I Regime.



1.6.2.2 Interviews

222. Similar results arise from the interviews, where one closed question dealt with this issue: “According to your experience, do you consider the following issues [rules on representation before the court] of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?”. The following chart contains the answers given to this question.

[Interviews] According to your experience, do you consider rules of representation before the court to be an impediment to cross-border litigation?



1.6.2.3 National reports

223. NR address this matter in a rather descriptive way and they do not disclose specific difficulties for cross-border litigation arising from this issue, apart from the obvious fact that recourse to a legal representative will increase the costs of litigation. In MS where legal representation is mandatory, in fact, there should be no great difference between domestic and cross-border cases: lawyer's fees are usually recoverable if the party is granted an award for costs. Where legal representation is voluntary, by contrast, the situation may turn out more problematic: a foreign party will certainly tend to use a legal representative before a foreign court (so "voluntariness" appears to be just theoretic), although the fees may not be recoverable at the end of the proceedings, even if the foreign party wins the case. In other words, where legal representation is not mandatory, a party using one might not be able to recover the incurred expenses, even if that party has won the case and benefits from an order to pay costs.

1.6.3 Proposals/Possible improvements

224. Divergence regarding the rules on representation should not be in itself an obstacle for cross-border litigation; however, it impacts on the issue of costs (all the more when they are not considered as recoverable in a loser-pays context). It is doubtful if the cross-border element of the dispute could justify per se the proposal of a common rule. Should such a rule be in the sense of imposing legal representation in cross-border cases, it will in fact be hardly consistent with the spirits of the ESCP. At any rate, and even if the empirical analysis does not show any urgent need to change the current status quo, some improvements could be suggested, that might help overcoming the cost hurdle, which gets increased relevance in cross-border cases. In this vein, it could be advisable to propose a common rule on the allocation of the costs of representation allowing the winning party to recover –at least to a certain extent– the lawyers' fees in case of successful cross-border claims, even if this would not be the case in domestic situations due to the non-mandatory nature of legal

1.7 Scheduling of the Proceedings and Setting of Time Limits[85]

1.7.1 Status quo. Summary[86]

1.7.1.1 Time for first reaction

225. National procedural law determines the time-limits according to which the defendant must show his/her first reaction to the claim and, thus, subsequently organize his/her defence. Depending on the internal structure of the proceedings this “first reaction” may differ:

- Some MS, in general or at least for some procedural tracks, establish that the defendant will be served with the claim or equivalent document instituting the proceedings and will be summoned to appear directly before court in a hearing (either to plead the case or to set with the claimant and the court the development of the proceeding). This is the case in Austria (in district court proceedings), Belgium, France (in front of the Commercial Court), The Netherlands.
- Some MS, in general or at least for some procedural tracks, establish that the defendant will be served with the claim or equivalent document instituting the proceedings and will be granted a deadline to enter an appearance before court (personally or through a lawyer) and at this moment a new deadline will be granted to present a written statement of defence (Cyprus, Germany, Italy) or to appear for a first hearing (France, in front of the *tribunal de grande instance*)
- Some MS, in general or at least for some procedural tracks, establish that the defendant will be served with the claim or equivalent document instituting the proceedings and will be granted a deadline to present a written defence (or, at least, a first written defence): Austria (in regional court proceedings), England and Wales, Estonia, Greece, Latvia, Lithuania, Malta, Romania, Slovenia, Spain.

[85] The information was retrieved from: National Reports, question 2.1.1.; on-line survey, questions 3, 5, 7 and 50; interviews.

[86] Note that we have already addressed above, under 1.3, the issue of the information that has to be given to the defendant domiciled abroad as to the steps to be undertaken to react against the claim.

226. For the purpose of this study it is relevant to determine the approach of domestic legislations when the defendant is domiciled abroad and how this fact influences the deadlines to appear in court, to enter a first appearance or to present his/her written statement of defence. Such rules vary significantly from jurisdiction to jurisdiction. Furthermore, while some national laws adopt a rigid approach whereby the time-limits concerning the service of the documents instituting the proceedings and the organization of the defence are fixed by law, in other Member States the court has a significant discretion and can modulate the time-limits on a case-by-case basis. This lack of uniformity may potentially lead to a refusal of recognition and enforcement under Article 34(2) of the Brussels I Regulation/Article 45(1) lit. c of the Brussels I *bis* Regulation.

227. As a matter of principle, all Member States agree that the defendant, upon service of the claim, is entitled to sufficient time in order to prepare his/her defence. Nevertheless, in substantiating this principle, domestic provisions governing first appearance or the submission of the statement of defence in cross-border cases significantly diverge not only in connection with the amount of time effectively granted for these purposes, but also with regard to the method used for setting the relevant time-limits.

228. In some countries the deadline for the submission of the defendant's defences is set, on case-by-case basis, by the court: that's the situation in Germany.[87]

- In other MS the court is sometimes bound, in this determination, by a fixed range set by law: that would be the case in Croatia and Lithuania.[88]
- Some MS have opted for fixed deadlines, but still foresee a more favourable regime for foreign defendants: this is the case, inter alia, of Belgium[89],

[87] National Report, question 2.1.1: Germany *(§ 276 para. 1 sentence 3 ZPO).*

[88] National Report, question 2.1.1: Croatia (*Art. 285 (2) of the Civil Procedure Act): the defendant shall be granted no less than 30 but no more than 45 days for the preparation of his defenses. The time-limits are marginally shorter in Lithuania, where the defendant is granted, to those same purposes, no less than 14 but no more than 30 days, starting from the date of service of the statement of claim.*

[89] National Report, question 2.1.1: Belgium (Art. 707 BJC): in purely domestic cases the defendant is granted a minimum period of eight days between the day the writ of summons is served and the preliminary hearing. However, this time-limit is supplemented (a) by 15 additional days if the defendant resides in France, Luxembourg, the Netherlands, Germany or the United Kingdom; (b) by 30 additional days if he resides in another European State; (c) by 80 additional days if he resides in another continent (Arts. 709 in conjunction with Art. 55,1° and 2° BJC).

Estonia[90], France[91], Greece[92], Italy[93], Latvia[94], The Netherlands[95], and Romania[96].

- Finally, other MS retain a single, fixed deadline for all defendants, irrespective of the cross-border nature of the case[97].

229. Regarding the time effectively granted to a foreign-domiciled defendant in order to organize his defence, Member States show very different conceptions as to what should be regarded as an 'adequate time' for this purpose, ranging between a minimum of 10 (Spain, for claims under 6000 euros) and a maximum of 130 (Greece) days.

---

[90] National Report, question 2.1.1: Estonia (CCP § 393(1)): the court serves the claim-form on the defendant and informs the defendant that he has to answer the claim form (including expressing his opinion on the jurisdiction of the court and whether other conditions for proceeding with the case are fulfilled) within the period specified by the court (at least 28 days when the defendant is located abroad).

[91] National Report, question 2.1.1: France (Art. 643 of the CCP), the time-limits for appearances will be extended by two months for persons living in a foreign country.

[92] National Report, question 2.1.1: Greece: until 31.12.2015, the plaintiff had to serve the claim to the defendant residing abroad 90 days before the hearing the latest (ex-Art. 228 CCP). Since January 1, 2016 by virtue of Art. 237 of the new Greek Code of Civil Procedure, the claimant shall serve the claim on the defendant within 60 day from the filing of the claim. The defendant, in turn, shall submit his defense within 100 days following the filing of the claim. For defendants residing abroad, however, this term is extended to 130 days. This leaves the foreign-domiciled defendant with at least 70 days for the preparation of his defense..

[93] National Report, question 2.1.1: Italy (Arts. 163 bis and 166 cpc): as a general rule, in Italy the defendant shall enter an appearance by submitting the documents listed by Art. 166 c.p.c. at least twenty days before the date set for the first hearing. Nevertheless, when the defendant is a foreign domiciliary, at least 150 days shall elapse between said hearing and the service of the writ of summons. As a result, the defendant is granted (at least) 130 days for the preparation of his defense. Such an extensive time-limit can have the effect of encouraging the filing of claims with dilatory purposes (torpedo actions).

[94] National Report, question 2.1.1: Latvia (Art. 148 of the Civil Procedure Law): in the cross-border cases different time limits are provided only for the defendant's whose place of residence or location is outside Latvia submissions. For instance, after a case is initiated, the statement of claim and true copies of documents shall be sent, without delay, to the defendant by registered mail and the foreign defendant is given 30 days to submit a written explanations to the statement of claim counting from the day when the statement of claim was served to the defendant. In the cases with defendant domiciled in Latvia such period of time is 15 to 30 days from the date the statement of claim was sent.

[95] National Report, question 2.1.1: The Netherlands (Arts. 114(1) and 115 (1) DCCP): the time between the serving of the summons and the first trial day should be at least one week, though if the defendant is located in another Member State, this term should be at least four weeks.

[96] National Report, question 2.1.1: Romania (Article 201(6) NCPC). When the defendant is domiciled abroad, the judge will set a reasonable longer term in order for the party to be able to enter an appearance, and arrange for his representation.

[97] This happens, inter alia, in Austria (4 weeks), in England and Wales (21 days, or 35 if the defendant wants to challenge jurisdiction), Malta (where the defendant has 20 days from the date of service to file his reply: Article 158 of the COCP), Slovenia (30 days) and Spain (where the deadline is, as a general rule, 20 days from the service of the claim, but is reduced to 10 days for cases under 6.000 €).

230. As for the possible abuse of the *lis pendens* mechanism, the problem is particularly visible in England and Wales, where the claimant has four months after the issue of the claim form to proceed with the service, under Rule 7.5 of the Civil Procedure Rules.

1.7.1.2. After appearance or in case of default

231. Once the defendant has appeared before court (or in case of default) each national regulation establishes different rules concerning the scheduling of the proceeding: some systems are more rigid, while others allow a more tailored organisation of deadlines for written submissions and for hearings. Those issues are not especially relevant for the purposes of this Study (even lesswhen the foreign party is represented by a lawyer), for they hardly impact on the right to a due process or the fairness of litigation in cross-border settings.

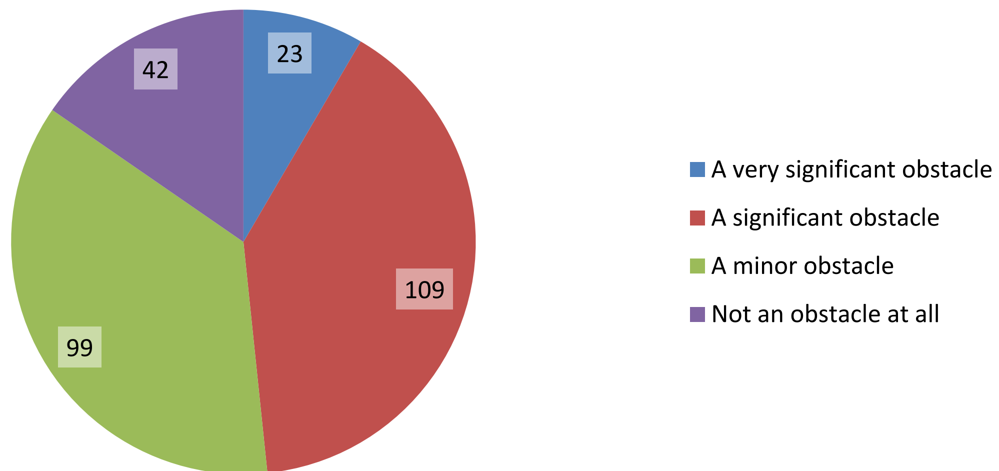
1.7.2 Problems and assessment

232. The data compiled through the questionnaires, interviews and national reports (comprising national case law) show relevant information on the issue of setting of time limits for the purposes of the present Study. They allow concluding that deadlines for defence are a critical point, potentially creating obstacles to subsequent recognition and enforcement of a decision.

1.7.2.1 Survey

233. The lack of time to prepare the defense is a typical objection raised by defendants in default of appearance under Article 34 no. 2 of the Brussels I Regulation.[98] In particular, 52.81% of respondents reported that defendants in default typically argue that 'the documents initiating the proceedings were served, but not in a sufficient time for the defendant to organize his or her defense'. Moreover, according to 42.55% of this subset of respondents, the objection was successful. Given its frequency and its relatively high success rate, therefore, we may conclude that the discrepancies concerning the time-limits for service and defense constitute a significant obstacle to the circulation of judgments.

[98] Overall, the question was answered by 96 respondents.



234. An additional complication concerning the differences in the time-limits for the service of the documents instituting the proceedings relates to the mechanism of *lis pendens*. According to Article 32(1) lit. a of the Brussels I *bis* Regulation, a court is deemed to be seized for the purposes of the *lis pendens* rule when the document instituting the proceedings is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant. This rule applies whenever, according to the applicable rules of national procedural law, the document does not have to be served before being lodged with the court. A critical point in this respect is that, according to some national laws, the claimant is afforded a long period of time for service, after having lodged the document with the court. In these cases, the claimant can lodge the document, thus triggering the *lis pendens* mechanism in advance, and then wait for a relatively long time. As a result, some national laws give the parties the possibility to activate *lis pendens* at an early stage, e.g. when negotiations are still ongoing and there is no certainty yet as to whether the litigation will eventually start, while other national laws preclude this possibility.

1.7.2.2 Interviews

235. The interviews confirm the consideration of this issue as problematic. The closed question “According to your experience, do you consider the following issues of the different civil procedural laws of the Member States [*Differences in time limits open to the parties or other actors of the proceedings with regard to certain procedural actions (appeals)]* to be an impediment to cross-border litigation?” received the following answers.

236. *Although the issue of the time-limits was not addressed as such by any open question, it was spontaneously raised under the heading “fall back general question”. Interestingly, two German academics expressed themselves against a harmonization of* deadlines. One of them argued this would lead to even more disorder. The second one does not recommend the implementation of uniform time limits for their observance depends too much on the personnel available to the courts in the

Member States: therefore some time limits may fall too short for some MS, but prove unnecessarily long for other.

1.7.2.3 National reports, case law

237. The difficulties to decide if the deadline granted in the MS of origin can be considered sufficient or not from the MS of enforcement's point of view have been addressed in some occasions by the German case law, where there exist numerous court decisions on the sufficiency or the insufficiency of the time limits depending on the circumstances.[99]

1.7.3 Proposals/Possible improvements

238. The time granted to the defendant domiciled abroad in order to prepare his/her defence is crucial from the two points of view taken into consideration in this Study: fairness of the proceedings, and later recognition/enforcement of the judgment in another MS. The currently existing deadlines set by domestic legislation may prove too short for cross-border (therefore almost always complex) litigation. Nevertheless, the effective availability of an 'adequate time' for organizing a defence will likely be benchmarked, by national courts, against the deadline set by their domestic provision; and this both when assessing, in the declaratory proceedings, if the defendant had a fair trial, and in the enforcement proceeding, if the objection under 34.2 Brussels I or 45.1 b) Brussels I bis shall be upheld (leading, obviously, to a high risk of inconsistency).

239. It might be advisable to analyse whether some common minimum standards could be achieved. Establishing *minimum* deadlines for the defendant to react would help overcoming the difficulties; it is here submitted that the deadlines be different depending on the sort of first reaction expected from the defendant. As for establishing common *maximum* deadlines, they would serve the purposes of fostering the right to speedy proceedings; still, they do not seem to be strictly necessary to address specific shortcomings of cross-border litigation.

[99] Two and a half months may be sufficient (BGH, 6 May 2004, IX ZB 43/03, NJW 2004, 2386-2388); three weeks are enough if the proceeding is pending in Belgium and the defendant resides within the district of the Higher Regional Court of Cologne (OLG Köln, 6 October 1994, 7 W 34/94, NJW-RR 1995, 446-448). Eight days are deemed too short in OLG Düsseldorf, 11 October 1999, 3 W 258/99, NJW 2000, 3290-3291.

1.8 The Cross-border Taking of Evidence (including problems related to the translation of documents or interpretation during court hearings)[100]

1.8.1 Status quo. Summary

240. The practical modes of taking of evidence in civil proceedings are regulated by national law. Cross-border taking of evidence may, however, force a sort of "cohabitation" of two sets of national rules on evidence: those of the requesting and those of the requested MS. While some Member States adopt a formalistic approach to the taking of evidence, regulating in detail the methods to be followed for the acquisition of information to the case file, other Member States prefer more pragmatic solutions, minimizing formal requirements. A typical example in this respect is the taking of oral testimony, which is subject to a scrupulous procedural regulation in some Member States, while it may be conducted rather informally in other jurisdictions. Courts in some jurisdictions adopt a very pragmatic approach to the hearing of witnesses: as reported by a judge from Finland, usually Finnish courts allow judges to hear witnesses directly by calling them on the telephone; such possibility is also admitted in Sweden. In most MS, instead, witnesses are required to appear in court.

1.8.1.2 The Evidence Regulation

241. The cross-border taking in evidence is mainly done by ways foreseen in the Evidence Regulation (ER). National reports and interviews show that, when needed, the ER has been successfully used to hear and/or examine witnesses (the most reported use) and other persons (e.g. children in family law cases, as reported for Romania). Other uses have also been reported as non-problematic by interviewees and in the national reports: for the taking of expert depositions[101], the collection of documents[102] and of information (bank account);[103] for social/psychosocial enquiry in family law cases;[104] for the undertaking or the collection of samples for DNA tests,[105] and even

[100] The information was retrieved from: National Reports, question 2.1.1.; online survey questions 4 and 40; interviews.

[101] An Italian judge; a Romanian lawyer.

[102] A Hungarian court clerk and a Spanish lawyer.

[103] A Judge from Estonia, as well as a judge from Slovenia (reporting refusal to submit information).

[104] A Judge from Belgium and a Judge from Estonia.

for the preservation of evidence.[106] Recourse to videoconferencing has been mentioned in some national reports, as well as in some interviews, although not always in the same sense: in some occasions to emphasize its utility and relevance,[107] but quite frequently, to point out the difficulties it may entail.[108]

242. Nevertheless, national reports and interviews also show a clear tendency to by-pass the provisions of the Evidence Regulation, which are very frequently considered as cumbersome, bureaucratic and time-consuming. With the background of the ECJ Decision in *ProRail*,[109] direct taking of evidence in a different MS tends to be performed outside the boundaries of the ER: appointed experts are directly entrusted by the court with the task of performing part of their activities in another MS; courts summon directly witnesses to appear in front of them, instead of asking the judicial authority of the MS where the witness is domiciled.[110] In a similar vein, it has also been reported the possibility of using written testimony (affidavit) to avoid resorting to mutual legal assistance (Malta).

243. The "normal situation" under the ER is one in which the requesting authority asks the judicial authority of the requested MS to carry out the taking of the evidence and then send back the outcomes. Several national reports and interviews describe malfunctions of the system: lack of cooperation of the requested authority, leading to lengthier proceedings[111]; improper use or filling of forms; problems with language and costs[112].

[105] National Report, question 2.1.1: Estonia; Interviews with a judge from Greece and a lawyer from Greece.

[106] A Romanian judge.

[107] National Reports, question 2.1.1: Latvia and Finland; interviews with Latvian's central authority representative.

[108] National Reports, question 2.1.1: The Netherlands, Romania and Spain; interviews with a Belgian judge, a Finnish judge, a judge, an academic and a court clerk from Spain.

[109] Case C- 332/11 *ProRail* EU:C:2013:87.

[110] A French lawyer, a German lawyer, an academic and judge, a Latvian lawyer, Luxembourgish academic and lawyers (5); Spanish academic.

[111] A Bulgarian lawyer, a Latvian judge, a Lithuanian lawyer, several Dutch judges.

[112] Reported by a Belgian academic and 2 Belgian judges; Bulgarian judge; a Croatian legal advisor; a French lawyer; a Finnish judge; an Italian lawyer; a Latvian officer at the Ministry of Justice; Romanian judge; the Slovenian Central Authority representative; a Slovenian judge; a Spanish academic.

1.8.1.2 The impact of local particularities

244. Some difficulties have been reported which arise from the different legal cultures on evidence: for example, a request to perform a DNA test on a person was turned into a summon to be heard as witness;[113] the requested and the requesting authority found it hard to agree on who should authorize the entry to a premise to carry out an inspection and report;[114] when a witness needs to be heard, the questions from the requesting authority have sometimes been considered too scarce, imprecise or ambiguous[115], but the contrary has also been criticized (too precise and specific questions,[116] leaving no room for the requested court to "improve" or to adapt the interrogatory to the circumstance).[117] Differences have been noted as to the sanctions applicable to witnesses reluctant to be examined, as well as to possible coercive measures.

245. A specific concern directly linked to the divergences between the different national rules on evidence in the MS involved has been noticed regarding the so-called "French blocking statute" (Act no. 80-538 of 16 July 1980), prohibiting the request and the communication, in writing or orally, of documents or information of an economic, commercial, industrial, financial or technical nature in several cases. It has been invoked to refuse implementation of discovery measures granted, for instance, by English courts; other legal systems (like Belgium) seem to have incorporated the principle that there is no obligation to submit evidence which might adversely affect one's case (or support the opponent's case), although they are not reluctant to apply the consequences of fair-play and collaboration principles.

[113] Reported by a Greek lawyer with 18 years of experience.

[114] Reported by a Spanish judge with 25 years of experience.

[115] Reported by a Belgian judge with 3 years of experience.

[116] Reported by a Dutch judge, a Belgian academic and a Luxembourgish lawyer.

[117] A Finnish judge with 4 years of experience advises the following: "One must remember not to ask for a specific operation to be performed as the laws of the Members States differ. If one describes the situation and what needs to be done, the receiving court will find out what the right thing to do is. Judges need to understand that there are differences in the legal systems, and describing the situation is very important. You must trust that your colleagues do the right thing according to their law".

1.8.1.3 Translation and interpretation

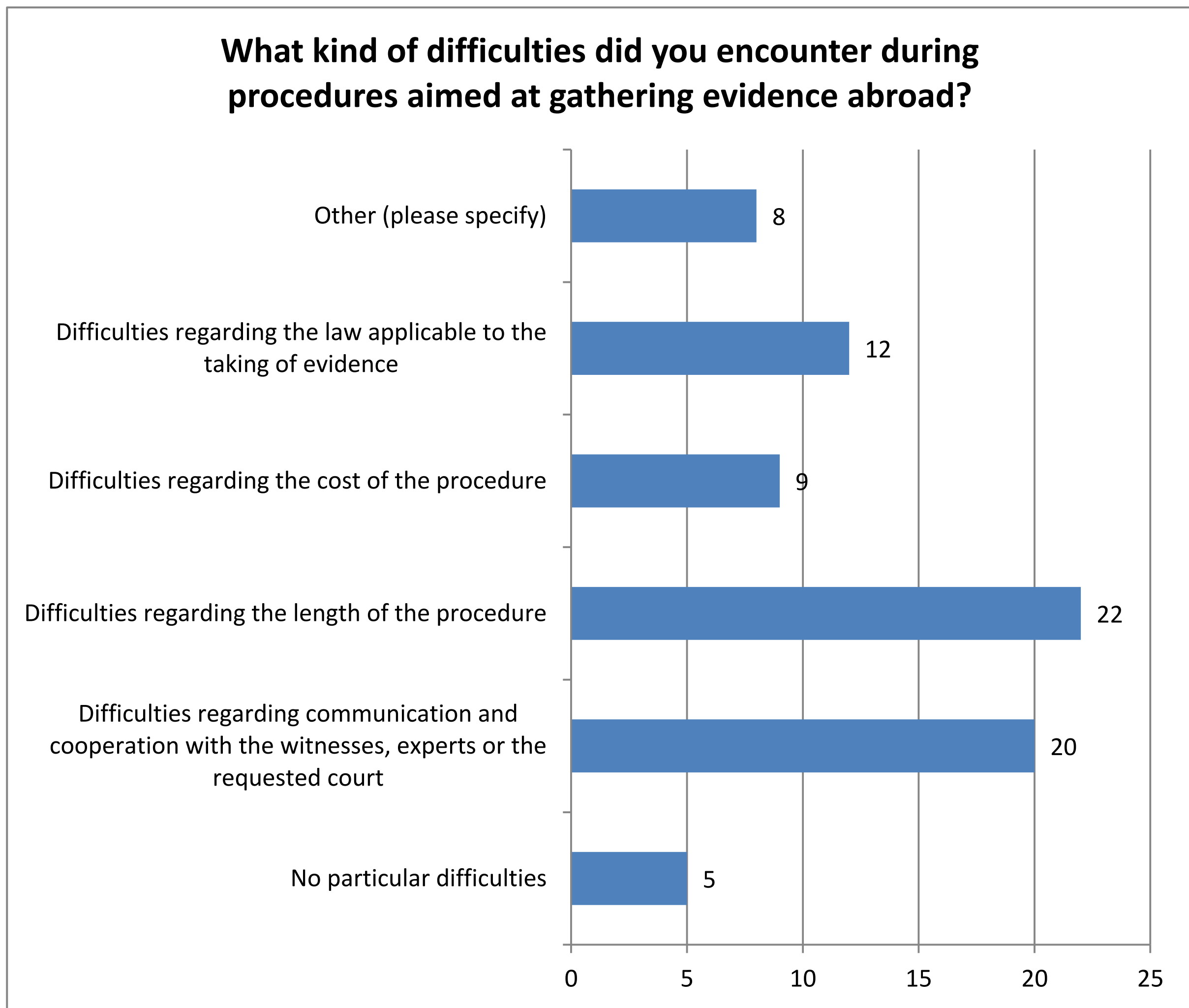
246. Translation of documents does not seem to raise specific concerns in the field of evidence (see Section 1.5 in this Chapter). The language issue, frequently mentioned in the national reports and in the interviews, relates to the difficulties associated to the lack of mutual language knowledge, or the lack of sufficient proficiency in English: judicial officers are prevented from a smoother cooperation (e.g., to make the arrangements for a videoconference) because they are unable to communicate.

247. As far as the use of interpreters is concerned, NR and interviews lead to predictable results. All legal systems foresee the use of interpreters when a person needs to be interrogated and he/she is not competent in the language used by the court. Some MS accept the possibility of not using translations or interpreters if the language of the person is sufficiently mastered by the court and the parties (France, Germany), but this still seems to be exceptional. In practice, the more recurrent issue is linked with costs (it is normally the court system that will pay the interpreter; however, in some MS it is the parties who shall bear the costs: Latvia) and with difficulties finding interpreters (in some cases, as reported for Greece, due to the low fees they are allowed to charge).

1.8.2 Problems and assessment

1.8.2.1 Survey

248. What the most relevant difficulties are experienced in cross-border litigation regarding the taking of evidence is reflected in the chart below:



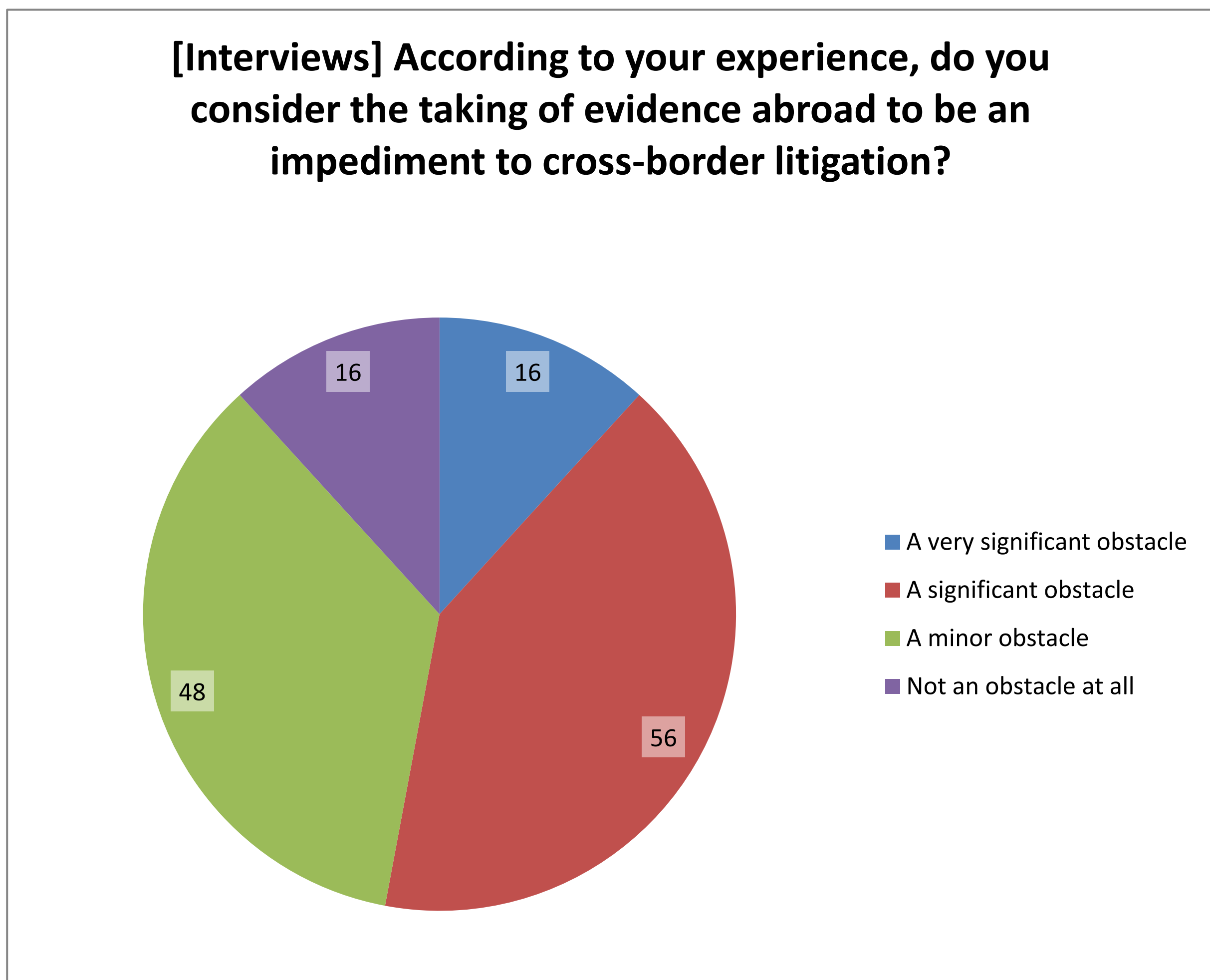
249. Besides, some respondents added the following information:

- A request sent to a central authority (in the UK) never came to a result. Translation of the annexes was required, although they were drafted in French, which is one of the admitted official languages, according to the Communication sent by that MS.
    - Difficulties were encountered as to the competent court [to implement the request].
    - Difference of opinions arouse as to who should bear the costs of an expert evidence to be performed in Germany
    - It has been asserted that technical problems impede a good performance of videoconferencing.
    - Problems have been identified as to the deadlines to perform the taking of the evidence, and to the use of videoconferencing.

- Wariness about the idea of taking evidence abroad.
- Insufficiently empowered expert led to serious problems regarding the possibility of conducting an expertise abroad

1.8.2.2 Interviews

250. There was a closed question in the interview template relating to this matter: "According to your experience, do you consider the following issues [taking of evidence abroad] of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?". The answers were the following.



251. As for the open questions, they showed some recurrent, non-isolated problematic issues:

- Some interviewees[118] reported that, especially in relevant cross-border cases, they still prefer to avoid resorting to the ER and to summon the witness directly to the court. This predilection is determined not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of evidence.[119] A judge from Romania additionally reports that parties are always willing to share the expenses necessary for keeping the gathering of evidence 'local', as far as concretely feasible (e.g. to cover the costs necessary for a local expert to carry out the technical investigation abroad, to pay for the witness's travel/accommodation expenses).
- The language issue appears recurrently: the need to translate the form (and the questions) into a language accepted by the requested MS raises problems with the accuracy of the translation itself and with the costs (as criticised by a Belgian academic and 2 Belgian judges, a Bulgarian lawyer, a Bulgarian judge, a Croatian judge, a French lawyer, a Finnish judge, an Italian lawyer, a Latvian ministerial officer, and a Spanish court clerk).
- Technical problems to carry out videoconferences, since not all involved authorities have the same IT infrastructure (a lawyer from Cyprus, a Finnish judge, an Hungarian court clerk, a Maltese registrar, a Romanian lawyer); they are also time-consuming for judges, parties and witnesses (a Finnish judge, a judge and a court clerk from Spain). Nonetheless some interviewees argue in favour of the use of new technologies and advice a more intensive promotion thereof (a German lawyer).
- More direct communication among judges and fewer forms should help avoiding complications attached to the excessive bureaucracy (Greek judge, Italian lawyer).

[118] Namely, a judge from Spain and one from Romania (also, although less clearly, one from The Netherlands); many lawyers from Luxembourg (5); a judge, a lawyer and an academic from Germany.

[119] It should however be noted that the Evidence Regulation provides for a mechanism of direct taking of evidence by the requesting court, at Art. 17.

- Differences between legal systems have been mentioned as causing trouble.[120] A Finnish judge with 4 years of experience asked for more trust among each other, while a French lawyer with 10 years of experience pointed out that those differences forced the parties, in practice, to use national counsel in the requested MS, generating additional costs (also Italian academics). A Slovenian judge with 23 years of experience considers that excessive differences in the procedural rules concerning the taking of the evidence could lead to non-usability thereof. A Spanish judge with 25 years of experience reported a case where an expertise was needed in France, requiring the inspection of some premises; the concerned party refused the inspection and the French court, deemed competent to decide on its authorization, denied it (but the Spanish court in its final judgment drew adverse inference against the party that refused to allow the inspection). More specifically, differences concerning coercive measures can also amount to difficulties (see interviews with an Estonian Central Authority lawyer and a judge from Italy): lack of sanction diminishes the effectiveness of the taking of evidence.
- In direct connection with the latter, grounds for refusing cooperation have also proven to be burdensome. However they do not usually arise from the ER, but from legal differences concerning heads of privilege, whose underpinnings are still domestic (see the "French blocking statute" issue, mentioned by a representative of a UK consumer protection association).

[120] It is worth quoting the following appreciation of a French lawyer with 15 years of experience: "Above all, the rules relating to evidence are so different that there is again no possible equality of arms depending on where the proceedings will take place. In Germany witnesses can be heard, in France this possibility exists but is never used. These are not only differences in the civil procedure code but also in the practice. Expertise proceedings take place in a very different way from MS to MS. Especially the way how and from what lists the expert is nominated, how the adversarial principle is handled, how the experts provides his opinion is varying extremely. The fact that there is no harmonisation in this area leads to severe doubts whether an expert's opinion given in one MS (e.g. as an urgent provisional pre-trial measure, as is often the case) may be used by the court of another MS. Another expert opinion may have to be sought, which is contrary to the principle of procedural economy and of expedition of proceedings. Experts' reports, which are a very strong evidence instrument in today's litigation, should be able to circulate between the MS as judgments do."

1.8.2.3. Recollection of problems and consequences thereof

252. The real impact of the difficulties and divergences referred above into the fairness of the proceedings (A) and into the free circulation of judicial decisions (B) is not easy to assess.

253. A) Starting with the effects on the right to a fair trial, the party that was not able to gather evidence supporting his/her claim/defence due to a malfunction of the system could consider that his/her right to access to the court or to defence has been unduly infringed. Sanctions by the requesting court (especially drawing adverse inferences) might help imbalance/compensate, if the lack of success is attributable to the opponent. This remedy, nevertheless, would be problematic if the opponent is entitled to refuse cooperation according to the procedural law of the requested MS (and also if the person or entity refusing cooperation in the gathering or in the taking of evidence is a third party).

254. More consequences arise from divergences which potentially impinge on the right to a fair trial. In particular, differences as to the specific way evidence is taken could translate into hurdles. Concerning the hearing of witnesses (the most frequently taken abroad type of evidence), some examples can be advanced: Who will address the questions? Are the lawyers entitled to be present and to perform direct- and cross- examination? Will the whole declaration take place in front of a judge? Will it be recorded? Formalities may differ and may be granted different importance; respect (or not) to the principle of immediacy is also of paramount importance in many jurisdictions. For procedural cultures attaching a significant importance to the formal aspect of the taking of evidence, the pragmatic approach adopted in the procedural law of other States may be seen as a violation of due process, thus possibly resulting in an infringement of public policy.[121]

255. B) The above mentioned phenomena may prevent a decision from being recognised or enforced in a different MS. Both an unsuccessful taking of evidence and the shortcomings in the way evidence was collected might be seen as a violation of due process triggering the application of the public policy clause.

[121] B. Hess and T. Pfeiffer, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law* (European Parliament Study) 60, with reference to BGH 26.8.2009, XII ZB 169/07.

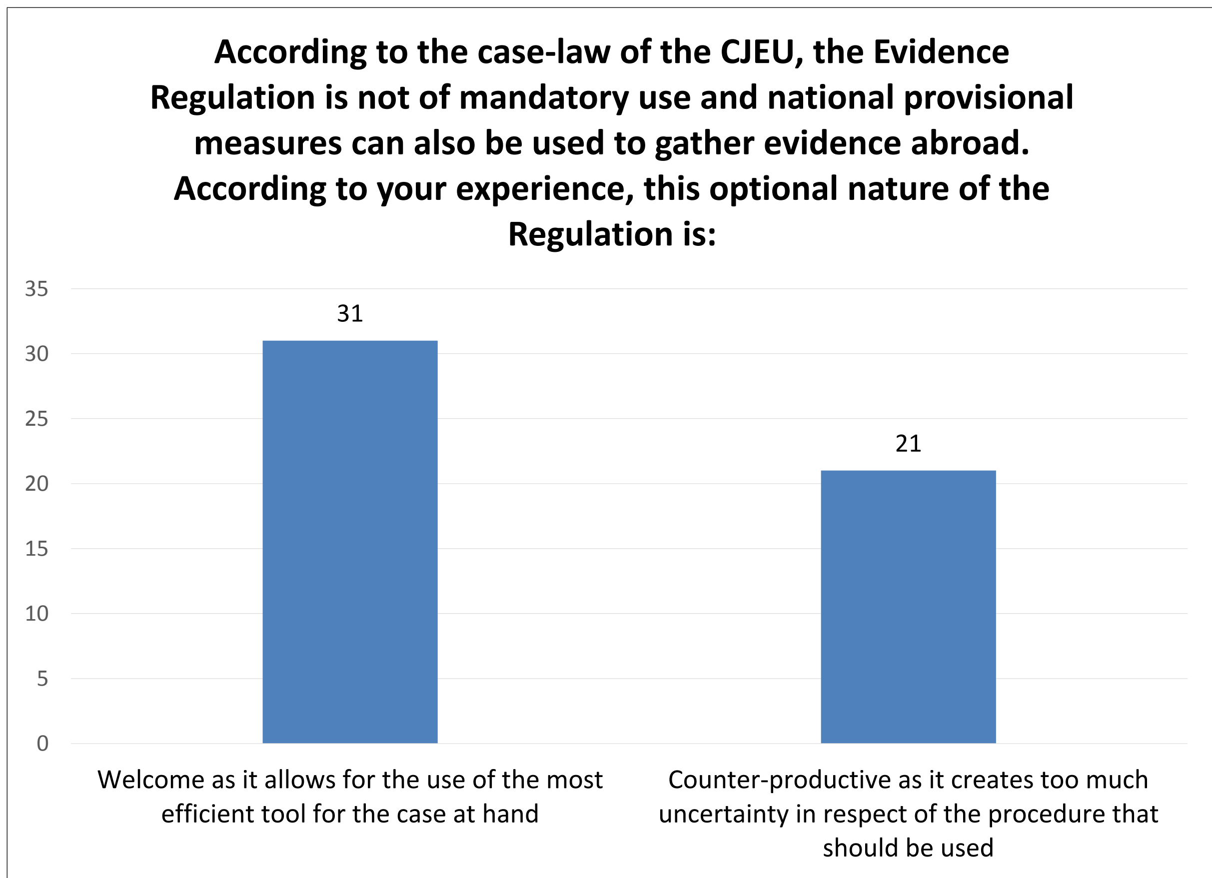
256. Indeed the results of the survey clearly suggest that parties routinely rely on discrepancies in procedural cultures and due process standards in order to resist the recognition of a judgment. In light of this, it must be concluded that a wide discrepancy in the formalism associated with the taking of evidence in different jurisdictions is likely to account to a large extent for the relatively high rate of objections formulated on grounds of public policy.

1.8.3 Proposals/Possible improvements

1.8.3.1 The Evidence Regulation

257. Policy options aiming at improving the taking of evidence abroad should not only address the ER, but possibly go further: the infrequent use of the Evidence Regulation and the open predilection to avoid resorting to it seem to be linked –at least partially- to the discrepancies among the national standards concerning the taking of evidence. Whether this underlying situation of discrepancies could be solved by vesting the ER with a compulsory character is uncertain; stakeholders seem to prefer keeping it as an optional tool, but the figures do not point to an overwhelming conviction in this regard. When asked to evaluate the optional nature of the Evidence Regulation, 40.38% of respondents stated that it is 'Counter-productive as it creates too much uncertainty in respect of the procedure that should be used', while 59.62% answered that it is 'Welcome as it allows for the use of the most efficient tool for the case at hand'.[122]

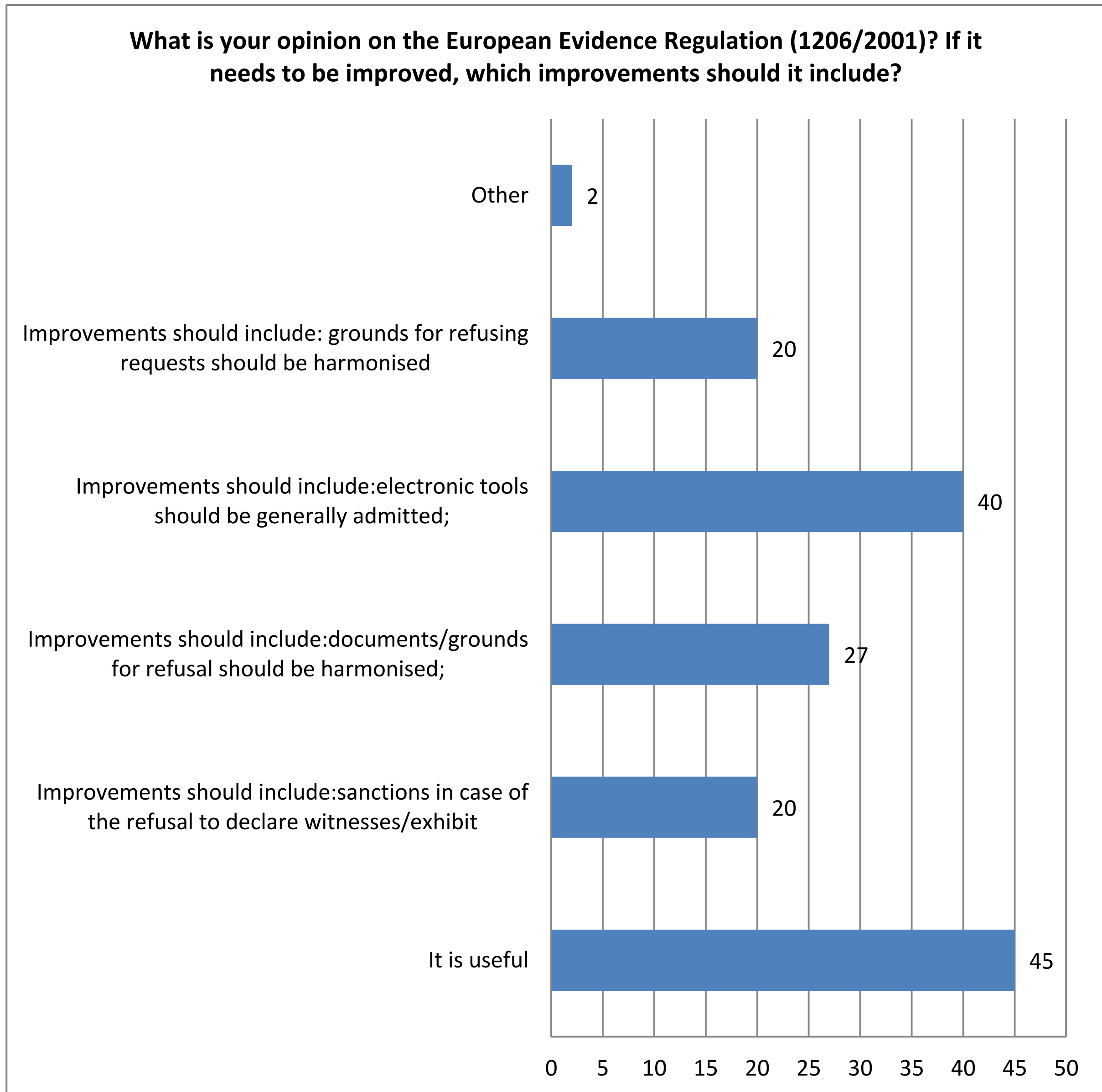
[122] Overall, the question was answered by 52 respondents.



258. It is interesting to note some very bold opinions against the European instrument -or the way it has been interpreted as regards the question of its compulsory or only optional nature- by some of the respondents: "the Evidence Regulation serves mainly the purpose to put pressure on the parties to reach an agreement. If the court envisages the taking of evidence abroad by means for the Evidence Regulation, then the lawyers will mostly feel overstrained and will try to shy away from the higher costs, the delay and the limited results of a taking of evidence that is not only in the hands of the court", and "Regrettably, this regulation is again an example of the questionable legal fragmentation in European civil procedural law."

259. On the contrary, 45 interviewees found the ER a useful instrument. This does not exclude, however, room for development. As to what the upgrades could be, the closed answers of the interviewees provide with some guidelines: improvements were suggested by 20 respondents to include sanctions in case of the refusal to declare witnesses/exhibit; 20 supported the harmonization of grounds for refusal under the ER; 40 interviewees would agree to foresee that electronic tools are

admitted as a rule in the taking of evidence abroad. No answer was given to the proposal that witness could be directly called.



260. In the answers given to the on-line survey to the same question in its open format, some respondents suggested that specific rules be established for requests to appoint judicial experts; they have also advocated for simplification, as a general policy or for specific issues such as the interrogation of witnesses via videoconferencing should be simplified.

261. In our view, whatever effort related to the ER must be accompanied by training and formative activities aiming at correcting the malfunctions detected when applying the

ER. Good practices should also be promoted to address the failures reported concerning translation of documents and the filling of the forms.

262. In order to ease the taking of evidence abroad we wouls still propose the following actions – with the caveat that not all of them can be addressed by way of amending the ER, as they actually impact on the national rules on procedural. We would advise to promote the use of videoconferencing by means of clearer, specific and detailed rules. Whether videoconferencing requires the presence of judicial officers in the requested state (or if more informal possibilities should be available, like skype or similar) should get a straight answer. The same goes for the doubts regarding interpreters: in case they are needed, it should be clarified whether they should be present at the court room of the requesting court or at the judicial premises where the person is declaring. The technical problems frequently raised by the use of videoconferencing could be helped by establishing a common technical device to channel requests or a similar compatible software tool, i.e, a European platform for videoconferencing, similar *mutatis mutandis* to the ODR platform.

263. Finally, we believe that it's worth trying to temper the divergences among MS national legislations on evidence to some extent. In this regard we would advise harmonization or the setting of common standards for the most controversial issues, namely those concerning the grounds to refuse cooperation (by the requested MS), or to refuse answering questions or providing information or documents (by the concerned party or by a non-party), and the consequences of such lack of cooperation (sanctions to the parties or to non-parties, drawing adverse inferences). In some sectors, such as IP rights and competition damages claims, the EU has already established standards concerning access to information -indirectly, the EU rules set limits to the possibility for domestic legislation to establish heads of privilege. The new Directive on the protection of trade secrets also deals with these issues.

1.9 Confidentiality Requirements in Court Proceedings[123]

1.9.1 Status quo. Summary

264. Under the label of "confidentiality" there are several different issues to be considered:

1.9.1.1 Confidentiality of proceedings and of judicial decisions

265. The rules in all MS have the same starting point: judicial proceedings are public[124], which means that hearings are held in public and that dockets and files are accessible to anyone showing a legitimate interest[125]. Exceptions to this rule are established in all MS, although with small differences: a common core of grounds to exclude publicity and to conduct hearings behind closed doors is linked to the preservation of privacy (sometimes under the notion of "morality") and connected rights (children protection)[126], national security and public order.[127]

1.9.1.2 Confidentiality in the proceedings

266. Confidentiality may also apply to information appearing in the proceedings, or required to be produced to the proceedings, or held by specific persons: in other words, it is an issue of privilege. MS address this issue differently:

[123] The information was retrieved from: National Reports, question 4.2.4; on-line survey, questions 3; interviews, under para J (Fall-Back General questions on EU Cross-border Litigation).

[124] See, for instance, National Reports, France (Art. 22 CCP); Germany (§ 169 GVG); Italy (Art. 128 c.p.c.); Belgium (Art. 148(1) of the Constitution); Cyprus (Art. 154 of of the Constitution); Spain (Arts. 24 and 120.1 of the Constitution); Greece (Art. 113 CCP); Malta (Art. 22 ìCOCP); Slovenia (Art. 293 Civil Procedure Act); Portugal (Art. 206 CRP and 606(1) CPC).

[125] In Italy, for instance, the general principle is that any interested party (even though not involved in the proceedings) can request copy of any procedural document or decision filed with any court (the relevant provisions are Arts. 743, 744, 745 and 746 c.p.c.). The same applies under Art. 141 of the Spanish LEC, under art. 163 of the Portuguese CPC and under the Swedish Public Access to Information and Secrecy Act. In Cyprus, third parties and the public have no access to court records, unless specifically authorized by the court. In Denmark third parties have a general right to access court documents, but this right explicitly exempts confidential information of the parties; a similar situation exists in Hungary (if the interested party specifically refused such an access to take place)

[126] In some MS family law cases (esp. matrimonial cases) are directly excluded from the general rule of publicity: this seems to be the case, for instance, in Austria, Greece (adoption), The Netherlands, or Spain.

[127] According to Art. 435 of the French CCP, the judge may decide that the hearings will take place behind closed doors not only for objective reasons (where their publicity might adversely affect individual privacy or if disturbances arise that may disrupt the atmosphere of the proceeding), but also if all the parties so request. Such a possibility is also permitted, under certain conditions, by the Belgian BJC (Art. 446ter and 757-2)

- In some cases, a head of privilege is recognised to protect confidentiality and is granted to a party or a witness answering some questions or producing certain documents.
- In other cases, respect to confidentiality is ensured by means of excluding publicity from the proceedings: hearings will be conducted behind closed doors, if confidential information is appearing; and access to the files will be restricted (in full or in part).

267. Both solutions are applied differently to the same issues in different MS: e.g., for trade secrets, banking secrecy[128] and some professional relationships[129], especially the attorney-client relationship[130]. As a consequence, the circle of persons entitled to claim privileges when summoned as witnesses may vary from one MS to another.

- In Austria clergymen, spouses and relatives, mediators, state employees, lawyers and persons holding professional secrets may refuse to testify under certain circumstances. In Finland, persons who are required to keep information confidential may refuse to testify; there are also some groups which have a privilege (close relatives) and some types of information which is privileged, primarily information on private matters (health, private life, or need for social services), information on the security of the state and some business secrets.[131] In France third parties may invoke the protection of their trade secrets when trying to resist a production order.
- On the contrary, in Croatia the need to protect the confidentiality of military, official or business secrets is ensured by means of excluding the public during the hearing. A similar situation occurs in Estonia (regarding state secrets, private lives of the participants or business secrets): if the proceedings are declared closed, persons involved must not disclose any information on the

[128] For instance, Art. L511-33 of the French Code of Financial Markets provides for banking secrecy. However, its scope is restricted as certain administrative authorities, such as the French Authority for Financial Markets, have the right to disclose the information. Additionally, the client is free to waive banking secrecy.

[129] Art. 226-13 of the French Criminal Code protects professional relationship by means of statutory professional secrecy provisions.

[130] For instance, § 43a para. 2 of the German Federal Lawyers' Act (Bundesrechtsanwaltsordnung).

[131] The provisions are found in the Act in the Publicity of Court Proceedings in General Courts (Translation available at http://www.finlex.fi/en/laki/kaannokset/2007/20070370).

contents of the hearing (although no sanctions are established in case of infringement). Also the Czech Republic, Latvia, Lithuania and Poland seem to protect trade secrets by exclusion of publicity, instead of by means of privilege. In a partially different way, in Denmark, if a party submits confidential information (such as trade secrets), other parties and the court will have an obligation to keep this information confidential under general rules on trade secrets. In such cases, the court can decide that (part of) a court hearing should be held behind closed doors (i.e. not as public hearings).

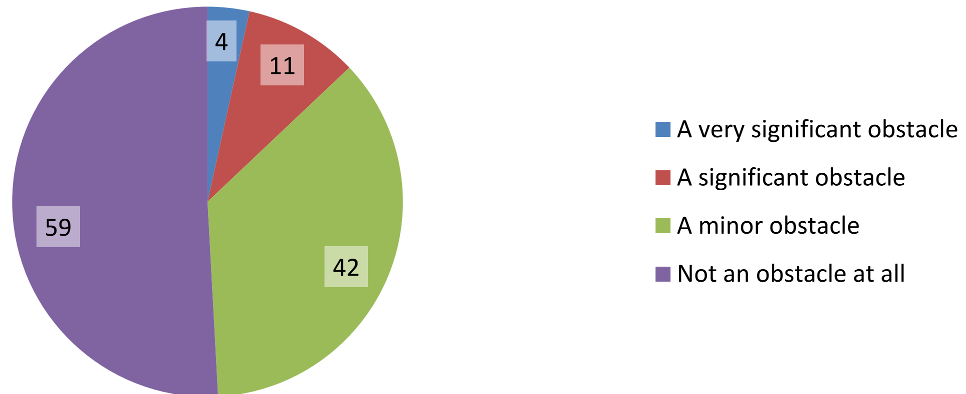
1.9.2 Problems and assessment

1.9.2.1 Survey

268. The online survey included the following question: "According to your experience, do you consider the following issues [Confidentiality requirements in court proceedings] of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?" The answers pointing to the negative are clear: it's not an obstacle at all for 197 respondents, a minor obstacle for 111, a significant obstacle for 46 and a very significant hurdle for 8.

1.9.2.2 Interviews

269. The same question was also formulated as a closed question in the interviews, with a similar outcome, as the following chart illustrates.



270.

1.9.2.3 National reports, case law

271. No specific concerns or difficulties were highlighted by the national reporters, which is also consistent with the results of the survey and of the interviews.

272. Publicity of proceedings amounts to a general procedural safeguard (see Art. 6 ECHR). But undue secrecy of proceedings (i.e., the fact that a court unduly excludes publicity) does not seem to be a real concern in the MS.

273. The issue of handling confidential information in the proceedings, on the other hand, is directly linked with evidence: the problems that differences in the way evidentiary issues are dealt with by national regulations have been considered above (see 1.8).

1.9.3 Proposals/possible improvements

274. Could undue secrecy of proceedings amount to an obstacle to recognition and enforcement? In theory, a positive answer may be possible if it amounts to a public policy infringement due, on turn, to the consideration of publicity as a basic procedural safeguard. It remains as doubtful, however, if there is a real need for harmonization or uniformity at this point, given the scarce possibility of such an issue arising in practice; in fact, it is a matter where national procedural regulations are already very uniform.

1.10 Motivation/reasoning of the Judgment[132]

1.10.1 Summary. Status quo[133]

275. There is a general requirement for judgments to be motivated, which in many cases has constitutional underpinnings[134], being considered as a general procedural safeguard. Small divergences certainly exist as to the extension and depth of the motivation, although the general rule is that judgments must be motivated both in facts (with reference to the assessment of the evidence) and in law.[135] A significant exception is Ireland, where judgments rendered by Circuit judges do not require motivation.

276. Lack of motivation entails, in many MS, the nullity of the judgment[136], provided that the lack of reasoning is sufficiently serious[137].

1.10.2 Problems and assessment

1.10.2.1 Survey

277. According to the results of the survey, the rules on motivation of judgments are considered to have limited impact on the fairness of cross-border litigation and to the circulation of judgments; the actually rank as the least significant hurdle.

[132] The information was retrieved from: National Reports, question 2.1.1.; on-line survey, question 3; interviews.

[133] The problems raised by the (lack of) motivation in default judgments are addressed in the next part of this Study, ***

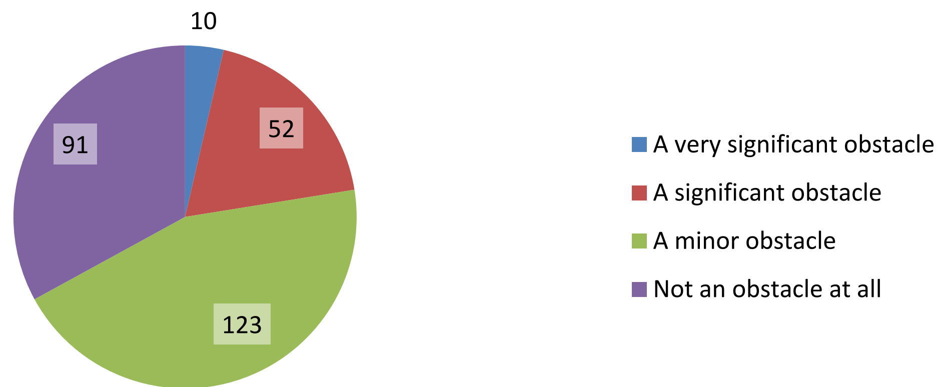
[134] See, e.g., art. 149 of the Belgian constitution or Art. 120 of the Spanish Constitution.

[135] In Poland, nevertheless, motivation is produced only upon request; the court will also draw up the reasoning of a judgment ex officio, if an appeal against the judgment is filed by a party within the statutory time limit. In Slovakia the judgment does not have to include the reasoning if all parties appeared at the oral hearing the judgment has been declared and they have waived their right to appeal. In both jurisdictions, nevertheless, the lack of motivation is not imposed to the parties, but consented by them.

[136] See National reports, question 2.1.1: France (art. 458 of the French CCP) Italy((Cass. 8 October 1985, No. 4881: the complete omission of any statement of reasons renders the decision inexistent); Portugal (art. 205 CRP, 24(1) LOSJ and 154(1) CPC).

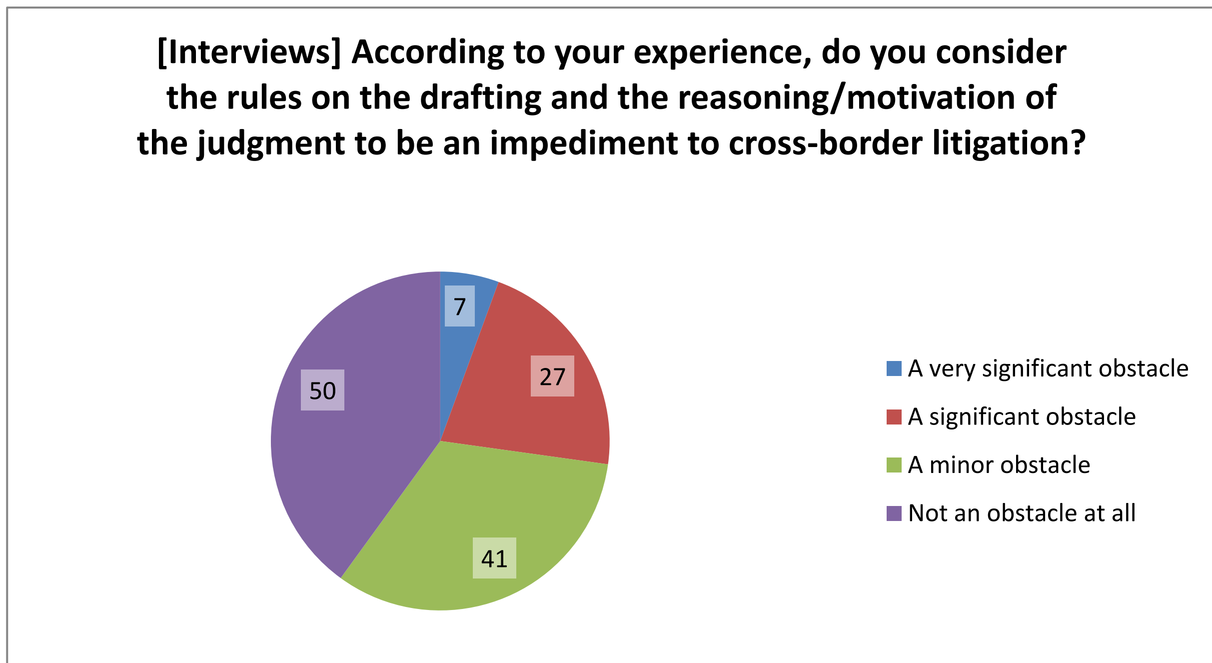
[137] National Report, question 2.1.1: Croatia.

[Online survey] According to your experience, do you consider the rules on the drafting and the reasoning/motivation of the judgment to be an impediment to cross-border litigation?



1.10.2.2 Interviews

278. The interviews also lead to the same conclusion: it is considered the least relevant obstacle among those presented to the interviewees. In answering to the question "According to your experience, do you consider the following issues [Rules on the drafting and motivation of judgments] of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?", only 7 respondents choose the option "very significant"; it is relevant for 27, but minor for 41 and not an obstacle for 50.



279.

280. There was no open question in the interview directly linked to this issue and the question was not raised by the interviewees either.

1.10.2.3 National reports, case law

281. Interestingly, the opinion of the respondents to the survey and of the interviewees does not match with the results of case law. Indeed, lack of reasoning can be regarded as an infringement of public policy to the extent that it is a basic procedural safeguard, and therefore amount to refusal of recognition and enforcement of foreign non-reasoned judgments, when there are no equivalent documents that could make up for that absence. Examples of this issue have been reported in national case law: lack of motivation (Germany[138]; Latvia[139]; The Netherlands;[140] France)[141]; lack of instructions on how to appeal (Slovenia)[142].

[138] BGH, 10 September 2015, IX ZB 39/13, NJW 2016, 160-163

[139] The NR refers to the decisions which later led to case C-619/10, *Trade Agency*, ECLI:EU:C:2012:531; Case fC- 302/13, *flyLAL*, ECLI:EU:C:2014:2319, before the CJEU.

[140] ECLI:NL:RBROT:2009:BL1873, the Rotterdam district court ruled that the decision by the German district court was not well-reasoned. However, it was reversed by the Supreme Court in ECLI:NL:HR:2011:BP0003 though it did consider that in particular circumstances an absence of reasons can be a ground for refusal (in this case the other party had recognised this part).

[141] CA Paris, 15 October 2013, n°12/19527; Cour de Cassation on the 9th September 2015, Civ. 1re, 9 sept. 2015, no 14-13.641, Dalloz actualité, 18 sept. 2015, obs. Mélin.

[142] Order of the Supreme Court Cpg 3/2010-6, 06.07.2010 (cited in the decision Cpg 6/2014, 21.01.2015, ECLI:SI:VSRS:2015:CPG.6.2014.

1.10.3 Proposals/Possible improvements

282. This is an area where national legislations, except for isolated exceptions, are quite uniform. Problems, in practice, will be the consequence of bad practice and shall be corrected, in first term, by the judicial authorities of the MS where a non-motivated/non-reasoned judgment was rendered. As a last resort, the public policy clause and the interpretation given to it by the ECJ seem sufficient to channel any reaction of reject, if needed.

1.11 The Decision on Costs[143]

1.11.1 Status quo. Summary

283. All MS have provisions on the reimbursement of costs; the general rule is that the court will decide on costs in the final judgment. The "loser pays rule" is foreseen as the basic criterion to decide on the refund of costs in all MS: it is, therefore, the common core of all national regulations. However, many differences arise when it comes to the details:

1.11.1.1 The "loser pays" rule. Exceptions

284. Albeit the "loser pays" rule is broadly accepted throughout the EU, exceptions thereto are admitted under many circumstances, which vary among MS. The most frequent exception, apparently common to all them, is the fact that the claim has only been partially upheld. However, even for this situation the consequences not always coincide: the general rule is that each party bears its costs, but some legislations establish the power of the court to decide that one party has to pay a proportional part of the other party's costs -Croatia, Romania, Slovenia- or that one party has to pay all the costs, if the court expressly considers that she has litigated with temerity – Spain.

285. At any rate, the above described exception is not the only one. Some MS report the possibility to exclude award for costs for reasons linked to the merits of the case[144] or

[143] The information was retrieved from: National Reports, question 2.1.1.; online survey, questions 1 and 2; interviews.

[144] This is the case for Italy, where the issues dealt with are new or the case law has been overruled, and also if a party has been declared in breach of the duties of loyalty and integrity (art. 92 c.p.c.). It also applies to Malta, where the courts may order that the costs shall not be taxed as between parties

for some specific areas[145]. In France (art. 700 CPC) and Luxembourg (arts. 239-240 NCPC) the courts have a very broad discretion to decide on the costs on an equity basis.

1.11.1.2 The concept of "costs"

286. There are important differences regarding what is covered by "costs" and may be reimbursed to the winning party.

287. There is a common approach that not all incurred costs are eventually recoverable, although the criterion to define refundable expenses is formulated differently: the standard may vary from "necessity" (Estonia, Finland, Germany) to "reasonableness" (Sweden), and ranges from the exclusion of "useless and vexatious costs" (Belgium) to those "superfluous and excessive" (Italy).

288. Many legal systems have included rules enlisting the expenses that are recoverable (usually conditioned to the fact that they were necessary or reasonable). Some of those expenses have a relevant connection to cross-border litigation: translation of documents, travel expenses (for witnesses and even for lawyers), serving the process abroad (when performed through bailiffs, for instance), taking of evidence abroad (including interpreters) and, of course, lawyers' fees (namely when their intervention is not mandatory): a good example of taking these factors in consideration is Latvia.

289. Most national reports explain that reimbursement does not match the real costs. This concerns especially the lawyers' fees:[146] in Germany, for instance, statutory fees are applied to lawyer's recoverable fees (bringing legal certainty);[147] in Spain, bar associations establish guidelines (not binding, but frequently followed by the court); in Belgium the decision as to the extent of the recoverable lawyers' fees takes account of the financial capacity of the losing party, the complexity of the litigation, any

when the matter at issue involves difficult points of law; and to Spain, where the loser pays rule will not apply if the court considers the case to be seriously doubtful from a legal or factual perspective.

[145] As reported for Belgium in social security cases, where the costs are always born by the social security institution, no matter whether it wins or loses the case.

[146] See National Reports, question 2.1.1: Belgium, Denmark, Finland, France, Germany, Latvia, Lithuania, Malta, Netherlands, Spain, or Portugal. But one could also think of party appointed experts or of the costs of bailiffs and judicial officers (as reported for the Netherlands).

[147] It is important to note, in that vein, that in Germany the lawyer fees are generally fixed.

contractually agreed compensation for the winning party and the manifestly unreasonable nature of the situation); in France the lawyers' fees are not included in the legal list of costs (Article 695 CCP), although they are usually more important than the official costs: this fact explains why a judge may decide on an equity basis (Article 700 CCP) to grant more than the official costs.[148]

1.11.2.3 Further divergence

290. Many differences appear concerning other technicalities as well.

- The decision on refundable costs is mostly rendered ex officio, although in some MS it needs to be requested by a party (Greece, Poland).
- In some MS the lawyer of the winning party is entitled to claim the payment of his fee directly from the losing party (Italy, according to art. 93 c.p.c.), although the common rule seems to be the opposite (the need for it to be challenged through a payment to the winning party).
- Some MS foresee cost schedules or cost estimations at the beginning of the litigation (Austria, Belgium), thus helping predictability of the issue.

1.11.2 Problems and assessment

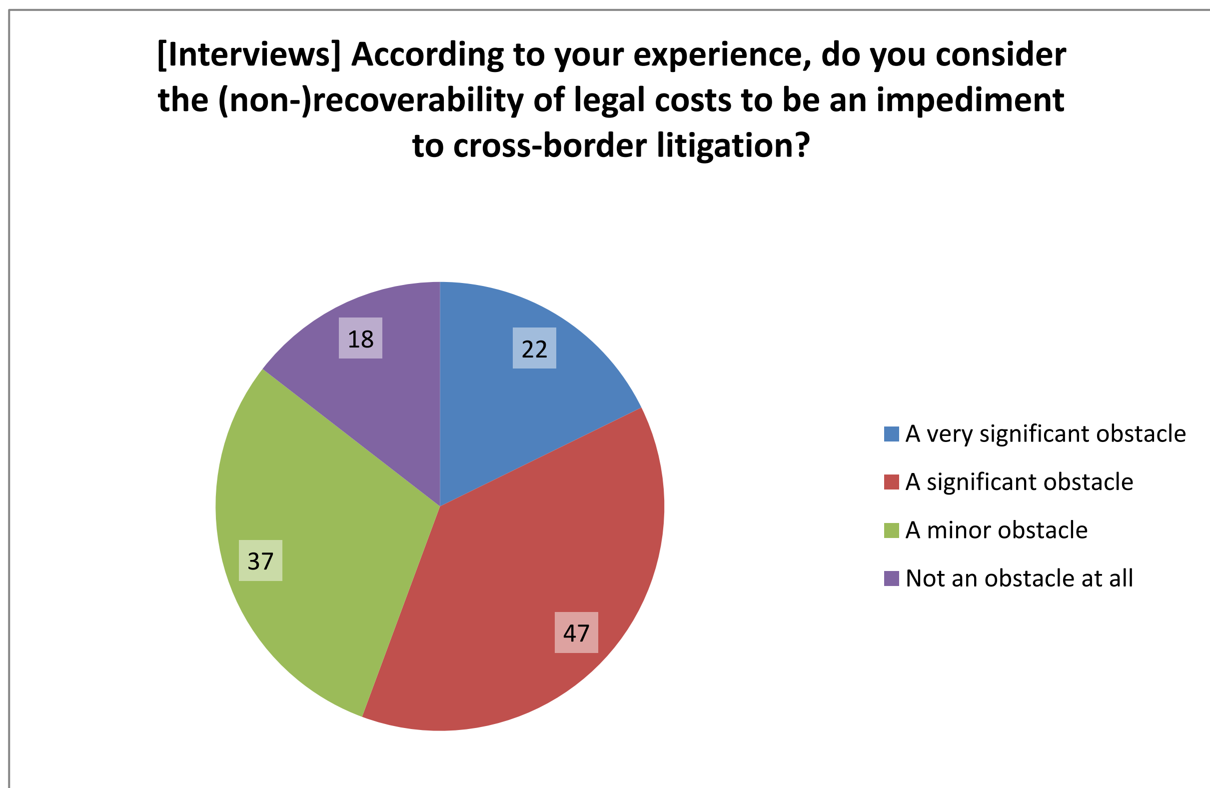
1.11.2.1 Survey

291. A relevant number of the participants to the online survey considered the recoverability of legal costs as a very significant or a significant obstacle to cross-border litigation. To the question "According to your experience, do you consider the following issues of the divergent civil procedural laws of Member States [(Non-) Recoverability of legal costs] to be an impediment to cross-border litigation?", 49 respondents found it a very significant obstacle, 101 a significant one, 84 a minor hurdle, and only 39 not an obstacle at all.

[148] The problem is that the amount granted by judges in such a situation varies a lot and does not fit the real expenses of the parties (it's usually very low between 1000 and 10000 Euros). In awarding costs, the judge will apply principles of equity and will take into consideration the financial situation of the losing party which can go as far as ordering that the losing party shall not pay any cost.

1.11.2.2 Interviews

292. A similar impression, though maybe more nuanced impression, arises from the interviews. The closed question "According to your experience, do you consider the following issues [(Non-)Recoverability of legal costs] of the different civil procedural laws of the Member States to be an impediment to cross-border litigation?" received the following answers.



1.11.2.3 National reports, case law

293. Divergences in the system of allocation of costs have not been raised as obstacles to recognition and enforcement, except for the cases reported for one jurisdiction (Greece), where the excessive amount of the order to reimburse costs was considered as infringing public policy.[149]

[149] Excessive cost orders. The issue has been brought several times before Greek courts within the last decade. From the Greek perspective, it is impossible for costs to exceed the amount in dispute in the main proceedings. Supreme Court 1829/2006, Private Law Chronicles 2007, p. 635 et seq.: goes against the principle of proportionality. In the same direction: Corfu CoA 193/2007, Legal Tribune 2009, p. 557. The Corfu Court of Appeal, in Corfu CoA 130/2012, Armenopoulos 2013, p. 767, refused to grant enforceability of a cost order and a default cost certificate of the York County Court on grounds that Greek courts would not have imposed such an excessive amount as costs for a similar

1.11.3 Proposals/Possible improvements

294. In general terms, the costs of litigation are considered one of the main hurdles to cross-border litigation. It may indeed not impact on the recognition or enforcement of a decision (very few cases have been reported in this sense), but it certainly deters parties from litigating cross-border; one step backwards, it prevents entering into cross-border commercial relations. In order to surmount the obstacle, a relevant factor would be to support the expectation and real possibilities to get a judicial decision where the recovery of all incurred costs (or of a substantial part of them) is ensured for the victorious claimant.

295. As explained, from a legal point of view all MS accept the so-called English rule; in practice, however, full indemnity is rarely achieved, both in domestic and cross-border settings. This matter is very strictly linked to the procedural culture and the legal tradition of each MS, namely with the approach to legal representation before court. Therefore, harmonization in full seems very difficult to achieve. Nevertheless, minimum standards could be imaginable concerning the costs directly associated to the cross-border nature of a case - translations, the use of interpreters, the taking of evidence or the service of proceedings abroad. It may prove useful that such expenses would be considered in all MS as procedural costs, so that an order to reimburse would include them (totally or in part, depending on possible additional criteria, such as tarification for translations or recourse to bailiffs abroad, or reasonability/necessity for travel expenses and taking of evidence). In this context, the items specifically foreseen by the 2003 Directive on Legal Aid may act as a reasonable departing point, although not necessarily a cap.

1.11.4 Addenda: court fees

296. Related to the issue of costs appear court fees. In some MS they are required as a tax law matter, conditioning access to justice. The widespread of this requirement, the way to determine the amount and the exceptions vary significantly from one MS to another. For a case such as the one contemplated as a model in this Study (monetary claim of 20.000 €), the amounts would show important differences: 707€ in Austria; 1035 € in Germany; 225 € in Greece; 931 € in Latvia; approx. 1200 € in

case in Greece. In particular, the court found that, granting costs of more than 80.000 £ for a case in which the amount in dispute was 17.000 £ contravenes Greek public policy perceptions.

Malta; 700 € in Romania; 300 € in Spain (but only for legal persons); 5% of the value of the claim (Poland, UK); 500 DKK, approx.. 70 € in Denmark. In some MS, additionally, new fees have to be paid as the procedure evolves into successive steps (Denmark: listing fee when the court fixes a date for the trial; UK). In many of the legal systems where they are contemplated, fees are used as tools to foster agreements.

297. The impact of this issue was not directly addressed in the survey or in the interviews, although it is linked to the recoverability of legal costs, as court fees are usually considered as costs. The existence and the amount of court fees may have a negative impact in cross-border litigation, while increasing costs and uncertainty. High court fees may be seen as restricting the right to access to justice and this.

2. Divergence at the Enforcement Stage

2.1 Approach of Research. Conclusions and Proposals

2.1.1 Standpoint

298. According to the tender specifications, the Study mandated by the EU Commission should focus on how divergently MS solve cross-border claims, and on how much this divergence translates in mistrust and hinders the free circulation of judgments among the MS. An analysis of the MS provisions on enforcement is inherent in the scope of the study. In our view, it fits into the purposes of the Study to the extent that MSs' enforcement rules and practices show diversity likely to impact as well in the free circulation of judgements. In this regard not only discrepancies, but also unsuitable solutions (for instance where the foreign element is not sufficiently taken into account at the enforcement stage), may be relevant.

299. It soon became evident that spotting all divergence at the enforcement stage, analysing it and making the necessary comparative assessment requires a separate research solely focused on the subject matter, with particular attention being paid to the law in practice; in other words, the scope of the endeavour is much too broad and the topic deserves exclusive attention. Moreover, some efforts have already been undertaken also on mandate by the Commission - ad. ex., in 2002 a study was conducted by Prof. B. Hess on making more efficient the enforcement of judicial

decisions within the European Union upon request of the EU Commission-,[150] which already reflected on the disparities among EU MS at this level. To the extent that very little has been done in terms of harmonization in the meantime, [151] we could presume (and later, confirm) that the *status quo* has been kept unchanged except for the fact that the access to the EU of new MS has led to further complexity.

300. In the light of the foregoing under the heading "enforcement" we recall sample evidences of the divergence factor. In a second step we address the interplay between enforcement according to national law and the Brussels I recast, to determine to what extent it results in further difficulties for cross-border civil and commercial relationships.

2.1.2 General findings

2.1.2.1 Deterrence

301. Very little has been done to date in terms of harmonization in the field of judgment enforcement. The materials we have gathered in 2016 from the 28 MS point to a great level of fragmentation. For stakeholders the management of the different legal solutions and practices is quite difficult; correspondingly the risk to incur in mistakes, severe costs and losses is high - in any event higher than in pure domestic settings. Although the deterrent effect on the willingness to enter into cross-border relationships is very difficult to measure and to conceptualize, it cannot be seriously denied.

2.1.2.2 Insufficient attention to the cross-border quality of setting

302. To the extent that the proceedings for enforcement are not regulated by common rules the field is governed by the procedural autonomy of the MS; as a consequence it has to comply with the principles of equivalence and efficiency. This is difficult to reconcile with the absence of national provisions, or the insufficiency of the national provisions, mirroring the cross-border character of a judicial decision. Enforcement of

[150] 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. Also, albeit with a more limited scope, the Case study on the functioning of enforcement proceedings relating to judicial decisions in Member States, Final Report February 2015, by Optimity Matrix, where Prof. Requejo Isidro was as expert.

[151] See Regulation (EU) 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

a judgment in a cross-border context may present distinguishing features linked to the parties, i.e., the involved actors. Many national systems do not seem to be aware of this and do not provide for *ad hoc* rules. We believe that a solution could built up by way of interpretation of the general rules; at any rate, the lack of specific rules reflects a particular state of mind characterized by no attention being paid to the cross-border element at the enforcement stage.

2.1.2.3 Watered-down harmonization

303. The new regulation provides a certain level of harmonization which nevertheless, due to the fragmentation mentioned above, gets blurred the moment the rules are applied in a MS together with the necessary national accompanying provisions. As we will explain further below (under 2.3.2), according to the data and opinions gathered for the purposes of this Study, forms (ad ex., the certificates in the case of Regulation Brussels I recast) are generally appreciated, but they is still place for improvement (content-wise; access and filling up could be easier and user friendlier). Besides, there is a general sentiment in the sense that judges, other authorities and practitioners lack the knowledge or skills to manage the intricate design of the system as a whole, and that this is detrimental for the stakeholders.

2.1.2 Policy options and proposals

304. The scope and complexity of enforcement law leads to recommend that the Commission **undertakes a further, thorough study limited to enforcement**. In this context it is of the outmost relevance that the questions are drafted in a way that they lead to comparable answers. Here having in mind culture background is of the essence. A common “language” has to be agreed upon beforehand to build a common understanding of the questions, which is the only path to getting comparable information from the MS.

305. As a result of such a Study some routes to convergence could be identified. Provided the EU is vested with the required competences, harmonization of some essential aspects of the enforcement of foreign decisions would be an option to be explored when aiming to effectively reduce the existing complexity, while simultaneously responding to the specific needs of cross-border constellations at the enforcement stage. This would mean a shift from the idea, firmly settled (at least formally), that

foreign and domestic decisions should be given the same treatment for the purpose of enforcement. However, what matters is non-discrimination and efficiency: particular rules to address the specific needs of a cross-border setting do not run counter the mandate of non-discrimination (on the contrary, they may be required by it), and they may be even mandatory for efficiency reasons

306. In the meantime, some move may be suggested to the EU towards a few **common hard rules** in fields likely to fall under the scope of art. 81 TFEU: this would be the case, for instance, of a common conflict of laws rule establishing the applicable law to the time-limits to apply for enforcement (whether the legal system of the MS of origin, that of the requested MS, or even a third one). Other provisions may be adopted as well to make the most of existing forms - re-drafting them in a user-friendly way, making them accessible and fillable online; including all the mentions that the practitioners report are of the essence.

307. **Training and formation activities** address to the large and plural community of actors of the enforcement should continue and be strengthened, in particular by raising awareness of good practices of some of the MSs in the field of enforcement of foreign judgments.

308. In any event, in the light of the information gathered it can be concluded that **more and more transparent and accessible information** for practitioners and lay man is of the essence,as explained below, under 2.3.2

2.2 Enforcement Proceedings[152]

2.2.1 Status quo. Summary

309. The procedural laws of the MS Member States are extremely divergent in regard to enforcement proceedings. In 2002 Prof. Burkhard Hess was entrusted by the EU Commission to undertake a Study entitled “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”. He concluded that “at first sight, considerable and structural differences can be seen”,[153]

[152] The information was retrieved from: National Reports, questions 2.1.1. (Conditions for enforceability of a judgment) and 3.3..

[153] B. Hess, General Report (n 150).

and this in spite of the existence of elements working as pushing forces towards some convergence: the rooting of many legal orders in the Roman legal tradition, or the “growing constitutionalization of enforcement” on the basis of art. 6 ECHR.[154]

310. The 2004 findings remain true in 2016. The information we have gathered from national reports, on line survey and interviews underpin this conclusion. Discrepancy is apparent in many areas; the following summarizes examples of significant ones.[155]

2.2.1.1 The responsible authority[156]

311. Whereas in some Member States enforcement will be granted and directed by a court (Austria, Ireland, Italy, Malta, Slovenia, Spain), in other the bailiffs are the competent authorities (Cyprus, Estonia, Finland, Greece, Romania, Slovakia). Bailiffs may be either court-appointed officers (Belgium, Denmark, Germany, Latvia, Lithuania, The Netherlands, Sweden, UK) or private practitioners (e.g. Luxembourg), or both (e.g. Bulgaria). Notaries are sometimes entrusted with enforcement-related tasks (e.g. enforcing extrajudicial titles in Croatia and Hungary –also in Spain, under certain conditions-, conducting auctions in Greece and Italy). In some MS the authority in charge of enforcement changes depending on the enforcement measure, on the type of asset subject to enforcement, or even on the choice of the applicant. Examples are France (the usual enforcement authority is the bailiff, but some enforcement measures will require a judicial decision and fall under the competence of the enforcement judge or another 1st instance judge), Luxembourg (where the enforcement authority is essentially the huissier de justice, but enforcement over immovable property also heavily involves courts), Germany (local courts are responsible for execution proceedings concerning enforcement against claims and other property rights and enforcement against real estate), or the Czech Republic (a creditor can choose whether to obtain satisfaction of his claim by means of judicial

[154] Ibid, under 4.

[155] It is impossible to delve here into the unfolding of the enforcement procedure itself: as already stated the highly technical and detailed character of the topic impedes a thorough research at this point. Besides, as a rule no MS offers one single track for enforcement, but several depending on elements such as the purpose of enforcement (payment of a specific sum of money, the handing-over of a particular item or the obligation to do something or to refrain from doing something). Moreover ordinary procedures may coexist with summary ones.

[156] We only address here the competence *ratione materiae*. The identification of the specific enforcement body will usually require as well an inquiry of the rules regarding the allocation of territorial competence.

enforcement of a decision, i.e. by a judicial enforcement agent, through proceedings under ss. 251 to 351a of the Code of Civil Procedure, or by means of execution by a judicial executor under Act No. 120/2001 Sb., on Judicial Executors and Action in Execution as amended).

2.2.1.2 Time limits. Voluntary compliance

312. The deadline given to the debtor for voluntary compliance varies substantively from one jurisdiction to another: 20 days in Spain, 15 days or two weeks in Slovenia, Bulgaria or Denmark, 10 days in Latvia and no less than 10 days in Italy, nor shorter than 10 days but no longer than 30 in Estonia; only 3 days in Greece and Slovakia and 2 in Malta.

2.2.1.3 Time limits. Statutes of limitation

313. Strong divergences exist among MS, starting with whether an explicit solution is foreseen by a procedural rule or not. Should the latter be the case, the general statute of limitations in national substantive law may do (Germany: 30 years). Specific rules are present in several countries, significantly differing among them: Austria, 30 years; Belgium and France, 10 years; Bulgaria, 2 years; Romania, 3 years; Spain, 5 years; UK 6 years. Moreover, special rules are foreseen in some countries which may change depending upon criteria such as: Finland, 15 years, but 20 if creditor is a natural person; Luxembourg, 30 years for civil matters, 10 for commercial matters; Malta, 15 for a decision of the Superior Court, 10 for a decision of an Inferior Courts or the Small Claims Tribunal.

2.2.1.4 Time limits. Appeal against enforcement[157]

314. Time limits to (first) appeal against enforcement vary considerably: 14 days in Austria; in Bulgaria, appeal is to be lodged within two weeks of the service; in Croatia, in the 8 days from the service of the writ; 15 days in the Czech Republic; in Denmark, two weeks from the day of the order made by the bailiff's court (but possible, albeit exceptional, extension until 6 month: that applicant is domiciled

[157] It's extremely difficult to give a summary of the answers. As a matter of fact, the rubric "contesting enforcement" is conceptually plural; many different possibilities may be envisaged under such heading in each single MS; several remedies or recourses are usually available in each legal system, and the time limits vary accordingly.

abroad, unable to understand Danish and has no representative is one of the exceptions); In Ireland a defendant may appeal within one month of the service of the Notice of Enforcement, but in case he is domiciled in a MS other than that in which the Notice of Enforcement was issued, the time for appealing is two months; ten days in Estonia; four weeks in Finland (with some flexibility being admissible - no indication has been provided as to under which circumstances); one month in France; 20 days in Lithuania; no limits are foreseen in the Netherlands, though once the execution is completed an objection can no longer be raised; 15 days Romania; 20 days Portugal; 14 days in Slovakia; 8 days Slovenia; 10 days in Spain. In Sweden it depends on assets targeted with enforcement: from indefinite in the case of decisions to be enforced against monthly salary to three weeks from date on service in case of enforcement against any other asset.

2.2.1.5 Provisional enforceability

315. According to the sources in some countries the enforceability of a judgment pending the possibility of appeal, or after it has been lodged, is the rule (ad. ex. Belgium, Finland, Spain), while the contrary is true in other MS (France, Luxembourg, Lithuania, The Netherlands, Poland). Both cases are subject to exceptions, either by law or left to the discretion of the enforcing authority for the case at stake; some of the circumstances justifying an exception coincide (typically, the irreversibility of the situation after enforcement is a ground for a stay in all countries), some differ from one MS to another (ad. ex., the fragility of the creditor's position).

316. In MS such as Estonia, Hungary or Lithuania only some types of judgments are immediately - albeit provisionally- enforceable. The elements pertaining to this category vary. Interestingly in some countries default judgments belong to the group (Hungary), while in other they are specifically excluded (Belgium, Sweden).

317. The rules on security and on its function - to stop provisional enforcement; as a guarantee for the debtor in case of provisional enforcement- also diverge, as well as its scope. Explicit regulation may be missing: such is the case in Slovenia.

2.2.1.6 Recourses against enforcement[158]

318. All MS regimes provide for remedies to resist enforcement. Once again, the systematization of the differences among MS requires a detailed study: it should be taken into account that as a rule several remedies or recourses are available in each legal system, according to factors such as whether contestation is lodged against enforcement itself or against a particular enforcement measure, the nature of the measure against which appeal is lodged, or the time the appeal is lodged (before enforcement has started, or after),[159] among other. These distinctions prompt themselves further ones related to the competent authorities, venue, time limits, etc. Only some of the divergences will be addressed here.

319. Systems where enforcement is entrusted to bailiffs or assimilated differ as to the sharing of roles among courts and bailiffs in case of recourse. In Finland the recourse has to be filed with a specific body which would then send it to the competent court. Bailiffs or courts may have exclusive competence depending on the remedy sought. Ad. ex., in Slovakia, objection must be filed before the bailiff, while application for a stay or halt of enforcement goes before the court of enforcement). When a bailiff or assimilated is in charge of enforcement a "petition" may be foreseen to be addressed to the bailiff prior to the proper recourse before a court (Lithuania). In Sweden national (as opposed to those in the Brussels Regulation) grounds for recourse are raised before the Enforcement Agency; the decision of the Enforcement Agency can be appealed to the District Court.

320. The identification of the territorial competent court may prove more or less complicated: as a rule the main venue is the place where execution takes place (as an exception, in Romania the competent court in the first place is the one at the domicile or headquarters of the debtor in Romania; in case the debtor is not domiciled or has his headquarters in Romania, the court within the jurisdiction of which the creditor has his domicile or headquarters will be competent to receive the recourses), however the internal allocation of competences may lead to a different result (for instance in Finland only fourteen of twenty-five District Courts are competent). The court before which the recourse is filed is not always the one taking

[158] Caveat to note 155 applies here too.

[159] See above, under 2.2.1.4.

the decision (In Slovenia, an appeal and an objection are to be submitted to the court that issued the decision against which the appeal is submitted; as a rule, the same court that issued the enforcement decision decides on an objection, whereas a court of second instance decides on an appeal)

321. In principle both procedural and substantive reasons, comprising third-party opposition, are arguable; and they appear to largely coincide all throughout Europe. However differences arise immediately, starting with where the grounds for opposition are foreseen - whether in a legal provision, or in the case law- and how they are formulated -as open or closed lists, and in a more or less individualized manner. As to the former, most MS have provisions on the subject matter; the Netherlands seems to be an exception as grounds are to be found in the case law. Two trends appear regarding the latter: the NR for Lithuania states that “there is no finite list of grounds”; the Maltese one refers to “total or partial” revocation of an executive act “for any valid reason valid at law”; in most countries -among which Austria, Germany, Croatia, Hungary, Italy, Portugal, Slovakia, Slovenia, Spain, Sweden- a list of limited grounds is foreseen.

322. How the grounds against enforcement are processed equally differs: in Austria and Germany each type of opposition gets channelled via a specific type of claim; other MS lack any legal classification of the sort. A further difference lies with the role of the judge: an assessment ex officio of some grounds - if the document on which the ruling has been rendered is an enforcement title document, whether the enforcement title document has been quashed, annulled or modified or whether the enforcement time limit has expired- is foreseen in Croatia and Slovakia, while no mention is made to this in regard to other MS.

323. In most MS the grounds to resist enforcement on the basis of art. 45 Regulation Brussels I bis are not channelled differently from other grounds. Spain and Sweden are exceptions. Still, some rules are shaped differently to account for the specificities of the Brussels regime: for instance, in Bulgaria venue is solely allocated to the Sofia appellate court. For further details see below.

2.2.1.7 Costs of enforcing of a judgment of 20.000 €.

324. It's very difficult to calculate in advance how expensive enforcement will be as the concept of "cost" is a composite one embracing both fixed and variable amounts. "Variable" means: that they may or may not be incurred on, such as translation costs; that they add or not to the final cost depending upon the success or failure of the enforcement - such as the percentage to be paid to the bailiff, or to the lawyer; that they are freely established by the professional engaged (lawyers, bailiffs), even if within a range legally defined; that they different depending on the enforcement measure (attachment of movable property, taking away of goods, auction). Most NR simply assert that cost depends on the circumstances of the case.

325. Regarding only courts fees the divergence among MS is worth noting, both regarding the way of calculation (whether calculated in relation to the value of the claim or not) and the actual amounts to be paid for similar steps undertaken in different MS:[160] ad ex., in Austria the court flat fee is of 147 e. if enforcement does not involve immovable property; it comprises stamp duties and registration charges, among other. In Greece the stamp fee alone is of 480 e.; the court registry fees in Malta range from 50 to 200 e. In Italy, the standard court fee, which does not include neither the service nor the stamp fees, goes from 139 e. to 278 e. In Ireland the court fees will be approximately €200.

2.2.2 Problems and assessment

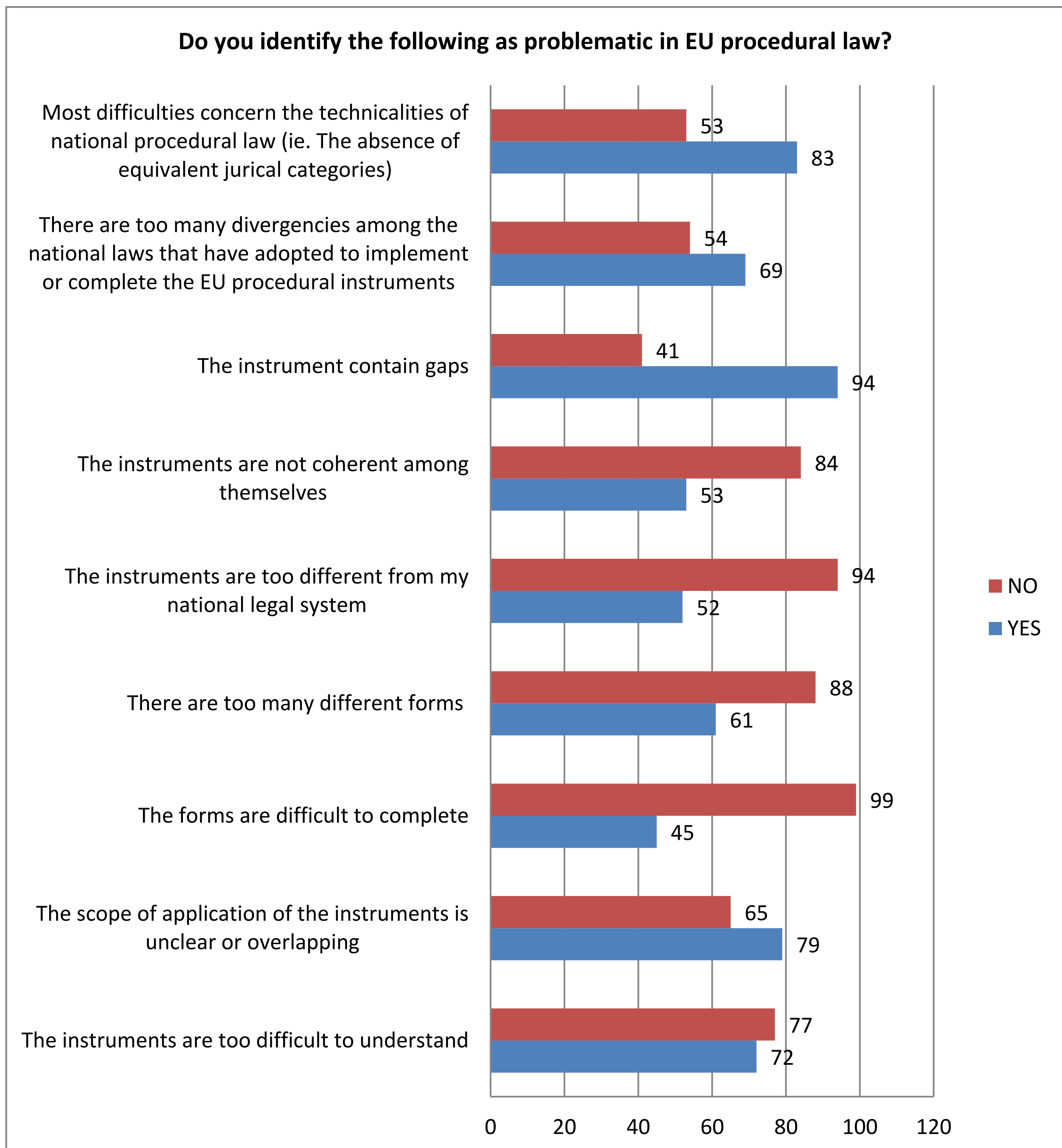
2.2.2.1 Uncertainty and costs

326. The highly detailed and technical character of the rules on enforcement makes it difficult for lay men -but also for sophisticated parties- to identify and understand them without professional help. This is all the more true in cross-border settings. The complexity of national civil procedure does not by itself result in the impossibility to obtain the enforcement of a judgment; therefore it should not be equated with scenarios triggering the applicability of a ground of refusal. However, in the worst case scenario the difficulty alluded to may end up with the failure of the enforcement and even amount to a denial of justice for the creditor; and in all events, it is highly

[160] What exactly is covered by "court fee" is uncertain too, in the light of the answers provided by the National Reporters.

unlikely that a party could effectively enforce a judgment abroad without the advice of a local lawyer, especially if no reliable information is made available in this respect at the institutional level. This entails uncertainty regarding the future situation should a dispute arise, and costs: both work as deterring factors preventing individuals and small business from entering into cross-border relationships.

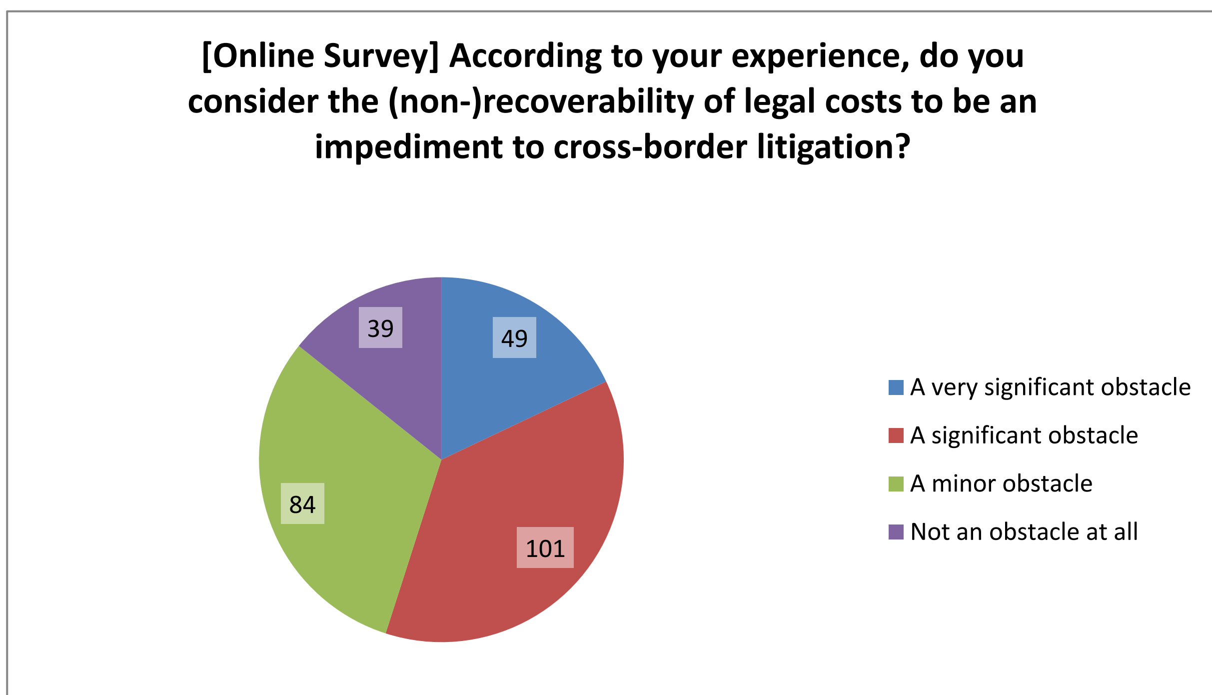
327. Interviewees largely identify the technicalities of national procedural law as a source of difficulties (83 positive answers, 53 negative ones).



328.

329. Whether uncertainty could be minimized by contract -for example by way of a waiver to appeal- and when -at the contracting stage or only once the dispute has arisen- depends again on the legal system at hand.

330. As for the costs of the case, the increase due to the *de facto* compulsory intervention of a local legal advisor can constitute a significant obstacle to the cross-border circulation of judgments: costs are indeed perceived by interviewees[161] and respondents to the survey as an important impediment to cross-border litigation.[162] To the closed question on whether (non-)recoverability of costs is perceived in practice as an impediment to cross-border litigation, the following answers were given. The issue of costs reappears again under the rubric “other obstacles”, as “costs of access to justice”. [163]



331.

332. Consistently with this result, thus, an increase in the costs associated with enforcement is likely to constitute a hindrance to the circulation of judgments among

[161] A further consequence is indicated by a Maltese practitioner, who states this constitutes an even greater obstacle for small scale business as opposed to large scale ones, therefore a situation where the smaller party is placed at a disadvantage is created.

[162] Under the Brussels I Regulation the costs of translation were a significant hurdle. A Luxembourgish lawyer with 11 years of experience explains that “The main issue is the need to provide translation of the judgment which is very costly compared to the amount at stake. We therefore try to bypass the Brussels I regulation using European Payment Orders”.

[163] Overall, the question was answered by 296 respondents.

Member States. Additionally, predictability plays an important role in this context: parties are likely to refrain from filing or from seeking the enforcement of a claim abroad if it is practically impossible to predict the approximate costs arising out of these activities.

333. As the procedural regime of enforcement differs from Member State to Member State, it could be said that this problem has an intrinsic pan-European dimension. In the interviews, some respondents of different MS[164] report the lack of easily accessible information as to the practical workings of the foreign enforcement procedure, and go as far as to qualify it as "the most important obstacle concerning cross-border enforcement procedures is the lack of information about the national enforcement rules of another country". The information presently available on the e-Justice portal is deemed insufficient: sometimes it is simply missing, or it is available only in the language of the corresponding country, which of course is of little help. As it is, the 'Going to court' section of said website contains a specific subsection on 'Enforcement of judgments – Procedures for enforcing a judgment',[165] providing for a general description of the procedure to be followed to enforce a judgment in every Member State. An English translation/version been made available for most Member States only in 2017. In the remaining cases, the relevant information is still available only in the national language of the Member State concerned (although translation seems to be on-going), a circumstance which may hamper the effective accessibility thereof[166].

2.2.2.2 *The protection of the foreign debtor*[167]

334. *A priori*, one may have thought that in the context of enforcement proceedings the debtor does no longer need specific "cross-border related protective measures". This is true for two reasons: on the one hand, as a (widely spread) principle legal systems intend to favour the creditor holding an enforceable title;equality of arms is

[164] Interviews conducted in France, Hungary and Lithuania.

[165]

[166] Thttps://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-en.do
The page has been updated in this regard in March 16, 2017 - last visited April 4, 2017.

[167] As for the creditor who needs to apply for enforcement in a foreign forum. It should be born in mind that he/she may incur in further costs, such as legal fees or translations. To the extent they could impair his/her right of access to justice he/she would deserve the benefits we have addressed under Part. 1 for similar problems at the declaratory stage of the litigation.

understood differently in this setting. On the other hand, a previous proceeding has already taken place, which has put the defendant/debtor in the position to defend him/herself.

335. In spite of the foregoing, it should be stressed that: a) the debtor might have remained in default during the previous proceeding; b) the debtor might not have used legal representation at that stage of the proceeding; c) the previous proceeding might have taken place at a different MS than the one in which enforcement is being carried out; d) a previous proceeding is not necessary to enforce authentic instruments, so enforcement proceedings might be the first occasion in which the debtor faces judicial proceedings.[168] These considerations allow concluding that a foreign debtor may be entitled and in need of protection also in the context of enforcement proceedings.

336. As a rule no national provisions address the protection of the foreign judgment debtor confronting difficulties similar to those of a foreign debtor at the stage of the proceedings in the court of origin. In particular, he/she needs to be accorded sufficient and timely information to comply voluntarily, or/and to contest enforcement; or even to adequately cooperate with enforcement (ad. ex., disclosing assets when requested) thus avoiding further negative consequences. NR offer examples of time limits which have already been denounced in the MS concerned as unreasonable: in Belgium any attachment of movable goods (e.g. furnishings, vehicles, …) in execution of a judgment will be preceded by an order to pay given (by the judicial officer) to the debtor at least *one day before the attachment* (Article 1499 BJC). It allows only a minimum of one day for the executive attachment of moveable property (“uitvoerend beslag op een roerend goed”/saisie exécution immobilière). This provision applies a very strict time frame; some authors claim that the time frame should be assessed on a case-by-case basis.

[168] A very interesting opinion of a German judge states the following concern: “(..)Defendants often raised legal remedies against the court decision which declared the judgment enforceable but were not aware of the existence of legal remedies in the State of origin, i.e., the State the courts of which issued the judgment. This was mostly the case because the decision on enforceability did only contain information on legal remedies against the declaration of enforceability and not on legal remedies in the State where the proceeding was conducted. In these cases, when the appellant was informed that he or she should have appealed in the State of origin, the time limit as well as the period for filing a petition on restoration of the status quo ante with respect to legal remedies in the State of origin was already elapsed. The court had considered to design a form informing the appellant that he or she should concurrently seek legal remedies in the State of origin. However, this project was given up because of the entry into force of the Brussels I bis Regulation.”

337. Therefore, the proposals made concerning the proceedings in the court of origin may also be of interest in the context of enforcement proceedings.

2.2.3 Proposals/Possible improvements

338. See below, under 2.3.3.

2.3 The Interface of Brussels I bis/National Systems[169]

2.3.1 Status quo. Summary

2.3.1.1 The typical procedure to enforce a decision according to the Brussels I bis regulation

339. MS decisions falling under the scope of the Brussels I bis regulation will typically be enforced in another MS following the same rules as the enforcement of domestic judgments. Deviations thereof have been foreseen in some MS to implement the few provisions of section 1, chapter III of the Regulation itself. Among the MS which have gone as far as to modify their national rules with such purpose the following deserve a mention: in Bulgaria the debtor can file an application for refusal of enforcement within one month after the service of the certificate with the request for voluntary compliance; if a translation of the judgment is necessary the one-month period is suspended until the debtor is provided with the translation. Another examples are: Germany (among other new provisions: the enforcement of foreign judgments is subject to the same rules as the enforcement of a national judgment except that no special certificate according to sec. 724 et seq. ZPO is needed and the formal certificate had to be served to the debtor before the enforcement measure begins); Poland (it is now specifically foreseen in the PCCP the enforcement title requires adaptation in accordance with the provisions of Regulation no 1215/2012 or Regulation no 606/2013, the enforcement body shall issue a decision on the adaptation; if a need arises, the enforcement officer may request the court to issue the abovementioned decision; the court's decision may be contested); or Spain (Final Provision 25 of the Civil Procedure Act).

340. Interestingly, some MS have introduced special solutions differing from the ones applicable to a domestic setting in spite of not being obliged by the Regulation, i.e.,

[169] The information was retrieved from: National Reports, questions 2.5.1, 3.1.; 3.2.6 and 3.3.6.

beyond the requirements established therein. Such rules make actually sense in cross border scenarios: that's the case of Article 9 Implementation Act in the Netherlands, according to which service of the documents in view of enforcement needs to take place at least 4 weeks before the enforcement when the person against whom enforcement is sought has domicile in the Netherlands, and 8 weeks when he is domiciled abroad.

341. Worth recalling is the divergent approach regarding the assessment of the grounds for non-recognition/enforcement allowed in the Regulation. Some MS are clear in that they are only taken into account upon request of the interested party (Austria, Belgium, Bulgaria, Greece, Italy, the Netherlands under Brussels I, Portugal, Romania, Spain, UK), although still some doubts arise regarding public policy (Belgium, Denmark, Estonia). Conversely, some NR refer to an assessment *ex officio*. It may be that the NR are answering to this question from the perspective of the first step in view of recognition/enforcement of a foreign decision, i.e., the *ex parte* application, where no intervention of the counter party is possible (Lithuania, Sweden). In this scenario only the national authority can raise objections: the use of the expression "ex officio" or "on its own motion" may relate to this. However, it is unclear whether a perfunctory check of *all* potential obstacles is made even at this stage, mainly in order to identify possible violations of public policy issues (Estonia, Finland).

342. Finally, it has been suggested that the powers usually conferred to judges to raise legal arguments *ex officio* may be used in the context of the obstacles to recognition (Luxembourg[170]; France, as a duty to be performed in the absence of the debtor, according to a 1971 decision).

2.3.1.2 Competent national court to hear Art. 36(2) or Art. 45 applications. Procedure

343. A) *Competent court*. As a rule no specific national court has been entrusted to decide on these applications, with the exception of Lithuania and, to some extent, also Finland (a limited number of District courts are competent), and Croatia (particular municipal courts have been expressly excluded from dealing with foreign decisions'

[170] National Report, question 3.2.6

recognition-related, or enforcement-related claims).[171] Therefore, the applicant's first step must the identification of the pertinent body within the local judiciary system.

344. Regarding venue most MS provide for several "cascade" criteria, starting with the domicile or assimilated data of the person against whom the application is filed; in the absence of such the permanent seat, residence or address of the applicant is retained; the place where enforcement is sought, may also come to play in the case of an art. 45 application. Some MS address the case of a domiciled-abroad applicant or counterparty, again providing for dissimilar solutions among them: open ones (Austria: in case the opposing party does not have a domicile in Austria, the competent court will be the District Court of the place where there is a legitimate interest for a declaratory judgment to be rendered); closed criterion (Belgium: Dutch speaking or French speaking Brussels court of first instance; Bulgaria: Sofia City Court; Poland: regional court in Warsaw). Finally, some MS allocate competence to the court on whose territory the place of residence of the person against whom enforcement is requested (Greece) or is permanently or temporarily resident (Slovenia), without any subsidiary solution.

345. Still regarding the internal allocation of cases, it is worth noting that some MS present further distinctions which may result in increased complexity for foreign parties: this would be the case of Croatia and the split between "civil" and "commercial" matters for the purposes of discussing under art. 45 Regulation. It is also interesting to note that according to the Hungarian PIL Law-Decree 1979 the party concerned is allowed to request that an application for recognition be dealt with through a specific procedure. It has not been made clear whether this applies to a Brussels I recast application under art. 36.

346. B) *The procedure*. As to the procedure to be followed in case of recourse against enforcement based on the grounds provided for by the Regulation, the rule seems to be the absence of a specific procedural path with the exception of Spain (and maybe Sweden: according to the NR, the grounds for recourse under the Brussels I (recast) Regulation against enforcement have to be raised in a separate action before the District Court), therefore the opposition to enforcement will be channelled using the domestic "common" ways to resist enforcement: this is explicitly asserted by the

[171] See nonetheless venue "by default", below.

Austrian, Latvian and Romanian NR, and can be derived from most NR. The lack of a special regime is seen with discomfort in some countries, such as Greece (the NR resents the absence of rules such as the one on the term for filing an application for refusal).

2.3.1.3 Objections that can be raised against the enforcement of a decision

347. Several issues deserve attention here:

A) Further grounds for non-recognition/enforcement.

- Besides those established in the regulation, an application for enforcement of a foreign decision may be contested for the same reasons as a domestic one. So far no practice has been reported on how the non-art. 45 grounds to resist enforcement are applied in cases where the enforcement title originates in another MS; or about how they relate to art. 45 Regulation Brussels I bis.
- Some MS have more stringent conditions for the recognition or enforcement of decisions in their own national laws, but no case law has been reported of application to situations falling under the scope of the Brussels I, Brussels I bis regulation.

B) The case of the sum due as a penalty

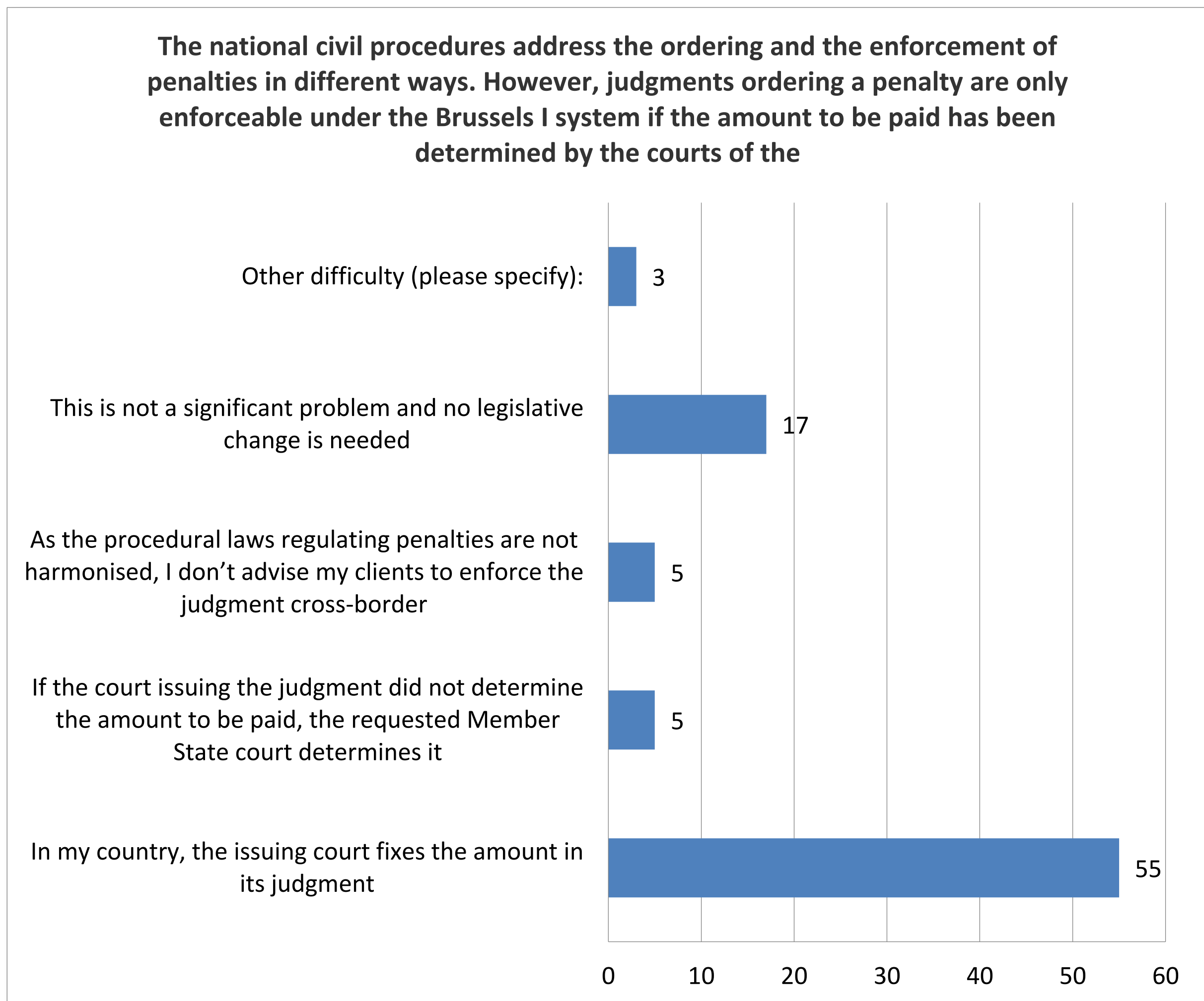
348. The absence of determination in the MS of origin of the sum due as penalty has created trouble in some MS. According to the procedural rules of some Member States, courts may order a payment by way of a penalty, without determining the amount of the payment. By contrast, in other Member States, courts determine the amount to be paid when they issue the penalty. Pursuant to Article 55 of the Brussels I *bis* Regulation, the judgment can only be enforced in another Member State in the latter scenario. The Belgian Court of Cassation ruled that the judge declaring the foreign judgment enforceable cannot modify or complement this foreign judgment by determining the amount of the penalty ordered by the court of origin[172]. The same problem has been reported by Finland: if the judgment to be enforced also provides

[172] Belgian Court of Cassation C.14.0386.N/4. This judgment annulled a ruling of the Brussels Court of Appeal which had decided in the opposite sense (Court of Cassation 29 October 2015, n° C.14.0386.N; Court of appeal Brussels 7 March 2014, Rechtspraak Antwerpen Brussel Gent 2015, Vol. 12, 848).

for a penalty in case of non-compliance, the actual amount of said penalty shall be necessarily determined by court in the State of origin, since, in Finland, the Enforcement Office cannot complement the foreign judgment in this respect. In any event, regarding its frequency the problem is marginal compared to other issues arising out of the differences among national procedural laws. 64.70% of Survey respondents have never faced this problem, as in their home jurisdiction the amount is fixed by the issuing court in its judgment.[173] An additional 20.00% of respondents argued that 'This is not a significant problem and no legislative change is needed'. Only 5.88% of respondents reported that they avoid enforcing the judgment cross-border, since the procedural laws regulating penalties are not harmonized. The problem at hand, however, could have a sectorial relevance, such as in competition cases where an injunction must be enforced: see, e.g., case C-406/09.[174]

[173] Overall, the question was answered by 30 respondents.

[174] Case C-406/09 *Realchemie Nederland BV* EU:C:2011:668.



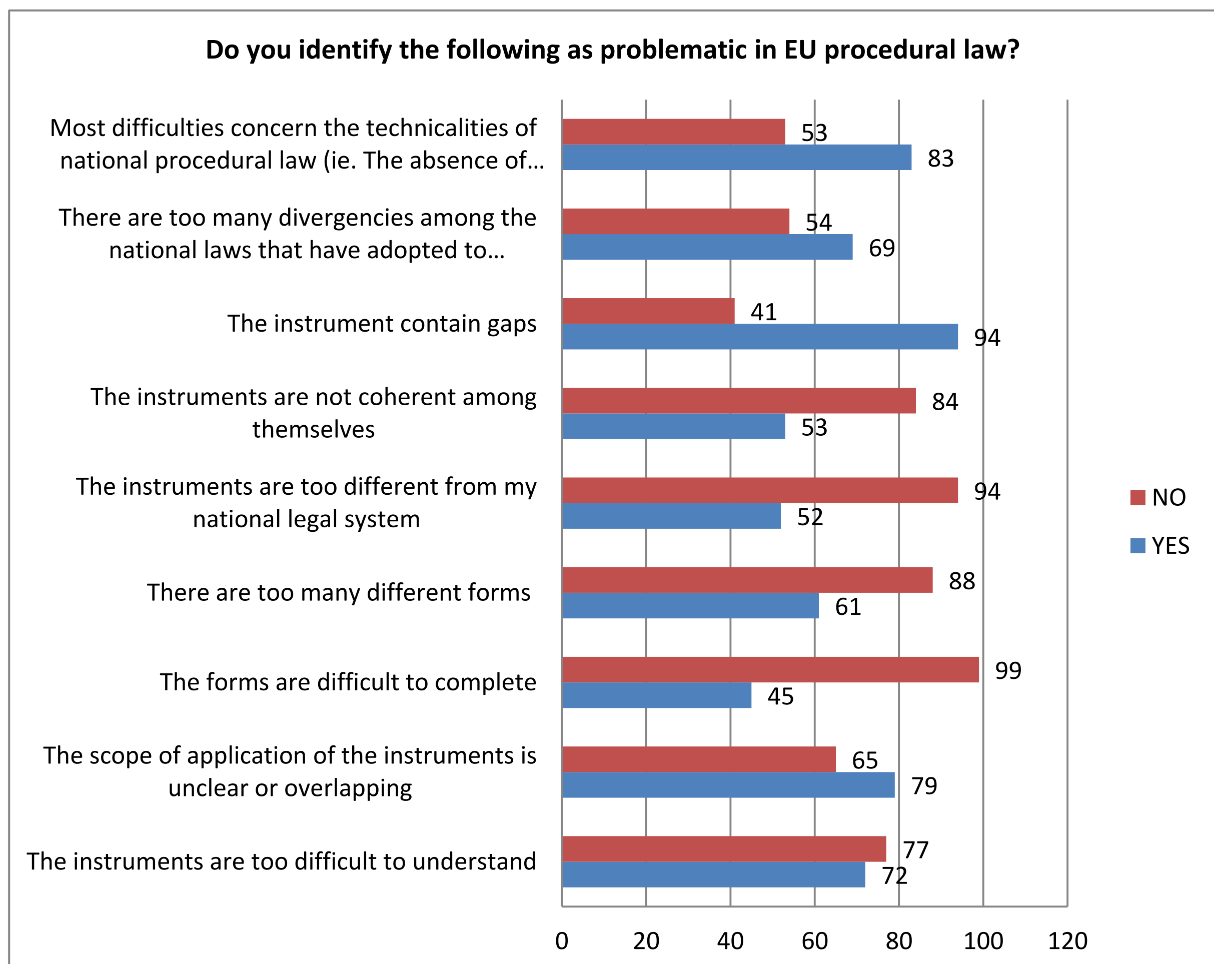
2.3.2 Problems and assessment

2.3.2.1 "Diluted" harmonization

349. The enforcement under Brussels I bis is basically left to the national rules, thus the comments made under the preceding heading apply here as well: uncertainty, costs, and insufficient attention paid to the cross border quality of the case. In this regard the answer to the question "According to your experience, what are the main problems when applying the Brussels I Regulation?" by a Greek practitioner is quite telling: "The main problem is that the national procedural law is very different among the Member States. As a result, when the national procedural law has to be applied according to the Regulations (for example according to the Art. 41 of the Brussels I Bis Regulation), several problems are caused for the professionals who have to use the Regulation".

350. A further (negative) consequence follows from the gaps in the regulation: the harmonization effect of the common rules is watered down by the need to implement them, which to a large extent means to complement them either with ad hoc domestic rules, or with the domestic pre-existing legal rules and local practices. It is to be deplored that the instructions given by the regulation itself as to how to implement the rules are too vague: this is the case of the reasonable time-limit required in the preamble of Brussels I bis (recital 32) between the service of the certificate (if necessary accompanied by the judgment) by the judicial officer and the first measure of execution; since no specification of this time-limit is provided for by the regulation, it is assumed that it is governed by the *lex fori*. In the same lines see art. 48.

351. *See table below, line "*There are too many divergences among the national laws that have been adopted to implement/complement the EU procedural instruments"; "the instruments contain gaps"*.*



352. To the closed question "the instruments contain gaps" and its qualification as "problematic" in EU law, the affirmative answer was given by 94 respondents, against 41 "no". To the question relating to whether the interviewee has come across divergence among national implementing laws, 69 answers go for the affirmative, 54 for the negative.[175]

353. A good example of how the prophylactic effect of harmonization gets lost are the documents foreseen in the Regulation the moment they go cross-border - in other words, they leave the Regulation and enter into the MS system. The Regulation actually anticipates and tries to minimize some of the problems - see ad ex. provisions on translation or transliteration; in a similar vein, art. 54 on the adaptation of unknown (in the requested MS) enforcement measures. However, even the application of these "facilitating" rules meets with difficulties in practice: this would be the case of the adaptation when left to the enforcement authorities without the intervention of the (allegedly better prepared) court. Indeed, so far no examples underpin the assertion; still, it is felt as a concern by the NR (Greece, Germany). The fact that the task is allocated to courts in some MS, and to enforcement authorities in others, also begs the question of the equal application of the common rules. In the words of one practitioner interviewed, "the fact that the Regulations leave intact the various national procedural rules creates different level playing fields".[176]

354. Moving now specifically to the rubric "documents"**,** a concern transpiring from the NR lies with the question of "what exactly" should be translated. Certificates (Annex I, Annex II) have created concerns as well: *a priori*, the opinion in the sense that neither the certification, nor the certificate itself have provoked any difficulties - or at least, difficulties that have been reported- is wide spread; this is confirmed as well by the many interviewees positive attitude regarding forms in general. Exceptionally, some

[175] The proper answer to this question requires that the interviewee has a good knowledge of the national implementing laws by, enough to detect the divergence. This is not the usual case. Still, see the answer of a long-time practicing Danish lawyer with more than 40 years of experience to the question "what are the main problems when applying the Brussels I regulation": "A general lack of conformity in procedural systems, which implies that the advantage of having the case tried in your home country continues to be important, partly as an issue of costs, and partly as an issue of trust and confidence in foreign systems". In a similar vein, a Finnish lawyer says: "One needs to understand the system where the cases originates from and where the judgment is to be recognized and enforced. Although there is a form you need to understand the foreign system to be able to operate in it, otherwise you will have a difficult time to navigate it."

[176] Greece, lawyer with 15 years of experience. Interview conducted by the Greek National Report.

NR point to a certain degree of complexity either in obtaining it from another country (The Netherlands: bureaucratic, time consuming), or in using it a country other than the issuing one.

355. As a matter of fact the situation is somewhat more complicated. Already under the Brussels I regulation several issues were disputed in the literature and got reflected in the case law; in the absence of clarification in the new text the state of affairs remains. Controversial questions are: whether additional fees apply (Estonia); who bears the costs (Austria)[177]; which instance delivers the certificate - the one issuing the judgment (Poland), or at any rate the court of first instance (Bulgaria); whether analogy with the *Imtech* case of the CJEU, case C-300/14,[178] would led to only courts being allowed to issue certificate.[179] A further question is whether the truthfulness of the certificate can still be contested before the court of the requested MS; in other words, whether the CJEU decision on case C-619/10, *Trade Agency*,[180] is valid in the light of the new function of the certificate.

356. Actually, complexity is likely to increase precisely due to the new function of the certificate. Under Brussels I it was still a "facilitator", and it was expendable; now the certificate is an ingredient of the cross-border enforceable quality of a judgment. Therefore the decision to deliver it carries more weight.[181] Under Brussels I, appeal against the decision to deliver a certificate or against the certificate itself was not admitted in some MS (Austria). It is uncertain whether this practice will last under the Recast; should this be case, it should be recalled that some MS provide for the converse possibility (Germany, Spain)[182], therefore a divergence is created that contradicts the very purpose of harmonization through common rules. Finally, in a

[177] The Higher Regional Court Graz has held that the applicant is not entitled to reimbursement of costs for the application for a certificate pursuant to Art 54 Brussels I Regulation (Higher Regional Court Graz, 26 July2006, 7Ra52/06f AT:OLG0639:2006:0070RA00052.06F.0726.000; Higher Regional Court Eisenstadt, 01March 2004, 13R312/03k AT:LG00309:2004:01300R00312.03K.0301.000)

[178]:EU:C:2015:825

[179] A concern expressed by the Luxembourgish National Reporter.

[180] EU:C:2012:531

[181] And the question arises as to the value (evidentiary, with a particularly strong force?) of the certificate. See in this regard the answer of a German academic: they should be only a "prima facie proof".

[182] § 1111, sec. 2 ZPO, for Germany. It is not foreseen in the law in Spain, but it has happened in practice in Spain - ongoing case on file with the authors.

similar vein, when the certificate was not compulsory the (at any rate, rare)[183] case of two conflicting certificates issued in the same MS could be solved expediently at the MS requested by merely disregarding both documents; the solution seems less straight forward under the new regime.

2.3.2.2 The system in motion. Bad habits and de facto difficulties

357. Not only national procedural laws, but also practice plays a fundamental role in ensuring an effective free circulation and prompt enforceability of judgments. The latter may be hindered, in particular, by procedural requirements which are not expressly provided for by law - either at national or at European level - but are nonetheless often demanded by judicial authorities in practice. The judicial authorities' attitude reveals in these instances either a substantial lack of knowledge of the system, or a perceivable lack of mutual trust in their foreign counterparts, with the result that the procedure set forth by Articles 39 and 42 Brussels I *bis* Regulation, originally conceived for being swift and deformalized, actually becomes lengthy and cumbersome.

358. The interviews carried out by the National Reporters shed light on some practicalities connected either to the declaration of enforceability provided for by the Brussels I Regulation or to the certification of a decision pursuant to Article 53 of the Brussels I *bis* Regulation, which may considerably increase the burden on the party seeking enforcement.[184] As to the former, it has been reported that in some Member States (e.g. Malta) courts have taken the view that a hearing must be conducted for the recognition and enforcement of a judgment under the Brussels I Regulation. While, in practice, just one hearing will be required for these purposes, the whole procedure can still take between two to four months. Moreover, in some Member States (e.g. Croatia), the rationale underlying the both the Brussels I and the Brussels I *bis* Regulation is completely disregarded: as the domestic procedural law solely recognizes domestic court decisions as enforceable titles, the parties consequently initiate proceedings for the recognition of foreign judgments even in cases where it is not necessary.

[183] Spain, ongoing case on file with the authors.

[184] As for now, the problem has been reported by interviewees from Bulgaria, Croatia, Latvia, Malta, Poland and Slovakia.

359. As to the certification of a judgment under Article 53 of the Brussels I *bis* Regulation, the National Reports as well as the survey on line and the interviews evidence that such formality is not, as such, problematic. Rather the contrary, forms in general are very much approved and seen as a positive element in the system: to the closed question “The forms are difficult to complete”, 45 respondents answered “yes”, against 99 “no”; regarding the open question on the same topic the positive answers clearly overcome the negative.[185] Nevertheless interviewees have highlighted that in practice sometimes the courts request documents, certificates or certifications with apostille which are actually not required in the given case.[186] According to some interviews, other difficulties have arisen which need to be addressed sometimes at the national level, sometimes by the EU lawmaker: the incorrect filling in of the forms has been denounced,[187] there are doubts as to who should fill in the form;[188] the much too technical language of the form itself has been denounced as well;[189] complaints have been expressed as to the accessibility and management of the forms online.[190]

[185] See table above, corresponding line. Many interviewees have answered positively to the question on the usefulness of the forms. Among many others, a Slovakian lawyer: “The introduction of the forms and simplified procedures by EU regulation enabled me to initiate at least such proceedings abroad without the financial burden of another lawyer from that country”.

[186] A French lawyer with 10 years of experience says: “The main difficulty is that the court-clerks (greffiers) in charge of those do not know how to use them and will frequently add conditions or requisites from national law. The same practice is also frequently reported in connection with applications for European Orders for Payment”

[187] Hungarian notary with more than 10 years of experience. Interview conducted by the Hungarian National Reporter.

[188] According to a Romanian judge with 12 years of experience: “The forms are very good and easy to use. There are also some problems because it is not clearly established who should fill in the forms and when they should be filled in because some are automatically issued (but it seems to be more of an internal question of distribution of tasks)”. In the same lines, a Luxemburgish lawyer with 15 years of experience explains: “We had one matter where we sought the recognition of a French notarial deed. Both the (French) notary and the relevant “Chambre des Notaires” had no knowledge about whom was responsible for the issuance of the certificate provided for by articles 54 and 57 of the Brussels I Regulation (manifest lack of information)”.

[189] Expressly stated by Romanian lawyers, who allude to the “ EU jargon” and ask for “more normal language, easy understandable by normal citizen who is seeking justice”. A Slovakian lawyer with 10 years of experience states “The approach is very form-based. This means that the forms are created in order to provide a one-size-fits-all solution with a technical language which is often not comprehensible. A more detailed explanation, or a template pre-filled form might be useful”. The certificate of Art. 53 Brussels I bis is perceived as non-user friendly by practitioners, see ad. ex. a judge from Belgium, a lawyer from the Czech Republic.

[190] A Bulgarian judge: The way they are accessible on the e-justice website is not ideal as one has to click through all of the forms to reach the necessary one.

Regarding in particular the certificate of art. 53, it has been regretted that Annex I is not editable electronically and has to be filled in only in hard copy.[191]

360. Besides, missing mentions within the certificate (date of pendency of the case;[192] details as to the instance delivering the decision;[193] interests;[194] other[195]), or the inadequacy of the certificate in the light of local realities,[196] are circumstances likely to create obstacles in practice, hindering the swift circulation of decisions within the EU. Inaccuracies of some of the contents reproduced in the certificate, i.e., its incapability

[191] Has been regretted by a Cypriot lawyer with 5 years of experience.

[192] A Finnish judge with 1 year of experience posits that "The new regulation is only applied to cases which have become pending after the new regulation entered into force. However, in many countries the date the case became pending is not expressed in the judgment. Nor do the forms for Brussels I ask for information on the date the case became pending. Some cases are processed rapidly, in just a few weeks, others takes year to process. Thus, this problem will persist over time. Some will wrongly pass the exequatur, others will wrongly apply for it. If the form would contain a box for the date when the case became pending, the problem would be identified early on and fixed".

[193] In Hungary a court clerk working on cross-border claims and EU Law advisor at the Curia has indicated that "The most problematic issue is probably that the certificate is not sufficiently detailed. For example the first instance judgment and the second instance (legally final) judgment are not indicated separately. If the second instance judgment alters the decision of the first instance court, which is quite common in pecuniary cases (for example the defendant have to pay only 2.5 million HUF instead of 2.8 million HUF) there is no place to mark it in the certificate. In some enforcement case, we have to take both judgments into consideration, given the example if the second instance court alters the decision of the court of first instance only partially. There is no rubric to indicate this". See as well n 195.

[194] A Hungarian lawyer working with cross border claims, with 12 years of experience, regrets that "Forms are said to be really problematic. There are some data which are impossible to highlight on the forms. For example more claims more different terms of interests etc". A Latvian central authority representative would go for more flexible forms that, when needed, could be completed by the judges.

[195] A Hungarian clerk working with cross border claims, with 4 years of experience, opines that "The most problematic issue is probably that the certificate is not precise enough. For example, rubric for the capital and rates could be much more consistent. Sometimes it is difficult to identify the exact spread of the claim. Using unified code tables would be very eligible".

[196] A collective interview from France states that "Another issue concerns the "certificate of origin" in the recast regulation. It only provides for four cases, which don't correspond to the French system. As a result there are some cases in which any of the possibilities given may be suitable. In this regard, French system may need to adapt imposing the clerks to do some tasks that normally are a matter within the bailiff's competence. This certificate is not suitable to the French reality and in consequence, it may be ill-adapted. In the same lines, a Finnish judge posits that forms are helpful, but they do not always match with local needs. A judge from Belgium with 3 years of experience questions the added value of question 4.6.3.1 of the form, arguing that "in practice a ruling is often more nuanced than can be expressed by the questions and subdivisions of the form. It demands quite a lot of effort of the court clerk to summarize the judgment in a correct way." He goes on: "Certificates are useful because they are recognizable and deliver with a minimal language barrier an European 'passport' to decisions. Nevertheless they are often hard to read and transferring the content of a judicial decision into a standard form is a risky, delicate and venturesome undertaking".

to reflect correctly the relevant contents of the judgments, have also been denounced[197].

361. Difficulties may also arise be *de facto* circumstances such as the lack of language skills; an example is given by an interviewee, "I could not understand what a Greek judge meant in his decision which was poorly translated in French".[198]

2.3.3 Proposals/possible improvements[199]

362. At this stage we cannot but recommend an in-depth analysis of the whole enforcement phase, also relating to the scope of the competence of the EU in the subject matter. It seems indeed rational to advocate for supplementary harmonization in the framework of the Brussels I recast to avoid that divergence jeopardizes the positive effect of the instrument; the results of an in-depth analysis could show whether it is necessary to go further However, as things stand today harmonization of the rules of enforcement -even if limited to foreign decisions, and to the national provisions which a greater potential to impact on a harmonized application of the EU rules- may not be politically feasible, not to talk of the technical difficulties to draft the appropriate rule.

363. We believe that in any event amendments to domestic law to reflect the cross-border quality will be gradually triggered by the principles of equivalence and effectiveness. However, waiting for the CJEU to shed light on this point on the occasion of a preliminary reference may prove slow and inefficient. Therefore, we would suggest that some actions of targeted harmonization in view of technical improvements could be undertaken by the Commission in fields where no competence difficulties are encountered or which may be surmounted. An example could be the statute of limitation: harmonization is not possible due to the strong liaison with substantive law; nonetheless, a uniform conflict of law rule may be drafted establishing which time limits apply to the right to apply for enforcement (whether the ones of the State of origin or the ones of the State of enforcement, or even those foreseen in a third legal

[197] As stated by a Belgian judge with 3 years of experience, in relation to the question 4.6.3.1 of art. 53 Brussels I bis certificate: "There is a great risk on discrepancy between the reproduction of the content of the decision on the form and the content of the judgment".

[198] Luxembourgish judicial officer with 15 years of experience. Similar concerns have been expressed by Romanian lawyers.

[199] Applies to section 2.2.3 above too.

system). Further, the EU could undertake action regarding the design and accessibility of the forms annexed to the EU regulations and certificates: they should be easier to identify, to access and to fill in online.[200] Regarding the Brussels I recast certificate, the Commission could consider whether it may be amended to better reflect the national contexts, as well as to make it more complete/precise. Besides, in the light of the majoritarian approval of forms we would suggest that the potentialities of forms be further explored.

364. Beyond the actions just described, it is recommended to take necessary steps in order to raise awareness of the good practices identified in some MS:

365. As a general rule a door should be kept open for *sensibility shown towards the cross-border element* to materialize. The issue of the time limits is particularly suitable for this exercise, but also errors originating in the lack of knowledge of the system at the MS of enforcement are. Germany could serve as a model here: according to the NR if an applicant filed the wrong type of remedy against enforcement, the court has the obligation to interpret the debtor's petition so that it can consider that the right remedy was chosen.

366. Regarding the *time limits*, different deadlines depending on the domicile of the party concerned have been adopted in the Netherlands in the Act for the implementation of the Regulation. In Denmark, in the case of an appeal against enforcement the notice for appeal should be given within two weeks from the day of the order; however it would be allowed later if the applicant is domiciled abroad, is unable to understand Danish and has no legal representative in the enforcement proceedings. In Finland no similar rule exists, but flexibility is foreseen regarding time limits for appeal against enforcement if "there is an acceptable reason" (no indication is given as to what this means, though).

367. Along the same lines, now in the field of *costs*, according to a special provision of Slovakian Bailiff's Regulation a Slovakian bailiff may agree with the applicant who is a foreign national on a Contractual Fee in the amount usual in the country of the

[200] Shared ideas of many stakeholders are represented by the following: a Belgian interviewee with 10 years of experience suggests to make already filled-in certificates available for stakeholders via a data-base, so that they can be used as examples. Similarly, a German academic and lawyer would go for "creating electronic platforms which guide the user through the various boxes to be filled in, and which at the same time offer cheap ways for cross-border communication among lawyers and/or courts and/or ombuds-systems which may assist consumers".

domicile (registered seat) of the applicant, or which is usually charged for similar legal services abroad, provided such agreement is concluded in written form.

368. The materials analyzed have shown further good practices which may help avoiding unnecessary hurdles. By way of example, it does not make much sense to stick to formalism regarding the *authenticity of the foreign copy* of the judgement: in Danish practice a simple copy is usually accepted. The same works for *translation*: again in Denmark, in the practice relating to Brussels I, the need for translation of the foreign decision depends of course on the language capabilities in the relevant bailiff's court, but a translation of the general/introductory part of the decision and the specific ruling usually suffices. Still on translation a suggestion may be accepted in the lines of art. 144 Spanish LEC: private translation is admissible, an official one may be requested by party, but if the contents are substantially similar to those of the private one the requesting party will bear the costs.

369. Regarding the enforcement procedure on the bases of a foreign decision, a good practice would be *to try to help foreign applicants understand the context*. In this regard the Pirkanmaa District Court has drafted two letters to the applicants: one is filed when the application is received and the other once the decision has been made. This helps the flow of information and helps the applicant understand the procedure.[201]

370. *Networking practices* among judges dealing with cross-border cases have been identified in countries like Denmark and the Netherlands.[202] Such initiative and the like should be incentive and fostered by the Commission.

371. Finally, we would recommend that two additional tasks are carried out by the MS and the EU in close cooperation. First, it is of the essence that the EU addresses the issue of the lack of information. In light of the key role of accessible (transparent, understandable), reliable, and updated information, the Commission should reflect on assuming itself the task of providing such information, with the allocation of the

[201] That's the view expressed by a Finnish judge with 1 year of experience. Interview conducted by the Finnish National Reporter.

[202] See the answer of a Danish judge to the question "According to your experience, what are the main problems when applying the Brussels I Regulation? What could be done to improve the situation or solve these problems?": "The Courts of Denmark have established an internal network of judges with a special expertise in EU law, which is inspired by the similar initiative in the Netherlands. The aim is to increase focus on the impact of EU law on national procedural law".

necessary resources, and in compulsory cooperation with the MS. Secondly, to ensure a swift and harmonious application of the EU procedural rules, the Commission should keep a vigilant eye on how the Regulation rules are implemented within the national systems.[203]

[203] To respond to a necessity felt by the stakeholders; for instance, several interviewees from the Czech Republic have expressed their wish that “The reaction of the Czech legislator to the EU regulations could be more precise”, or in the sense that “The Czech legislator could take account more of the EU-regulations and project them to the national law.”

Chapter 2: Default Procedures and Judgments in Cross-border Settings

FLORIAN SCHOLZ, KATHARINA AUERNIG, JULIUS SCHUMANN AND PAUL OBERHAMMER

1. Introduction to the Chapter

372. Differently from what many people expect, judgments rendered after the court has taken evidence and evaluated the conflicting positions of the parties are rather the exception than the rule when it comes to the enforcement of civil and commercial claims in many jurisdictions; in any event, other scenarios play a very important role as well in all member States: On the one hand, many litigations are ended by a party disposition with respect to the subject-matter of the claim such as a settlement, a waiver or an acknowledgement of the claim. On the other hand, many cases are “decided” simply on the basis of the fact that the respondent did not enter an appearance. This is the case where an order for payment is not contested, and, in particular, where a court renders a judgment on the basis that the respondent is in default of appearance.

373. As we will show below[204], there is no uniform European default judgment or procedure; rather, the laws of the Member States provide for different kinds of detrimental consequences for a party, in particular the respondent, who does not enter an appearance in the proceedings. As a consequence, judgments based (at least to some extent) on the respondent’s lack of appearance in the proceedings are of high practical relevance with respect to the cross-border enforcement of civil and commercial claims in Europe. However, they are also the source of many problems: The most important principle in the field of civil procedure (perhaps besides the court’s independence and impartiality) is the parties’ right to be heard in the proceedings. Judgments in default occur in a situation where a party has not been heard in the proceedings. Accordingly, it is always possible that the right of such party was violated by the judgment in default, e.g. – to name the most important

[204] See below, 2.4.

problem – because the service of process upon the respondent did not take place or did not take place in due time.

374. As a consequence, judgments in default are important with respect to mutual trust in two aspects: On the one hand, many creditors have to rely upon such judgments in order to enforce their claim within the European Union; therefore, the respective domestic and European rules must offer such creditors effective and fair access to justice in default cases in order to protect their claims. On the other hand, a judgement in default is obviously a dangerous thing from a debtor's perspective. Therefore, the European legislator must also safeguard the protection of the debtors' interests, in particular their right to be heard, when it comes to judgments in default in order to make the principle of mutual trust credible and therefore justified.

375. Judgements in default may have an international implication in different situations: The claimant might be a resident of the state where the judgement was rendered, and the respondent might be not; in this case, the original complaint might have been served upon the respondent on the basis of the European Service Regulation. This, however, is not necessarily the case: It is also possible that the international enforcement of a default judgment is based on domestic service of process, simply because the respondent of the proceedings was sued at his or her domicile, but has assets abroad. In particular, the first steps necessary for the respondent's defense are of the essence here: It is necessary for the respondent to appear before the court and/or to submit a written statement of defense (or any other statement) within a certain time limit, and how long is this time limit? Is it legally or factually necessary that the respondent avails himself or herself of representation by counsel in the (foreign or domestic) proceedings? Are these proceedings in a language known to the respondent or not? These and many other problems will be discussed in this chapter.

376. This chapter will examine these problems from two different angles. First, it will look at specific features of the proceedings in the Member State of origin and on how the proceedings are handled in the various Member States (2.). Second, it will examine how problems and differences in the way such proceedings are handled can lead to obstacles for the recognition and enforcement of a default judgment in another Member State (3.).

377. The assessment in this chapter is based on the following sources of information: the status quo in the different Member States as reported by the National Reporters, the outcome of the online survey and the results of interviews conducted by the National Reporters.

2. The Perspective of the Member State of Origin

2.1. The Cross-border Service of the Lawsuit

2.1.1. Status quo

378. The situation regarding the cross-border service of the lawsuit has been described in detail in the previous chapter of this report.[205] The problem assessment and the proposals in this section draw upon this description.

379. Some national reports described the preconditions for default and its consequences in the sections where they dealt with service of the lawsuit. These questions will be dealt with in a subsequent section of this chapter.[206]

2.1.2. Problems and Assessment

380. An extensive overview on the results of the online survey with respect to service and the interviews has already been given in the previous chapter.[207]

381. Attention will be drawn here to some aspects of cross-border service that are specifically problematic in regard to situations where the defendant does not enter an appearance.

382. From the perspective of the Member State of origin it is particularly problematic that the court will often not be able to establish whether or not service in another Member State has been effected on the defendant or whether the defendant has at least received the relevant document because a court will often not be in a position to investigate the details of the service process in another Member State.

383. This can lead to a severe delay of the proceedings. According to Art. 19 para. 1 of the Service Regulation, if the document had to be transmitted to another Member

[205] See Chapter 1, Section 1.3.

[206] Infra 2.4.

[207] See Chapter 1, Section 1.3.

Sate for the purpose of service pursuant to that regulation[208] and the defendant has not appeared, judgment shall not be given until it is established that (a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation.

384. According to Art. 19 para. 2, however, each Member State may make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled: (a) the document was transmitted by one of the methods provided for in this Regulation; (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

385. While reducing the delay of the proceedings, this reservation which has been notified by more than half of the Member States,[209] does result in fictitious service on the defendant that will not only undermine the defendant's protection but is also contrary to the idea of mutual trust.[210] The mere fact that a period of six months has already expired is no indication whatsoever that service has actually taken place. Therefore the legislator accepts obvious violations of the respondents' right to be heard here. This is obviously inconsistent with the principle of mutual trust.

[208] According to the CJEU's ruling in C-326/11, Alder, ECLI:EU:C:2012:824, para. 24 et sequ. where the person to be served with the judicial document resides abroad, service always falls within the scope of the Service Regulation, except for cases where the permanent or habitual residence of the addressee is unknown or that person has appointed an authorised representative in the Member State where the judicial proceedings are taking place.

[209] Cf. the list available at http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_1393.pdf (accessed 05.12.2016).

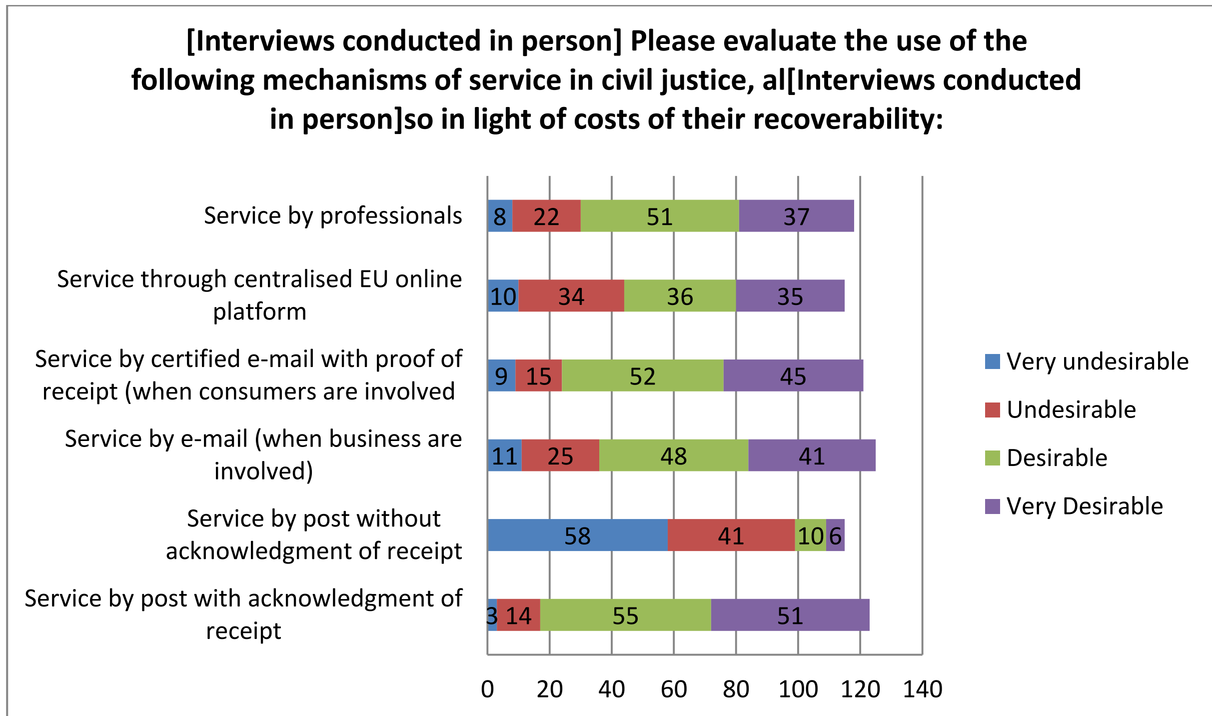
[210] Cf. C-326/11, Alder, ECLI:EU:C:2012:824, para. 34 et sequ., where the CJEU stressed that fictitious service (in this case the Court had to deal with a provision of Polish national law) was incompatible with the Service Regulation's objective of protecting the rights of the defence.

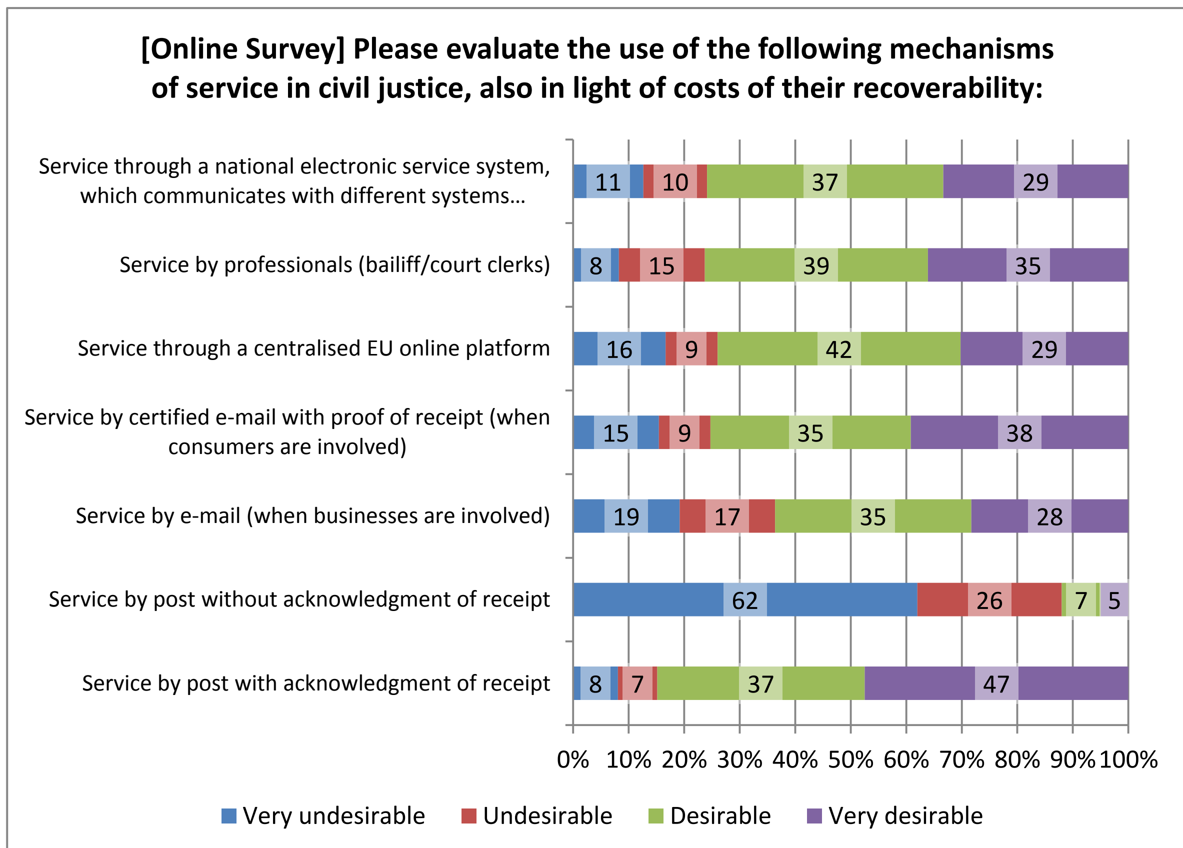
2.1.3. Proposals and Improvements

2.1.3.1. General proposal

386. Service of process is formalistic to some extent in basically all jurisdictions. There is obviously no general agreement on how formalistic such service of process should be under the different domestic laws of the Member States. A certain degree of formalism will be well-founded here, as it is one way of guaranteeing and, in particular, ascertaining that the respondent or any other recipient actually received the respective documents. All this, however, does not speak against opening so to speak “parallel channels” of information in order to increase the chances that the respondent actually receives the documents initiating the proceedings: It seems to be generally agreed today that “service” by email message is useful, but it is best used to complement and integrate formal service under the different provisions of the Member States, at least as far as consumers are concerned.[211]

[211] The online survey respondents and interviewees were generally in favour of the adoption of a system of electronic services when businesses are involved. When asked to assess the desirability of "Service by e-mail (when businesses are involved)", 35.35% of the online survey respondents described it as "desirable" and another 28.28% described it as "very desirable" (overall, the question was answered by 99 respondents). When asked the same question, 37.80% of interviewees answered “desirable” and 33.07% answered “very desirable” (overall, the question was answered by 127 interviewees). When considering service towards consumers, the online survey respondents and interviewees were in favour of a more cautious system, with certified e-mails ensuring proof of receipt. In particular, when confronted with the option of adopting "Service by certified e-mail with proof of receipt (when consumers are involved)", 36.08% of the online survey respondents described it as "desirable" and 39.18% characterized it as "very desirable" (overall, the question was answered by 97 respondents). When asked the same question, 42.28% of interviewees answered “desirable” and 37.40% answered “very desirable” (overall, the question was answered by 123 interviewees).





387. Nevertheless, it is also generally known that in many cases of private and business life, an email message will come to the recipient's attention within a very short period of time, while the physical service of a document might get lost or is delayed. Of

course, there will always be respondents who try to obstruct justice by referring to alleged service problems; however, there will also be a large number of respondents acting in good faith and therefore willing to take part in the proceedings on the simple basis of a mail message where service was perhaps delayed or did not take place at all. Accordingly, this measure can prevent default judgements in cases where the respondent actually wishes to participate in the proceedings; as a consequence, this measure prevents complications and delay resulting from remedies against the default judgment in the state of origin as well as objections at the enforcement stage.

388. Therefore, we suggest that courts shall not only serve documents according to the applicable provision of today's European and domestic service law, but shall in addition send an information copy of the respective documents to the respondent via an email message. This should not mean to introduce email as a regular means of service, but it could serve as an additional channel to enhance the chance that the recipient gets actual knowledge of the document. As this is not meant to replace, but rather only to improve the service of documents as it takes place today, such additional service to the recipient by mail message can simply be performed to the email addresses identified by the claimant. As it cannot be expected that courts will uniformly adopt such a practice on the basis of a mere best practice recommendation, it is suggested that this should be provided for in the Service Regulation.

2.1.3.2. Regarding difficulties arising from EU instruments

389. In the online survey 74% of the respondents[212] requested a better harmonisation of the methods of service and 79 % were at least in favour of a common set of rules regarding essential procedural aspects[213]. The latter view was also expressed by by 75 % of the interviewees.[214] Accordingly, it would be an obvious approach to at least change provisions of European law providing for the application of national law for no good reason and resulting in both different levels of protection, unequal treatment of parties with the Union and legal uncertainty. This corresponds also with the results of

[212] Q 40 of the online survey: a need for a better harmonisation has been answered by 65 out of 88.
[213] Q 50 of the online survey; a common set of rules regarding essential procedural in aspects has been answered in favour or highly in favour by 120 out of 153.
[214] Q K.3. of the interviews.

the interviews, in which several experts expressed a need for a further harmonisation[215] and an elimination of discrepancies[216]between the Member States. Art 19 para. 2 of the Service Regulation is a typical example of such a provision. Therefore, Art 19 para. 2 of the Service Regulation should be abolished, which makes para. 1 mandatory for all Member States in order to ensure a uniform level of protection for defendants.

2.1.3.3. Regarding difficulties arising from divergent national laws

390. The European Service Regulation provides for a number of standard forms already today. Note, however, that in particular the form according to Art. 10 of the Service Regulation which is the document containing the information about the actual service to the recipient of a document, does not contain sufficient information. It is a generally accepted problem that foreign courts which need to ascertain whether service did actually take place are in a very difficult position; the standard form under Art. 10 of the Service Regulation will not always help to identify what actually happened. In the first place, not only the day and the place of the service, but also the time of the service should be contained in this standard form. In addition, it would be very helpful if that standard form identified who was actually in charge of the service,that is the identity of the actual postman including his or her email address, telephone number and ID. In addition, a signature or a rubber stamp of the recipient is not necessarily sufficient in order to identify who actually took over the documents. The postman should ask for an ID and the standard form should contain the ID number of the person who actually took over the document. Measures should be taken that the signature of the recipient can be examined in subsequent proceedings. In particular, many postal services avail themselves of tablet instruments for such signatures which do not at all allow an examination whether the signature on record is the actual signature of the recipient.

[215] Stated in particular regarding the service regulation by an academic from Poland, a judge from Greece with 8 years of experience, two judges from Italy with 5 and 6 years of experience as well as by an academic and lawyer with 14 years of experience from Italy.

[216] As stated by an academic from Malta withe 8 years of experience.

2.2. The Translation of Judicial Documents

391. Translation of documents, especially of the document instituting the proceedings, has already been discussed in the previous chapter.[217] The sources we analysed did not address any further aspects with specific relevance for default procedures.

2.3. The Rules on Representation Before the Court

2.3.1. Status quo, summary

392. General rules on party representation have been reported in a previous chapter.[218] In the context of default proceedings the focus of this overview will be on court appointed representatives.

393. The laws of many Member States do not provide for such an possibility at all.[219] Also **German** courts can only appoint such a representative in very few cases.[220] The law of **Slovakia** only provides for court appointed representatives for persons who are incapable to represent themselves.[221]

394. According to **Austrian** law a representative for the absent defendant has to be appointed by the court if the domicile of the defendant who has to be served is unknown and the defendant would have to take a procedural action in order to safeguard their own rights, and especially if the document which has to be served contains a summons to a hearing pursuant to Section 116 of the Code of Civil Procedure. The representative is authorized to be served with all documents. Moreover they can represent the absent defendant for each procedural act which is necessary to protect the interests of the absent defendant.

395. **Bulgarian** law allows for the appointment of a representative for a defendant who has not entered an appearance in various situations. First, the court can appoint such a representative for a missing person[222]. Further such appointment is possible when

[217] See Chapter 1, Section 1.5.

[218] See Chapter 1, Section 1.6.

[219] These states are: Finland, Luxembourg, Spain, Sweden, England and Wales, the Netherlands, France, Italy, Hungary, Estonia, Belgium, Greece, Cyprus, Latvia and Denmark.

[220] National Report, Germany, question 2.3.4.

[221] Slovakian Code of Civil Procedure, Section 69.

[222] Bulgarian Code of Civil Procedure, Art 29 para. 2.

service has been duly effected on the defendant. A representative for the debtor can also be appointed in enforcement proceedings on application of the creditor if the debtor does not have a registered permanent or current address in Bulgaria.[223]

396. In **Hungary**, the court has to appoint a representative for parties whose whereabouts are unknown and who have no authorized representative. A court appointed representative is only allowed to collect sums of money in dispute or rights in rem upon the court's consent and may conclude settlements, or recognize or waive any disputed right only if this serves to protect the party he represents from imminent damage.[224]

397. In **Romania** a judge can appoint a representative, inter alia, for a party who has disappeared and has not represented a proxy and for parties who are incapable to defend their interests in a proper manner.[225]

398. In **Malta** a court can appoint a curator for an absent person,[226] as well as when the persons entrusted with the judicial representation of a legal entity are absent.[227]

399. In **Portugal** the public prosecutor's office has to ensure the defence of defendants who are absent or under some incapacity and not otherwise represented in the proceedings.[228] Although the prosecutor's office is supposed to safeguard the defendant's right, it is not bound to contest the claim, when the plaintiff's claim seems to be well founded. [229]

400. In **Lithuania** the court usually appoints a curator only on application by the opposing party. In cross border cases the Court can appoint a curator to receive documents in enforcement proceedings.[230]

401. According to **Polish** law, a curator can be appointed on request of the plaintiff when the plaintiff substantiates that defendant's place of residence is unknown.[231] There

[223] Bulgarian Code of Civil Procedure, Art 430.

[224] National Report, Hungary, question 2.3.4.

[225] National Report, Romania, question 2.3.4.

[226] Maltese Code of Civil Procedure, Art. 929.

[227] Maltese Code of Civil Procedure, Art. 187(6).

[228] Portuguese Code of Civil Procedure, Art. 21 para. 1.

[229] National Report, Portugal, question 2.3.4.

[230] National Report, Lithuania, question 2.3.4.

are elaborate rules on how the appointment of the curator has to be announced in public. The curator represents the defendant in the proceedings.

402. Article 146 of the **Slovenian** Civil Procedure Act provides for the appointment of a representative only to accept service on behalf of the defendant (or their statutory representative). The court appointed representative cannot perform any further procedural actions on behalf of the defendant.

2.3.2. Problems and Assessment

2.3.2.1. Responses to Online Survey and Interviews

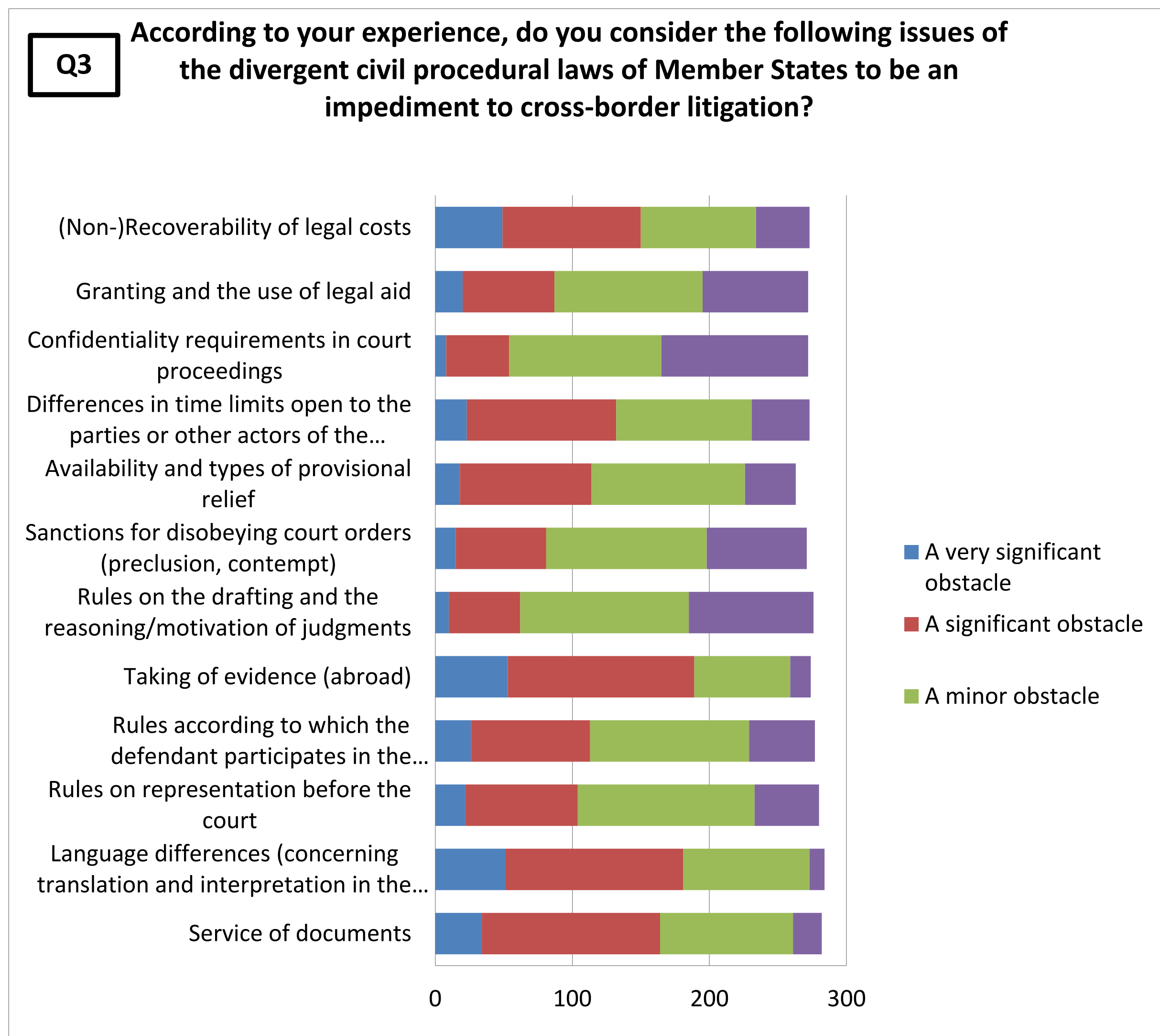
403. According to the results of the online survey, the rules on representation are not seen as a major problem regarding cross border proceedings. Q3 shows, that 63% of the respondents[232] consider the rules on representation to be only a minor obstacle or not an obstacle at all. The same observation can be made regarding the circulation of judgments under the Brussel I regime: 71% of the respondents[233] see the rules on

[231] Polish Code of Civil Procedure, Art. 143 et sequ.

[232] Q3 concerning the representation before the court was answered by 280 out of 588 respondents.

[233] Q6 concerning the circulation of judgments under the Brussel I regime was answered by 132 out of 588 respondents.

representation as a minor obstacle or not an obstacle at all.



404. Also the experts interviewed by the national reporters did not consider this as a significant problem. As a response to the question, which issues of the different civil procedure laws of the Member States can be considered to be an impediment to cross-border litigation, only 8 % stated the rules on representation before the court as a very significant and 24 % as a significant obstacle whereas 68% qualified this issue to be a minor obstacle or not an obstacle at all.

2.3.2.2. The result of case law as reported in the NR.

405. Problematic situations can arise when the action has been brought before a court that has no jurisdiction according to the Brussels Regulation and the defendant is represented by a court appointed curator. As the CJEU has held in regard to an

Austrian case, the appearance entered by that representative does not amount to an appearance being entered by the absent defendant for the purposes of Article 24 Brussels I/Art 26 para. 1 Brussel I bis Regulation.[234] Thus, the curator cannot submit to jurisdiction on behalf of the absent defendant.[235]

2.4. Failure of the Defendant to Enter an Appearance and Declaration of Default by the Court

2.4.1. Status quo

406. This section of the chapter deals with provisions of the national laws of the Member States concerning the default of the defendant. First, it is highly relevant what steps the defendant has to take to enter an appearance. Second, the consequences of his or her failure to do so have to be examined. It is of particular interest whether the national laws provide for a declaration of default issued by the court and what consequences such declaration might have; i.e. if the proceedings can be conducted without the defendant's participation or if the court will issue a default judgment against the defendant.

(a) Time limits

407. The time limits for the defendant to enter into the proceedings differ significantly in the various Member States. For example in **Austria**, in low-value cases the time between service on the defendant and the first oral hearing could be as short as three weeks (and in exceptional situations even shorter).[236] In **Spain** there is a (non-extendable) time limit of usually only twenty days, and in cases below € 6.000 even only ten days for the defendant to submit a written statement of defense.[237] In **Slovenia** the defendant has to file a written statement of defense within 30 days.[238] In **Croatia** the time limit is between 30 and 45 days.[239]

---

[234] C-112/13, ECLI:EU:C:2014:2195.

[235] This seems to be a general rule under Maltese law; cf. National Report, Malta, question 2.3.4.

[236] See Austrian Code of Civil Procedure, Section 436.

[237] National Report, Spain, question 2.1.1.

[238] Slovenian Civil Procedure Act, Art. 277.

[239] Croatian Civil Procedure Act, Art. 285 para. 2.

408. Only few Member States have particular time limits for cross-border cases. **In England and Wales**, for example, the defendant has to file an "acknowledgment of service" within 21 days in cross-border cases (14 days in domestic cases) and a statement of defense within 35 days (28 for domestic cases).[240] Also **French** law provides a specific rule for the extension of deadlines in cross-border situations. Pursuant to Art. 643 of the Code of Civil Procedure, the time limit for appearances, lodging an appeal, a motion to set aside, a motion for revision and an appeal in cassation is extended by two months if the counterpart lives in a foreign country. In **Belgium** there is a minimum time limit of only eight days for domestic defendants to prepare for the preliminary hearing.[241] For defendants who do not have their place of residence in Belgium this time span is extended by 15 days if the place of residence is located in France, Luxembourg, the Netherlands, Germany or the United Kingdom; by 30 days if it is in another European country and by 80 days for other continents.[242] In **Portugal** the deadline of 30 days to file a statement of defense can be extended for another 30 days on the basis of "serious grounds".[243] In **Italy**, a defendant who has had to be served in another Member State must usually be granted at least 130 days for entering into an appearance.[244]

(b) Declaration of default and consequences

409. Default of the defendant to enter an appearance will lead to a default judgment in a number of Member States, including **Finland**, **Austria**, **Bulgaria**, **Germany**, **Denmark**, the **Netherlands**, **Hungary** (where it is formally rendered as a court order), **Estonia**, **Belgium**, **Croatia**, **Greece**, **Slovakia**, **Portugal**, **Cyprus**, **Lithuania**, **Poland**, **Slovenia.** In **Sweden** the admissibility of a default judgment depends on whether the matter at issue is amenable to out of court settlement.[245]

[240] CPR rr.12.3, 6.35(3).

[241] BJC, Art. 777.

[242] BJC, Art. 709; Art. 55 para. 1° and 2°.

[243] Portuguese Code of Civil Procedure, Art. 569 para. 5.

[244] Art. 166 para. 1 of the Italian Code of Civil Procedure provides for a deadline of 20 days before the first hearing; Art. 163bis provides that the first hearing might not be scheduled earlier than 150 days after service upon the defendant, when service had to be executed abroad; note that the defendant can also still enter an appearance at the first hearing, the only consequence being that they will be time-barred in respect of certain defenses; see National Report – Mutual Trust, Italy, question 2.3.2.

[245] Swedish CJP, Chapter 44, Section 2.

410. In **Latvia** a default judgment cannot be rendered against a foreign defendant.[246]

411. A default judgment is usually only rendered on request by the claimant and only after the court has established, whether the defendant has been properly served with the relevant documents (statement of claim, summons, etc.).[247]

412. In other states, namely **Spain**, **Italy** and **Romania** default of the defendant will not lead to a default judgment, but the Court will declare the defendant in default and will proceed without them. According to the Italian National Report "*[t]he fact that a party is in default does not have any negative consequence with respect to his position, i.e. there will neither be an automatic upholding of the claimant's claims, nor any release from the latter's burden of proof. On the contrary, the main goal of the special regime governing default proceedings is to ensure that the default party does not suffer any harm due to his failure to participate in the proceedings, in order to guarantee the respect of the adversarial principle, at least from a formal point of view*"[248]

413. Note that when the document initiating the proceeding has been served according to the Service Regulation, Art. 19 of said Regulation applies in cases where the defendant does not enter an appearance in time. A majority of Member States have transmitted a notification according to Art 19 para 2 of the Service Regulation, thus the courts of those states do not have to order a stay of proceedings if the prerequisites of Art. 19 para. 2 a) – c) are met. This report suggests to abandon Art. 19 para 2 of the Service Regulation (see above).

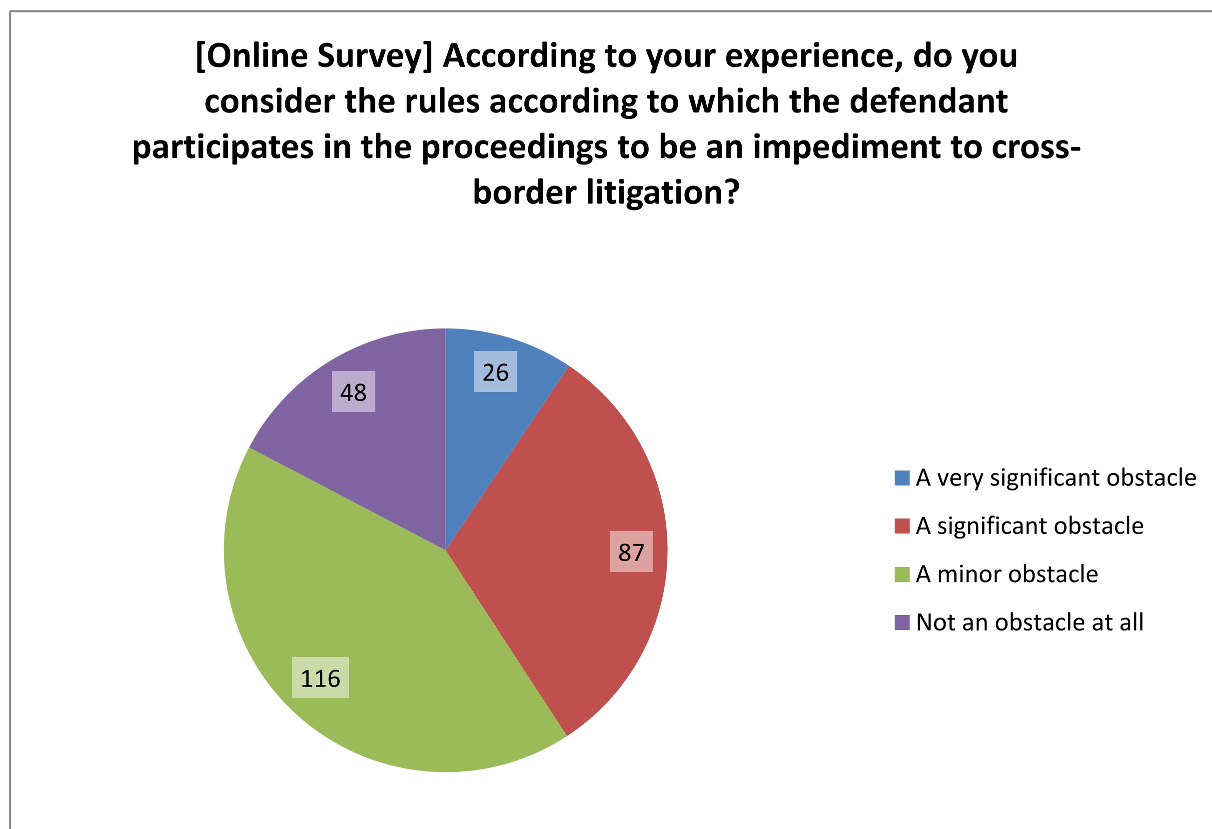
414. It is obvious that the rules on default judgements and proceedings differ strongly from one member state to another also apart from the aspects pointed out above. From the perspective of mutual trust one can, however, say that the mere fact that an (alleged) default of appearance has detrimental consequences (of whatever exact nature) for the respondent can serve as a basis for the discussion below.

[246] Latvian Civil Procedure Act, Art. 208.1.

[247] For cross-border cases concerning Member States, Art. 19 of the Service Regulation has to be considered in this context.

[248] National Report, Italy, question 2.3.2.

2.4.2. Problems and Assessment

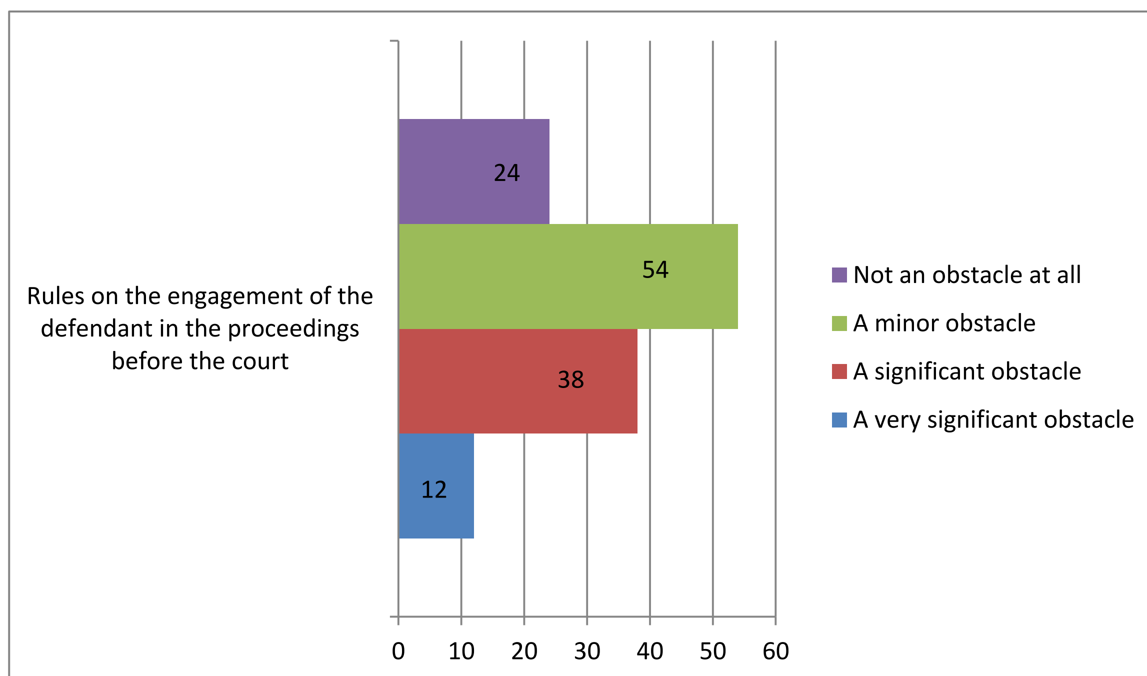


415. The rules according to which the defendant participates in the proceedings before the court are regarded to be an at least significant obstacle by 41% of the survey respondents. Whereas this aspect cannot be seen as the most problematic aspect of cross-border proceedings, it still seems to be a prevalent problem in practice. Only 17% do not regard this aspect as an obstacle at all.

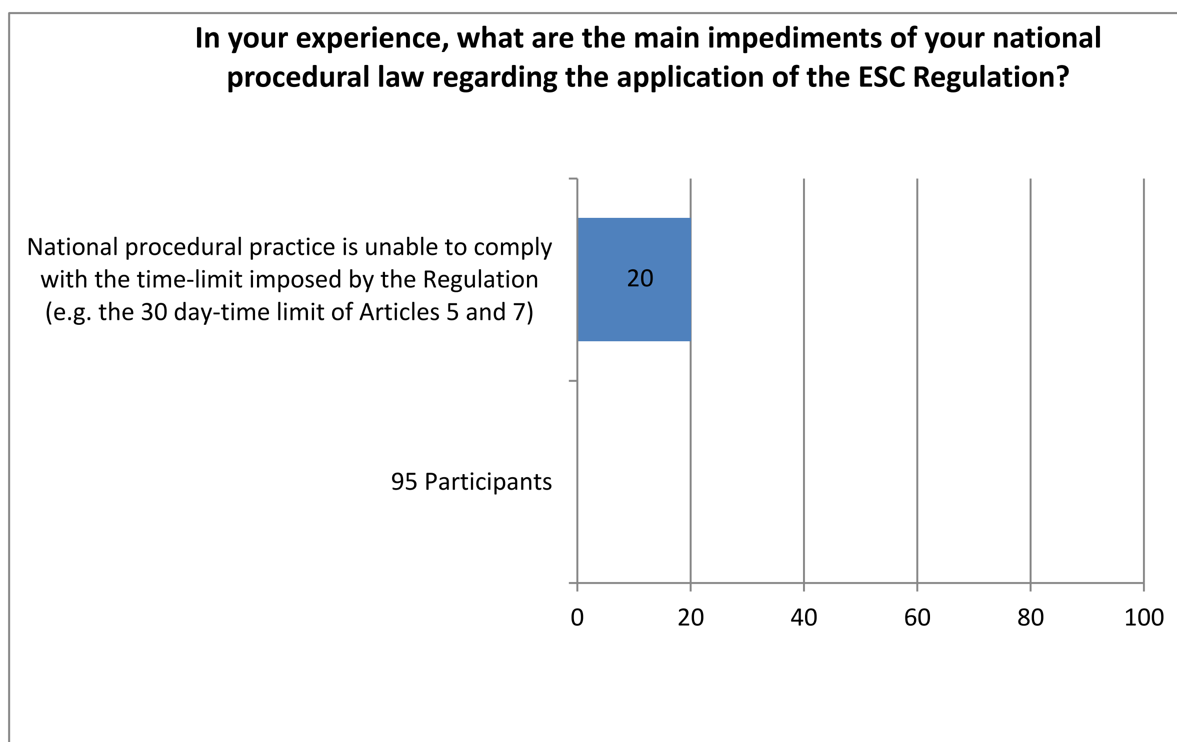
416. The sanctions for disobeying court orders are not generally seen as a very problematic aspect. 42 % of the interviewees and 30% of the participants in the online survey regard this topic as an at least significant obstacle, whereas 58 % of the interviewees and 70% of the participants in the online survey see sanctions for disobeying court orders as a minor obstacle or not anobstacle at all. This conclusion is also indicated by comparing the results to the other parts of question 3. Only drafting rules and confidentiality requirements are seen as less problematic; all other aspects are seen as a more relevant barrier to cross-border litigation.

An analysis of the interviews with experts also shows that there are some problems regarding the defendant's obligation to enter an appearance.39% of the experts

stated that the rules on the engagement of the defendant in the proceedings before the court are a very significant or at least significant obstacle whereas 61% declared this issue to be a minor obstacle or not an obstacle at all.



417. The responses to another question in the interview template show that 21% of the experts regard the national procedural practice as unable to comply with the time-limit imposed by the ESC Regulation (e.g. the 30 day-time limit of Articles 5 and 7).



418. In general, a lawyer from France suggests harmonizing procedural time-limits as well as sanctions in case of non-respect of these time-limits.[249]

419. The National Reports do not report any case law that would point out specific problems in this regard. This however does not indicate that such problems do not exist – rather, they simply do not lead to case law of higher or supreme courts because they are caused by what is undisputedly the law (such as short time limits) and / or they result from practical issues relevant more or less only for the first instance court.

2.4.3. Proposals and Improvements

420. As already pointed out above, the rules relating to default judgments are relevant for the issue of mutual trust both from the perspective of the claimant and the perspective of the respondent of such proceedings: The claimant may reasonably expect efficient and fair default proceedings in order to obtain a basis for enforcing his or her claim; the respondent may reasonably expect that his or her right to be heard in the proceedings is protected in every possible way. These two aspects of

[249] Interview conducted by the French National Reporter.

mutual trust in the field of default proceedings and judgments should also be reflected in relation to the time limits to enter an appearance in proceedings in order to avoid a default judgment: On the one hand, a significant number of jurisdictions provides for time limits for the respondent to enter an appearance either in writing or by appearing before the court in an oral hearing which is, in our opinion, much too short in order to protect respondents' right to be heard in these court proceedings in cross-border cases. It is not fair to request a party to appear before a court or to submit a written statement of defense before a court in a foreign language under a foreign law and probably with the assistance of a foreign lawyer within a time limit of two, three or four weeks. This, however, is the law and/or the practice in a significant number of Member States. Therefore, we believe that it is imperative to introduce a minimum time limit for entering an appearance before the courts of another Member State in European law in order to protect the respondents' right to be heard in such proceedings. We believe that a minimum time limit of six weeks for entering an appearance in a foreign Member State adequately takes into account both the interests of the claimant and of the respondent.

421. Note, however, that having a longer time limit is not necessarily better in this respect, simply because the time limit might be too long from claimant's perspective taking into account his or her fair expectations to obtain a judgment within a reasonable period of time. We believe, e.g., that a minimum period of 130 days for entering an appearance in cross-border cases (as it exists in Italy) is too long against that background. Therefore, we suggest a uniform maximum time limit of three months under European law here as well.

422. Therefore, it is our proposal to provide that if the respondent must raise his or her defense by entering an appearance either in writing or in an oral hearing before the courts of a Member State where he or she is not domiciled, the time limit between the service of the document initiating the proceedings and the steps necessary in order to enter an appearance before the foreign court must be at least six weeks; national law, however, must not provide a time limit that is longer than three months.

2.5. The Assessment (on Jurisdiction and/or on the Merits) Undertaken by the Judge in case the Defendant does not Enter an Appearance

2.5.1. Status quo

423. The information provided by the National Reports on this issue unveils considerable similarities but also notable differences in the various jurisdictions when it comes to what needs to be assessed by the national court judge if the defendant has failed to enter an appearance. In particular, it is crucial to consider which prerequisites have to be examined to establish the default **(a),** and which information can or shall be taken into account by a national court judge when assessing the court's jurisdiction **(b)** as well as when he/she is considering rendering a decision on the merits **(c)**.

(a) Obligation to investigate whether the document was served properly

424. In several National Reports (**Austria**[250], **Belgium**[251], **Bulgaria**[252], **Croatia**[253], **Greece**[254], **Italy**[255], **Lithuania**[256], **Portugal**[257] **Romania**[258], **Slovenia**[259], **Sweden**[260]) it was stressed that before the national court judge may start examining the court's jurisdiction and, especially, before a default judgment may be rendered, it needs to be examined whether the statement of claim has been duly served upon the party failing to enter an appearance. The **Bulgarian** Report further stated that the parties need to have been informed about the legal consequences in case they would not adhere to the time limits and/or not appear in the oral hearing.[261]

[250] National Report, Austria, question 2.3.3.

[251] National Report, Belgium, question 2.3.3.

[252] National Report, Bulgaria, question 2.3.3, with reference to Default Judgment № 586 from 25 July 2012, rendered by the Regional Court of Kiustendil (case № 4262/2011).

[253] National Report, Croatia, question 2.3.3.

[254] National Report, Greece, question 2.3.3.

[255] National Report, Italy, question 2.3.2, cf. Italian Code of Civil Procedure, Art. 182 para. 1.

[256] National Report, Lithuania, question 2.3.3.

[257] National Report, Portugal, question 2.3.3.

[258] National Report, Romania, question 2.3.3, cf. Romanian NCPC, Art. 153.

[259] National Report, Slovenia, question 2.3.3, cf. Slovenian Civil Procedure Act, Art. 318.

[260] National Report, Sweden, question 2.3.3, cf. Swedish CJP, Chapter 44, Section 8.

[261] National Report, Bulgaria, question 2.3.3, cf. Bulgarian Civil Procedure Act, Art. 239 para 1 No. 1.

(b) Assessing jurisdiction and other procedural requirements

425. Once the statement of claim was served (and proper service can also be verified, see [a]) and, nevertheless, the defendant did not submit a statement of defence and/or did not enter an appearance at the oral hearing, the courts in **Austria**[262], **Belgium**[263], **Cyprus**[264], **Denmark**[265]**,** **Estonia**[266], **Germany**[267]**,** **Greece**[268], **Luxembourg**[269], **Malta**[270], **Netherlands**[271], **Poland**[272], **Romania**[273] are obliged to examine their jurisdiction *ex officio*.

426. The National Reports for **Finland**[274] and the **United Kingdom**[275] emphasized that the claimant has to provide sufficient information for the court to assess its jurisdiction.

427. In **Spain**[276], the court generally examines its jurisdiction on its own motion. There are, however, exceptions for certain grounds for jurisdiction. In these cases, the court can only decline jurisdiction upon a motion of the respondent.[277] If the latter is in default, this is considered as an implicit acceptance of the court's jurisdiction.[278]

428. In **France**, the courts must generally not assess their jurisdiction *ex officio* in case of the default of one party. Judges can declare their lack of jurisdiction only in

[262] National Report, Austria, question 2.3.3, cf. Austrian CCP, Section 402.

[263] National Report, Belgium, question 2.3.3.

[264] National Report, Cyprus, question 2.3.3.

[265] National Report, Denmark, question 2.3.3.

[266] National Report, Estonia, question 2.3.3.

[267] National Report, Germany, question 2.3.3.

[268] National Report, Greece, question 2.3.3, cf. Greek Code of Civil Procedure, Art 3 et seq.

[269] National Report, Luxembourg, question 2.3.3, with reference to Court of Appeal, 15 July 2015, case no 42489, JTL Lux 2015.179 obs. Cuniberti.

[270] National Report, Malta, question 2.3.3.

[271] National Report, Netherlands, question 2.3.3.

[272] National Report, Poland, question 2.3.3, cf. Polish Code of Civil Procedure, Art. 1099.

[273] National Report, Romania, question 2.3.3, cf. Romanian NCPC, Art. 131.

[274] National Report, Finland, question 2.3.3.

[275] National Report, United Kingdom, question 2.3.3.

[276] National Report, Spain, question 2.3.3, cf. Spanish LEC, Arts. 38 and 48.

[277] National Report, Spain, question 2.3.3, cf. Spanish LEC, Art. Art. 59.

[278] National Report, Spain, question 2.3.3, cf. Spanish LEC, Art. Art. 56.2.

exceptional cases, namely if the grounds for jurisdiction are mandatory in nature ("*d'ordre public*").[279] There are only very few rules of this mandatory character.[280]

429. In **Portugal**, there is a distinction between "*absolute lacks of competence*" that requires an assessment by the court *ex officio* on the one hand,[281] and "*relative lacks of competence*" on the other hand, where the defendant's default "*may prevent the court from declining jurisdiction*".[282]

430. Also the **Swedish** National Report stated that for most rules of jurisdiction the defendant must indeed appear and contest their application in order for this to be taken into account in the proceedings.[283]

431. The **Austrian**[284], **German**[285] and **Swedish**[286] National Reports also emphasized that, besides jurisdiction, other procedural prerequisites and impediments (such as the principle of *ne bis in idem*) have to be considered by the court on its own motion in case of default by one party.

432. The **Greek** National Report further focused on the order according to which the assessment on jurisdiction and procedural matters on the one hand, and the assessment whether the statement of claim had been duly served upon the respondent on the other hand shall be conducted. According to the National Report, the court shall examine its jurisdiction first, before then moving on to the assessment of a potential default. Judicial practice, however, deals with these issues in reverse order.[287]

[279] National Report, France, question 2.3.3, cf. French Code of Civil Procedure, 92.

[280] National Report, France, question 2.3.3, with reference to examples, e.g. French CCP, Art. 1038 ("disputes over French or foreign nationality of natural persons"), Art. 1406 ("jurisdictional rules governing issuance of [national] payment orders").

[281] National Report, Portugal, question 2.3.3, cf. Portuguese Code of Civil Procedure, Art 97 para 1.

[282] National Report, Portugal, question 2.3.3, cf. Portuguese Code of Civil Procedure, Art 103 para 1 and Art. 104 that refers to exceptional cases.

[283] National Report, Sweden, question 2.3.3.

[284] National Report, Austria, question 2.3.3.

[285] National Report, Germany, question 2.3.3.

[286] National Report, Sweden, question 2.3.3.

[287] National Report, Greece, question 2.3.3.

(c) Assessment on the merits

433. If the defendant fails to appear in court proceedings in the **United Kingdom,** "*no examination on the merits is conducted*".[288] The courts in **Austria**[289], **Estonia**[290] and **Germany**[291] conduct a full assessment with regard to the legal issues – this, however, on the basis of the facts as they were submitted by the claimant. Hence, the court has to consider the factual allegations of the claimant as true, without taking any evidence. Also in **Greece**, the "*defendant's default at the first hearing is deemed as a confession of the plaintiff's assertions and allegations, provided that such a confession is generally permitted*"[292]; similar consequences are attached to the defendants default in **Portugal**.[293]

434. The same holds true in **Spain**, where the National Report, however, further emphasized that "[i]*f public policy issues were at stake, ex officio control would be possible (although, in practice, rather strange to imagine)*".[294] After a period of legal uncertainty and controversial discussions in case law and literature, also in **Belgium** similar rules were adopted as of 1 November 2015.[295] The term of "*public policy"* shall thereby be considered as a "*flexible and evolving one*".[296] Also in **Poland**, there is an exception from the obligation to treat the claimant's factual allegations as true if "*they raise justified doubts or were presented with an aim to circumvent the law*".[297]

435. In **Sweden**, there are exceptions from the general rule described above in cases, where the statement of claim is "contrary to matters of common knowledge", where it "does not comprise legal reasons for the plaintiff's case or it is otherwise clearly

---

[288] National Report, United Kingdom, question 2.3.3.

[289] Cf. Austrian Code of Civil Procedure, Section 396 para. 1.

[290] National Report, Estonia, question 2.3.3, cf. Estonian Code of Civil Procedure Section 407 para. 1.

[291] National Report, Germany, question 2.3.3, cf. German Code of Civil Procedure, Section 331 para. 1.

[292] National Report, Greece, question 2.3.3, cf. Greek Code of Civil Procedure, Art. 271.3.

[293] National Report, Portugal, question 2.3.3, cf. Portuguese Code of Civil Procedure, Art. 567 para. 1.

[294] National Report, Spain, question 2.3.3.

[295] National Report, Belgium, question 2.3.3, cf. Belgian JC, Art. 806.

[296] National Report, Belgium, question 2.3.3.

[297] National Report, Poland, question 2.3.3, cf. Polish Code of Civil Procedure, Art. 339.

without foundation".[298] In these cases, the Swedish courts have to dismiss the claim on the merits.[299] Similar conditions were mentioned in the **Croatian** National Report.[300] In **Finland**, the case must be dismissed on the merits if the claim is "manifestly without basis" or "if the result the claimant has requested cannot follow from the factual basis of the claim".[301] Also in **Slovenia,** the courts have to assure that "the action does not contain a claim which the parties may not dispose of; the claim is founded upon the facts stated in the action; and the facts upon which the claim is based (…) are not in contradiction with evidence adduced by the plaintiff or with judicial knowledge".[302] Similarly, the courts in **Hungary** need to examine (only) whether the statement of claim is specified enough. The courts are, in this context, also entitled to hear the plaintiff.[303]

436. In **Luxembourg** (and, similarly, in **France**[304]), the courts have to assess whether the claim is "*'regular', admissible and well founded*".[305] Also in the **Netherlands**, claims that are unjust or unfounded need to be dismissed.[306] In practice, according to the Dutch National Report, in about 25 % of the cases the claim is partially denied – this concerning mainly questions of claimed interest or costs.[307]

437. In **Denmark** and **Romania**[308], the judge has to assess the case on the basis of the submitted documents, including evidence and, as was specifically stated in the Danish National Report, "*any other information available to the court*".[309] In case of the defendant's default in **Malta**, the case is to be "*determined according to law on the acts available after hearing such evidence as the court may consider necessary,*

[298] National Report, Sweden, question 2.3.3.

[299] National Report, Sweden, question 2.3.3, cf. Swedish CJP, Chapter 44, Section 8.

[300] National Report, Croatia, question 2.3.3, cf. Croatian Civil Procedure Act, Art. 331.b.

[301] National Report, Finland, question 2.3.3, cf. Finnish CJP, 5:13.

[302] National Report, Slovenia, question 2.3.3, cf. Slovenian Civil Procedure Act, Art. 318.

[303] National Report, Hungary, question 2.3.3.

[304] National Report, France, question 2.3.3, cf. French CCP, Art 472.

[305] National Report, Luxembourg, question 2.3.3, cf. Luxembourg New Code of Civil Procedure, Art. 78.

[306] National Report, Netherlands, question 2.3.3, cf. Dutch Code of Civil Procedure, Art 139.

[307] Cf. Kramer, Tuil & Tillema, Min. of Justice Report 2012).

[308] National Report, Romania, question 2.3.3. cf. Romanian NCPC, Art. 223 para. 2.

[309] National Report, Denmark, question 2.3.3.

notwithstanding his default of appearance”.[310] Similarly, in **Cyprus**, the court “*will not act as the defendant’s lawyer, but if it appears that (…) the claim is not proved on its merits (i.e from what the plaintiff presents to the Court for proving the claim), the Court shall reject the application for judgment in default of appearance.*”[311]

438. In **Lithuania[312]** as well as in **Slovakia[313]**, there are no specific provisions on the assessment to be conducted by courts in case the defendant does not enter an appearance. The general procedural rules apply.

439. Also in **Italy**, there is no release for the claimant with regard to his burden of proof. To ensure the application of an adversarial principle (from a formal point of view), the judge has to apply the same standards to assess the allegations and evidence brought forward by claimant as it would do in ordinary proceedings. The major difference for default proceedings “*lies in the duty of the claimant to serve on the default defendant (and in the alternative of the registrar to communicate to him), within a deadline determined by a court's order, those judicial and procedural acts referred to by art. 292 c.p.c.*”[314]

2.5.2. Problems and Assessment

440. The online survey asked for personal experience of the respondents regarding the types of assessment undertaken by the judge if the defendant does not enter an appearance.[315] 41% of the participants report that the judge performed *ex officio* assessment as required deciding on the jurisdiction of the court as prescribed in article 26 BX I 2001/article 28 BX I bis 2012. 28%[316] report that the judge undertook no or very little assessment in practice. 13% of the respondents[317] report that the judge undertook the same assessment as if the defendant had entered an

[310] National Report, Malta, question 2.3.3, cf. Maltese COCP, Art. 201.

[311] National Report, Cyprus, question 2.3.3.

[312] National Report, Lithuania, question 2.3.3.

[313] National Report, Slovakia, question 2.3.3.

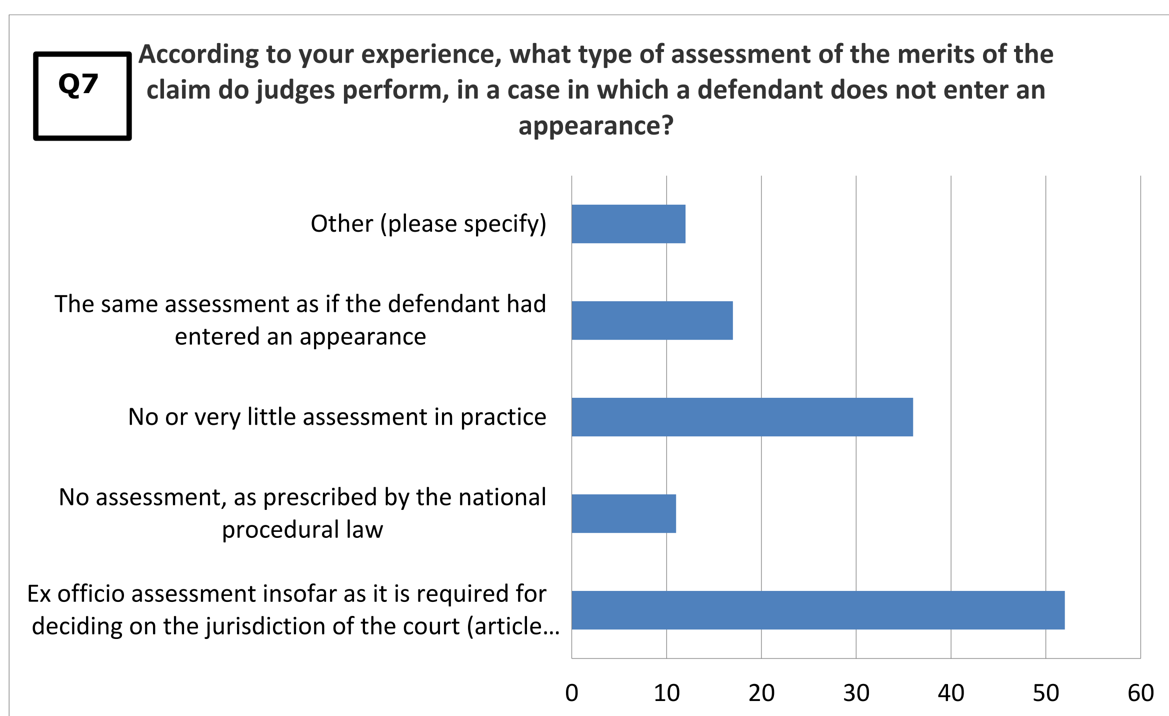
[314] National Report, Italy, question 2.3.3.

[315] Q7 of the online survey, which has been answered by 128 out of 588 respondents.

[316] Q7 regarding no or very little assessments has been answered by 36 out of 128 respondents.

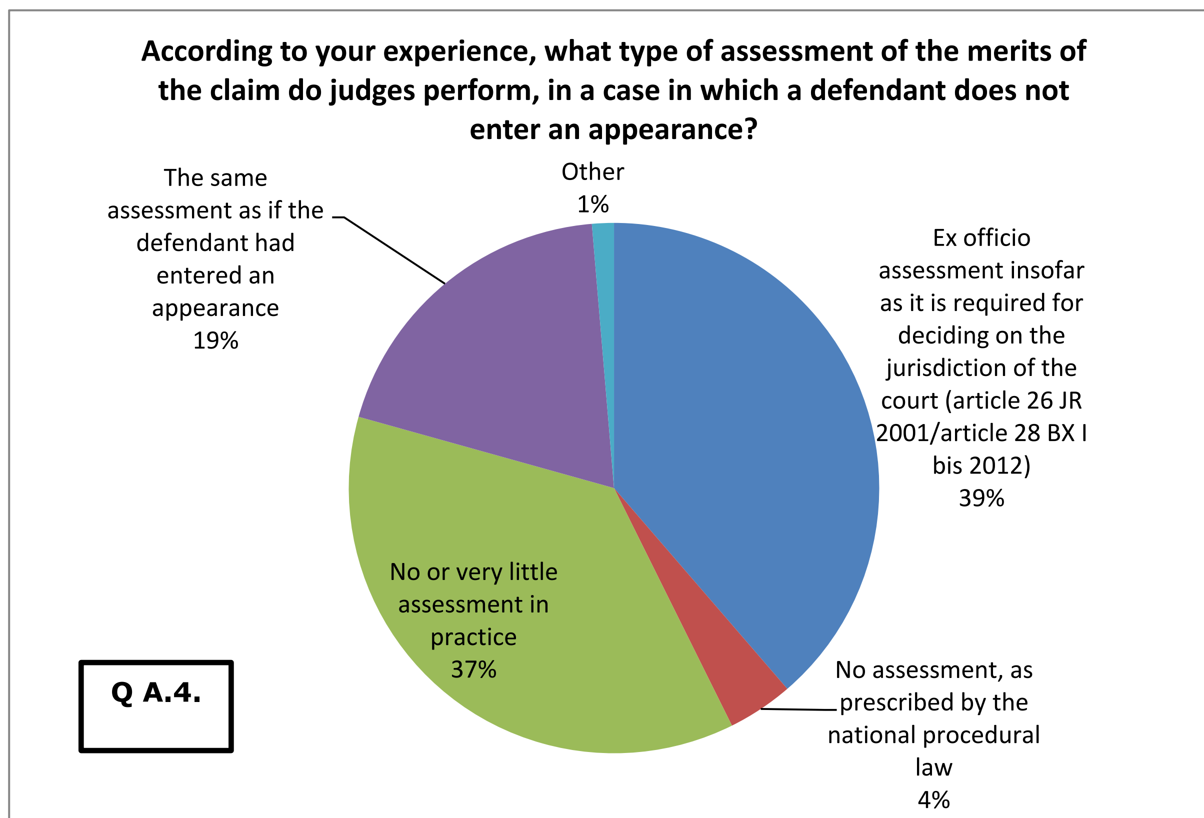
[317] Q7 regarding the same assessments: 17 out of 128 respondents.

appearance. 9%[318] report that no assessment has been performed as prescribed by national procedural law. In general, differing answers arise out of the fact that national procedural rules foresee a more nuanced reaction. The obligation of judges to assess the merits often varies as to whether the plaintiff has fulfilled all their procedural and formal duties. One answer from the online survey also suggest that precise national rules do not exist for such a case: „*The case will be postponed until the defendant will come to the appearance. If the case will be judged- the judge will not like that the defendant is not there and the national Decision will be mostly against the defendant*."



[318] Q7 regarding no assessment as prescribed in national law: 11 out of 128.

441. An analysis of the answers by the experts who have been interviewed by the National Reporters shows a very similar picture[319].



442. The chart Q A.4. presents data showing that according to the experience of the experts a high percentage of judges do an ex officio assessment as it is required for deciding on the jurisdiction of the court or at least perform the same assessment as if the defendant had entered an appearance. Nevertheless, the figures also reveal that 37 % of the judges perform no or just as very little assessment in practice and 4 % perform no assessment according to their national procedural law.

443. In regard to the assessment of the judge, a lawyer from France reports that judges only verify whether the defendant was "*properly informed of the legal action*" while applying Brussels I.[320] Another expert from Lithuania states that quite often judges perform "*little assessment what to do with the case and they go on to render a judgment*" in general,[321] whereas a Lithuanian court advisor found it difficult for the

[319] Q A.4. has been answered by 150 experts.
[320] Interview conducted by French National Reporter.
[321] Interview conducted by Lithuanian National Reporter with a judge.

judge to decide what to do if the defendant does not enter an appearance or does not submit any arguments according to the Brussels I regulation.[322]

444. The National Reports did not give an account of case law that pointed out any problems in this regard.

2.6. Specific Situations where a Defendant will not be Permitted to Defend Himself although he is Present/Aware of the Case (i.e. contempt of court or debarment from defending)

2.6.1. Status quo

445. About half of the National Reporters[323] were not aware of any such situations.

446. Only in some Member States the defendant can actually be removed from the proceedings because of undue conduct in court. This is the case in **Germany**, **Austria**, **Belgium**, **Croatia**, **Romania**, **Slovakia**, **Poland** and **Slovenia**. In many legal systems this sanction can only be imposed if the party has been warned by the court beforehand and has been advised on the consequences of continued contempt.[324] Only very few National Reports mention the possibility of a party representative being removed from the proceedings. Under the law of **Croatia** for example, both the party and their representative can be removed from the proceedings. If "a legal representative of a natural person was removed from the courtroom, the court shall postpone the hearing if this is necessary for the protection of rights and interests of a represented party (Art. 318 paras. 2-3)."[325] In **Slovenia**, "[i]f an attorney is removed from the courtroom, the court shall adjourn the hearing upon a motion by the party. If the hearing is conducted in absence of the party, the court shall adjourn it on its own motion and advise the party of their attorney being removed from the courtroom for violating the order".[326]

[322] Interview conducted by Lithuanian National Reporter.

[323] Finland, Luxembourg, Bulgaria, Sweden, Netherlands, France, Italy, Hungary, Estonia, Portugal, Cyprus, Latvia and Lithuania,

[324] See for example Austrian Code of Civil Procedure, Section 198 para. 2 and 3; Polish Law on the Organization of Court, Art. 48.

[325] National Report, Poland, question 2.3.5.

[326] National Report, Slovenia, question 2.3.5.

447. Some National Reporters pointed out in this context, that a defendant who is not represented by a lawyer in cases of mandatory legal representation, will be treated as not having entered an appearance and, thus, will be unable to defend themselves under the respective national law.[327]

448. In **England and Wales**, disobeying a court order could lead to the sanction of contempt of court. If a party is held in contempt of court, he/she faces criminal prosecution and debarment. In case of debarment, the sanctioned party is unable to defend himself and, thus, often loses the case.[328]

2.6.2. Problems and Assessment

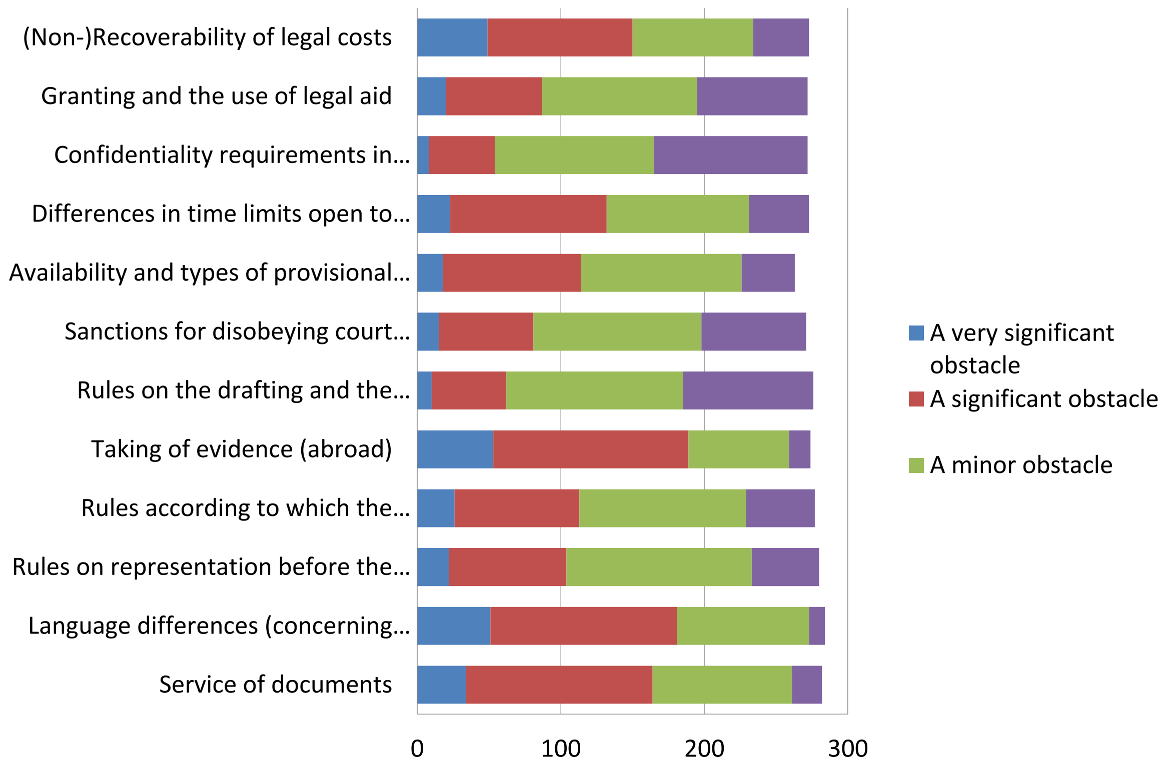
449. Q11 of the online survey asked for typical objections raised regarding service for defendants in default of appearance. 13 out of 96 respondents report that they have raised the objection that the defendant could not defend himself following a sanction for disobeying a court order, out of which 3 were successful. Hence, 10% of the respondents to Q11 have already experienced a situation where a defendant was not able to defend himself as such a sanction was imposed.

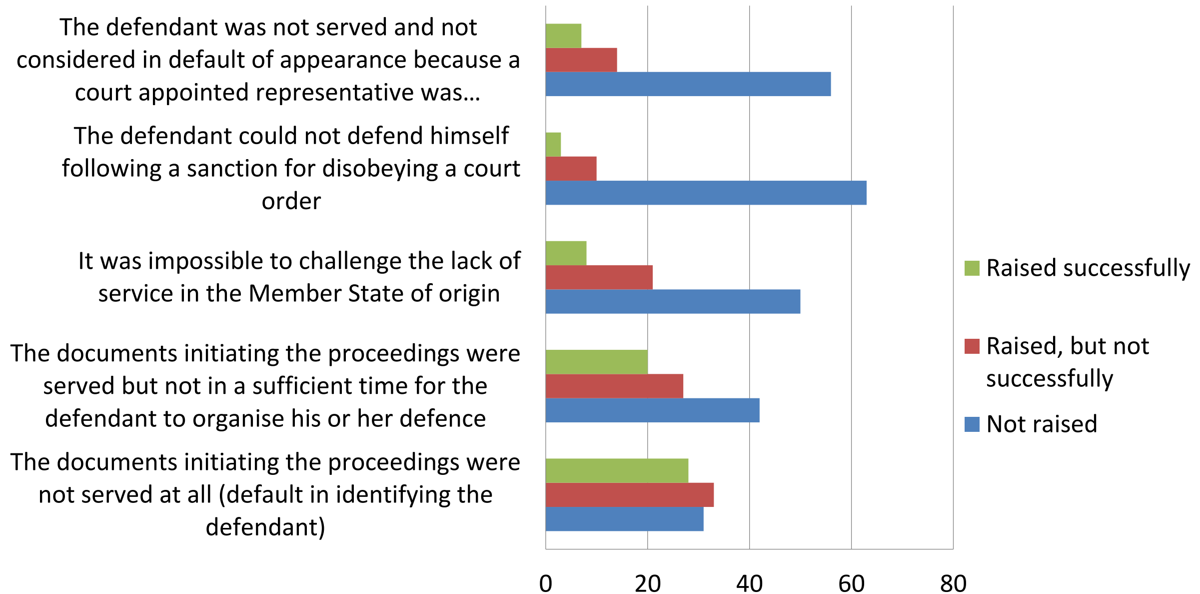
450. Additionally, 30 % of the respondents[329] of Q3, stated that sanctions for disobeying court orders generally are at least a significant obstacle to cross-border litigation. It has to be stated, though, that Q3 does not exclusively treat the possibility of a proper defense in default procedure cases, but asks for a general impression in cross-border litigation.

[327] Examples are Austria, Spain and Denmark.

[328] National Report, England and Wales, question 2.3.5.

[329] Q3 regarding sanction for disobeying a court order has been answered by 263 out of 588.


Q3
According to your experience, do you consider the following issues of the divergent civil procedural laws of Member States to be an impediment to cross-border litigation?
(Non-)Recoverability of legal costs
Granting and the use of legal aid
Confidentiality requirements in...
Differences in time limits open to...
Availability and types of provisional...
Sanctions for disobeying court...
Rules on the drafting and the...
Taking of evidence (abroad)
Rules according to which the...
Rules on representation before the...
Language differences (concerning...
Service of documents
0
100
200
300
A very significant obstacle
A significant obstacle
A minor obstacle


Q11
Regarding service for defendants in default of appearance (article 34 no 2 JR), what are the typical objections raised in your Member State:
The defendant was not served and not considered in default of appearance because a court appointed representative was...
The defendant could not defend himself following a sanction for disobeying a court order
It was impossible to challenge the lack of service in the Member State of origin
The documents initiating the proceedings were served but not in a sufficient time for the defendant to organise his or her defence
The documents initiating the proceedings were not served at all (default in identifying the defendant)
0
20
40
60
80
Raised successfully
Raised, but not successfully
Not raised

451. The practical relevance of the problem of sanctions for disobeying a court order seems to be mainly limited to England and Wales. The limitation of the possibility to formulate defences and present one's case may result in objections against recognition and enforcement in another Member State. The ECJ notoriously resolved the problem in *Gambazzi*, clarifying that the court of the Member State where enforcement is sought may consider debarment relevant from the point of view of public policy.[330] Even in that case, however, Italian courts ultimately recognised the English judgment, considering that the defendant was originally given an opportunity to present his case and debarment was the consequence of his intentional procedural behaviour in the Member State of origin[331]. For this reason, while it is important to refer to *Gambazzi* for the purposes of a comprehensive overview of the topic at hand, it seems that in practice court sanctions have very little impact on the free circulation of judgments and that, in any event, the public policy exception can capture such situations.

2.6.3. Proposals and Improvements

452. The provisions outlined above relate to rare and specific situations. They might be a reasonable reaction to such situations from a national law's perspective. Nevertheless, we note that there is obviously no consensus on how to react to such situations under European law today. Then again, because the situations are quite rare, we believe that the possibility to deny enforcement recognition in such cases on the basis of procedural public policy is sufficient in order to fight abuse from today's perspective. As a long-term perspective, the European legislator could, however, try to find a uniform approach on how to deal with the problem of respondents with unknown domicile. This, however, will require thought and time as the laws of the member states provide for rather different approaches here today, and all these approaches are based on different, sometimes fundamentally different understandings of the right to be heard in this context.

[330] C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, ECLI:EU:C:2009:219.

[331] *Gambazzi v Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company*, 14 December 2010, sez I, Corte d'appello di Milano.

2.7. Procedures to Oppose the Judgment in the Member State of Origin besides the Appeal

2.7.1. Status quo

453. In many Member States there are special proceedings to oppose default judgments. However, as the preconditions and consequences of default judgment differ greatly among the various legal orders, also the procedures to have such judgments set aside are quite different in the Member States.

454. In a number of Member States "normal" appeal and the special remedy against default judgments are mutually exclusive (e.g. **Finland**, , **Bulgaria**, **Sweden**, **France**, **Romania**). In Luxembourg, appeal becomes admissible, once opposition (the special remedy for default judgment) ceases to be.[332] In **Germany** there are two different types of default judgments that can be challenged by different remedies. A "first" default judgment can be challenged by protest (*Einspruch*) – a special remedy for default judgment – only. If the defendant fails to appear to the hearing subsequent to their *Einspruch* a "second" default judgment will be rendered, which cannot be challenged by *Einspruch* but only by means of appeal and only on ground that there was no negligent or intentional failure to appear on behalf of the defaulting defendant.[333]

455. In other Member States, the defendant can choose between appeal and the special remedy or even combine them. The latter is the case in **Austria**, **Belgium** and **Greece**.

456. Another point in which the various laws of the Member States differ, is whether the defendant needs to put forward an excuse for their failure to enter an appearance (in most cases that the defendant would have to show that there was no fault on their part). This is the case for example in **Luxembourg**, **Bulgaria**, **France**, **England** and **Wales** and **Slovakia**. For example in France, opposition is only available against a default judgment if the defendant had not been served with the document initiating the proceedings and if appeal is not possible;[334] a very similar rule is in force in

[332] Luxembourg New Code of Civil Procedure, sec. 571.

[333] German Code of Civil Procedure, sec. 514 para. 2 ZPO.

[334] French Code of Civil Procedure, Art. 473.

Romania.[335] In **Estonia** the defendant only needs to put forward a "good reason" for their default, if they (or their representative) have been served with the claim/the summons to the hearing by personal delivery against a signature or electronically and all procedural preconditions for the issuing of a default judgment have been met.[336] In **Croatia**, a default judgment (as well as a judgment in absentia, which is a different procedural instrument) can be challenged only on grounds of certain defects of the proceedings.[337]

457. In other Member States, the defendant can have the judgment set aside without bringing forward any valid excuse for their previous default (**Austria**, **Belgium**, **Finland**, **Germany**, **Netherlands**).[338] In some states, like **Austria**, **Germany** and the **Netherlands**, there is no threshold for this application at all. In **Finland** on the other hand, the defendant has to present grounds which could have been relevant for the decision of the case.[339] A very similar rule exists in **Belgium**.[340]

458. In some legal orders, the special remedy is only available for certain kinds of default judgment. For example, in **Austria** *Widerspruch* is only admissible, when the defendant has failed to make use of the very first occasion to enter an appearance. For example, if the defendant has presented a written statement of defense and then fails to make an appearance in the oral hearing, no *Widerspruch* can be brought against the default judgment.[341]

459. The time limit for remedies against default judgments – naturally – also differs strongly among the Member States. In **Austria** and **Germany** it is quite short, respectively fourteen days and two weeks. In **Belgium**, **Bulgaria** and **Sweden** the deadline is one month. The same is true for domestic defendants in **France**,[342] while

[335] Romanian New Code of Civil Procedure, Art. 504 para. 1.

[336] National Report, Estonia, question 2.3.6.

[337] National Report, Croatia, question 2.3.6.

[338] Also the Hungarian National Report does not name any further preconditions for an application for opposition; National Report – Mutual Trust, Hungary, question 2.3.6.

[339] Finish CJP, 12:15.

[340] See Belgian Code of Civil Procedure, Art. 1047 para. 4.

[341] Austrian Code of Civil Procedure, sec. 397a; see also supra for the distinction between "first" and "second" default judgment in Germany.

[342] French Code of Civil Procedure, Art. 528.

a defendant who resides abroad has as much as three months to file his application.[343] Greek law provides a quite long time limit of 60 days for parties residing abroad while defendants residing in **Greece** have to bring the application within 15 days upon service of the default judgment;[344] if the decision has not been served, there is no time limit for filing the application.[345] Again, those differences must also be seen in light of the different functions and preconditions for default judgments.

2.7.2. Problems and Assessment

460. Neither the online survey nor the template for the interviews did explicitly address this subject. Note, however, that there is a strong demand for harmonisation in cross-border proceedings in the interviews[346] as well as in the online survey[347].

461. The **Portuguese** National Reporter raised the question of whether the current Portuguese legal framework, which does not provide for review of default judgments, complies with Art. 19 of Regulation 805/2004.

462. The National Reporter for **Lithuania** referred to a number of cases, in which a default judgment had been rendered after a party – who was thought to be still residing in Lithuania – had been served with the claim by public announcement and it later turned out that the party had moved to another country. In such situations, the Lithuanian courts extend the three-month deadline for lodging a remedy against the default judgment.

2.7.3. Proposals and Improvements

463. It is easy to see that, while practically all Member States provide for specific remedies for such cases, there is an obvious lack of uniformity of law here. As a consequence, it is very hard to find out for a foreign litigant which remedy applies in a

[343] French Code of Civil Procedure, Art. 643.

[344] Greek Code of Civil Procedure, Art. 503.

[345] A very similar rule is in force in Romania; however, with the main difference that there is an absolute time limits of one year; see National Report, Romania, question 2.3.6.

[346] Q K.3. of the interviews: 75 % of the experts answered at least in favour of a common set of rules regarding essential procedural aspects.

[347] Q 40 of the online survey: a need for a better harmonisation has been answered by 65 out of 88; Q 50 of the online survey: a common set of rules regarding essential procedural in aspects has been answered in favour or highly in favour by 120 out of 153.

given situation. The situation is, therefore, not very transparent from a foreign litigant's point of view. The problem could be addressed by introducing a provision whereby judgments rendered in cross-border cases should contain simple and standardized information concerning the possibility for appeals. This could be done within the framework of the BX I Regulation, the Service Regulation or in a future legislative act providing for a codification of European civil procedure law in order to better serve the citizens of the Union. This proposal will be elaborated in detail in section 3 below.

2.8. In Case the Defendant is Unable to Introduce his Recourse within the Time-limit, what Circumstances Allow Him to Introduce his Recourse outside of this Time-limit

2.8.1. Status quo

a) European Law

464. For cases where the document initiating the proceedings had to be transmitted according to the Service Regulation Art. 19 para. 4 of said Regulation contains a specific provision for restitution in integrum under certain conditions. If the defendant who had not entered an appearance has failed to lodge their appeal in time, the judge has the power to relieve the defendant from the effects of the expiry of said time limit if the defendant has disclosed a *prima facie* defense to the action on the merits and certain other conditions are met, which will be discussed below at 2.8.2.2.

b) National Laws of the Member States

465. Most legal orders of the Member States provide for reinstatement or similar instruments that allow the defendant to lodge his remedy outside the regular time limit. In detail, those instruments operate under a variety of concepts and have different names, but they all share the common feature that the judge can allow the party to bring an application outside the original time limit, provided that certain – also quite differing – preconditions are met.

466. However, there are some exceptions, i.e. countries where there is no such instrument at all. This is the case e.g. in **England and Wales**, since there is no strict time limit for the application to set aside a default judgment in the first place.

Nevertheless, the defendant has to file the application "promptly", the criterion of promptness being fact specific.[348]

467. The standards for an application for reinstatement to be successful are quite different in the various Member States: For example, in **Luxembourg**, the applicant has to demonstrate that they did not know of the act that initiated the deadline or that they were incapable to act in due time and that there was no fault on their part.[349] The same is true for **France**.[350] In **Austria** the application can be granted even in cases of minor negligence of the applicant, as long as they can demonstrate that default was due to an unforeseen or inevitable incident.[351] In **Germany** and in **Poland**, the party has to show that s/he is not to be blamed for any fault.[352] In **Bulgaria**, the party has to prove, that s/he missed the deadline due to exceptional circumstances which the party was unable to overcome.[353] In **Estonia**, a party who fails to bring a petition to set aside a default judgment in time can ask for reinstatement if s/he can demonstrate a "good reason" for missing the deadline,[354] quite similarly **Romanian** and **Slovenian** law require "justified reasons" on the part of the applicant.[355] Also **Slovakian** law does not limit reinstatement to cases of force majeure, but accepts, as well, other "serious grounds".[356] **Belgian** law applies a very strict standard and provides for a suspension of the time limit only in cases of force majeure.[357] In a similarly strict way, **Greek** law allows restitution in integrum only in cases of "vis absoluta" and if the plaintiff has committed fraud in order to obtain the default judgment.[358]

[348] National Report, United Kingdom, question 2.3.7.

[349] Law of 22.12.1986, Art. 1.

[350] French code of Civil Procedure, Art. 540.

[351] Austrian Code of Civil Procedure, sect. 147 para. 1.

[352] National Report, Germany, question 2.3.7; Polish Code of Civil Procedure, Art. 168.

[353] National Report, Bulgaria, question 2.3.7.

[354] Estonian Code of Civil Procedure, sect. 415 para. 2.

[355] Romanian Code of Civil Procedure, Art 186 (for details further see National Report – Mutual Trust, Romania, question 2.3.7); Slovenian Code of Civil Procedure, Art. 116.

[356] National Report, Slovakia, question 2.3.7.

[357] National Report, Belgium, question 2.3.7.

[358] Greek Code of Civil Procedure, Artt. 152-158.

468. In **Denmark** only the Supreme Court can – under very narrow preconditions – grant leave to appeal against a default judgment after the elapse of the time limit and it can only do so for appeals on procedural grounds.[359]

469. In **Cyprus** there exists no time limit for challenging a default judgment, but the party must bring forward a "valid reason" for a delay in taking action against such a judgment.[360]

470. In most Member States the deadline starts either with the elapse of the original deadline or at the time when the obstacle, that hindered the defendant to act, ceases to exist/the defendant learns of the act he had to perform. In **France** the deadline to bring an application starts with the defendant's first personal notification of the first enforcement measure against him and elapses two month thereafter.[361] The length of this deadline varies greatly among the Member States. It can be as short as eight days[362] and as long as two month.[363]

471. Many legal orders stipulate an absolute time limit for such application, which most commonly is one year from the elapse of the original time limit. This is the case for example in **Finland**, **Luxembourg** and **Germany**. In **Hungary**, the absolute time limit for making an application for "justification" is three months from the elapse of the original time limit,[364] in **Estonia** it is six months,[365] in **Croatia** only two months.[366]

472. In other Member States, e.g. **Austria** and **France** there is no such absolute time limit. **France** has, however, notified to the commission according to Art. 19 para. 4 and Art. 23 para. 1 of the Service Regulation that an application according to Art. 19 para. 4 is inadmissible if it is filed after the expiry of a period of one year following the

[359] National Report, Denmark, question 2.3.7.

[360] National Report, Cyprus, question 2.3.7.

[361] National Report, France, question 2.3.7.

[362] Croatian Code of Civil Procedure, Art. 118 para. 2.

[363] National Report, France, question 2.3.7.

[364] National Report, Hungary, question 2.3.7.

[365] Estonian Code of Civil Procedure, sect. 67 para 2.

[366] Croatian Code of Civil Procedure, Art. 118 para. 4.

date of the judgment. According to the CJEU, this also leads to the inadmissibility of application for relief according to national law, which has been filed after that date.[367]

2.8.2. Problems and Assessment

2.8.2.1. Problems Arising from National Law

473. Neither the online survey nor the template for the interviews did explicitly address this subject.

474. According to the National Report for **Lithuania,** Lithuanian case law has extended the time limits for challenging a default judgment for foreign party when the statement of claim has not been served properly. The same is true for the five-years time limit to apply for the renewal of civil proceedings, when the defendant does not reside in Lithuania and has not been aware of the proceedings.[368]

2.8.2.2. Problems arising from Union Law and from its Relationship with National Law

475. As mentioned above,[369] Union law provides a special, autonomous provision for restitution in integrum which is applicable in cases where the writs of summon or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of the Service Regulation and the defendant failed to enter an appearance. Under certain conditions, the judge can relieve such defendant from the effects of the expiry of the time limit for appeal from a judgment that has been rendered against him or her.

476. This provision – Art 19 para. 4 of the Service Regulation – seems problematic for several reasons. First and foremost, the conditions under which restitution in integrum (for the time limit to bring an appeal) can be granted are not clear.

477. Art. 19 para. 4 a) of the English version of the Regulation sets out the following requirements: the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, **or** knowledge of the judgment in sufficient

[367] 7.7.2016, C-70/15, *Lebek*, ECLI:EU:C:2016:524; see also infra 2.8.2.2.

[368] See case No. 3K-3-121/2011.

[369] Supra 2.8.1.

time to appeal.[370] The German version, however, requires that **both conditions** (no knowledge of the document in sufficient time and no knowledge of the judgment in sufficient time) have been met at the same time (the German version uses the word "und" which translates as **and**). While the English version is in accordance with e.g. the French, the Italian and the Spanish one, the German text seems to be better in line with the purpose of the provision, to grant an extraordinary remedy in cases where the defendant did not have knowledge of the document initiating the proceedings in time. When taken literally, the English text would allow for relief of the defendant also in cases where fault can be attributed to him either for the failure to enter into the proceedings or for the failure to lodge an appeal against the judgment, when only the other omission can be attributed to the lack of information and has happened without any fault on his part. Hence, in an extreme situation, the English text of Art. 19 para. 4 – if taken literally – would allow for restitution in integrum in cases where the defendant has gained knowledge of the document initiating the proceedings in time and only did not learn of the default judgment in time to lodge an appeal.

478. Further ambiguities and problems arise from the rules on time limits provided for by Art. 19 para. 4. First, the provision requires the defendant to bring his application within a reasonable time after he has knowledge of the judgment. What "a reasonable time" might be in eyes of the judge, is rather unclear and to a high degree unforeseeable for the defendant.[371]

479. The last subparagraph of Art. 19 para. 4 further allows for the Member States to notify an absolute time limit for the application, which may not be less than one year following the date of the judgment. As the CJEU has held in a recent decision,[372] Art. 19 para. 4 does not only set a minimum standard for restitution in integrum when the time limit for appeal has elapsed; if a Member State has notified an absolute time limit, the defendant cannot bring an application for relief under national law after the elapse of this time limit, even when national law provides for a longer time limit. This

[370] Art. 19 para 4 b) further requires that the defendant has disclosed a prima facie defence to the action of the merits.

[371] Cf. Bajons in Fasching and Konecny (Eds) Kommentar zu den Zivilprozessgesetzen (2nd edn, Manzsch'sche Verlags- und Universitätsbuchandlung, Vienna, 2010) Art. 19 EuZVO, para. 10.

[372] 7.7.2016, C-70/15, *Lebek*, ECLI:EU:C:2016:524.

situation could potentially lead to an unjustified discrimination of parties who reside in a different Member States, since they might be time-barred from bringing an application for relief, while a domestic party in the same situation would still be able to do so.

480. In the same judgment[373], the CJEU has also held that the concept of "proceedings to challenge a judgment" referred to in Art. 34 para. 2 of the Brussels I Regulation must be interpreted as also including applications for relief (restitution in integrum) when the period for bringing an ordinary challenge has expired. Hence, recognition and enforcement of a judgment cannot be denied on grounds of Art. 34 para. 2 Brussels I Regulation (Art. 45 para. 1 b Brussel Ibis Regulation) if the defendant could have filed such an application and failed to do so.

2.8.3. Proposals and Improvements

481. In regard to the clear need of a harmonisation of essential procedural aspects[374] and the fact that 61 % of the experts in the interviews[375] and 45 % of the participants in the online survey identified the lack of coherent instruments as problematic[376] we suggest that the European legislator should replace today's Art. 19 (4) of the Service Regulation with a more logical, uniform and just solution. In this context, three main proposals can be put forth. Firstly, all language versions of the Regulation should specify that restitution in integrum is only possible if the defendant has not gained knowledge of both the document initiating the proceedings and the judgment in time. Secondly, the broad wording "reasonable time" should be substituted with foreseeable time-limits. Thirdly, the notification system set forth in the last subparagraph of Article 19(4) should not lead to unjustified discrimination of parties residing in a different Member State. By amending this provision the European

[373] 7.7.2016, C-70/15, *Lebek*, ECLI:EU:C:2016:524.

[374] Q 40 of the online survey: a need for a better harmonisation has been answered by 65 out of 88; Q 50 of the online survey: a common set of rules regarding essential procedural in aspects has been answered in favour or highly in favour by 120 out of 153.

[375] Q J. 4 of the interviews.

[376] Q 4 of the online survey which has been answered by 262 participants.

legislator would also action the request for eradicating wording discrepancies in regulations[377] and for a harmonisation in general[378] as urged in the interviews.

3. Perspective of the State of Enforcement

482. This chapter has identified a number of problems and obstacles in the stage of the proceedings where a default judgment is rendered. All these problems are reflected in the defences a respondent might raise against a default judgment at the enforcement stage. As a matter of principle, the European legislator should on the one hand try to prevent such problems as far as possible in the proceedings in the state of origin; this, however, does not mean that one, therefore, should do away with the defences of a respondent in the enforcement stage. Rather, one should keep these defences and better do away with the problems at the stage of the proceedings in the state of origin in order to prevent the defences in the enforcement proceedings to become practically relevant. These objections against enforcement and recognition should, however, in any event be kept as emergency brakes in cases where the proceedings went wrong in the state of origin – note that, basically, such defences are about a respondent's right to be heard and, therefore, a matter of public policy of every enforcement state.

483. The following section consists of three parts. First, it will give a summary of the case law on grounds-of non-recognition under the Brussels I (and Ibis) Regulation that have been invoked against the recognition and enforcement of judgments stemming from default proceedings. Second, it will report on the respective results of the online survey. In a third step, conclusions and recommendations will be drawn.

3.1. Summary of Case Law on Grounds of Non-Recognition

484. The courts of the Member States were confronted with various problems and challenges in the context of enforcing judgments originally rendered in another EU Member State. In the following sub-section, the court decisions that were cited by the

[377] As stated for example by an academic and attorney from Hungary regarding Brussels I.
[378] As stated by a practitioner from Germany, a judge from Greece with 8 years of experience as well as by an academic from Malta with 8 years of experience.

National Reports shall be grouped and presented according to the several issues that were tackled in those judgments.

(a) Lack of service of the document initiating the proceedings

485. A considerable number of decisions dealt with an application to deny enforcement due to the fact that the document initiating the proceedings had not been served upon the defendant or that the latter had not been notified of and summoned to the oral hearing.[379] In this context, the LG Trier in **Germany** stressed that the document has to be served in an official way, meaning that a notification by an ordinary letter sent by one party to the other does not suffice.[380] In **Luxembourg**, a court refused to enforce an Italian default judgment where the service of the initiating document had been conducted via diplomatic channels – it could, however, not be verified whether it had actually reached the defendant.[381] A **Finnish** court had to deal with a case where the defendant (after having submitted a written statement of defence) had not received any summons for the oral hearing. Under the given circumstances, however, the court rejected the application to refuse enforcement, since the defendant had not seized the possibility to challenge the default judgment in Estonia.[382]

(b) Service to the wrong place

486. In a number of other cases, service was indeed conducted; however, the documents were served to the wrong place. The **Luxembourg** Court of Appeal denied enforcement of a French decision in a case, where the relevant documents had been served to the former address of the defendant which supposedly was his “*last known address*”. Although this had been in compliance with French law, the Luxembourg court concluded that the defendant had not been given sufficient opportunity to

[379] Court of First Instance of Antwerp 4 February 2003, unpublished; a petition in cassation (on ground of Article 37(2) 1968 Brussel Convention) against this judgment has been rejected by the Court of Cassation 28 January 2005, Pasicrisie 2005, Vol. 1, 224; MD & CT [2014] EWHC 871 (Fam), 25 March 2014; English High Court, 9 July 2015, Corcoz & Anor v Molina (unreported); see also National Report – Mutual Trust, Germany, question 3.2.2.; Portuguese Supreme Court, Ruling of 9 July 2015, that qualified the lack of notification as a breach of public policy.

[380] LG Trier, 17 October 2002, 7 HKO 140/01, NJW-RR 2003, 287-288.

[381] National Report, Luxembourg, question 3.2.2., cf. Judgment of 19 June 2014 (case 36918).

[382] National Report, Finland, question 3.2.2., with reference to VaaHO:2015:9.

defend himself.[383] A similar judgment was rendered by the Luxembourg Court of Appeal with regard to a Belgian default judgment.[384] The **Swedish** Svea Court of Appeal had to decide on the enforceability of an Italian default judgment under the following circumstances described by the Swedish National Report: "*Based on the facts in the case a registered letter had first been sent to the old address and then to the new address. In Sweden this meant that a notification and a follow-up reminder to collect a registered letter at the post office was sent by the post office to the addressee. When no collection took place within a certain time, the letter was returned to the Italian sender. The notification to collect the registered letter includes no information on who had sent the letter or what documents it contained.*"[385] In light of these facts, the Swedish court concluded that the defendant in the Italian proceedings had not been given sufficient opportunity to defend himself.

487. In **Romania**, the Alba Iulia Court of Appeal was asked to deny enforcement of an Italian default judgment, since it appeared from the facts that the served documents were collected by a person different from the defendant from the Italian post office. The defendant was resident in Romania and, thus, claimed to have learnt about the proceedings and the decision only at the moment of enforcement. The Romanian court rejected the application to refuse enforcement, as the defendant "*should have challenged the enforcement (contestație la executare). The decision of the Sibiu General Court recognising the Italian judgment remained in place (Sibiu General Court, Decision No. 88/19.06.2015).*[386]

488. In **France**, the CA Nancy refused to enforce a decision rendered in Luxembourg, as the defendant had been served at his workplace and not personally. Thus, he had not been regularly notified according to Reg. No. 1393/2007.[387]

489. A **German** judgment was denied enforcement in **Romania**, since the documents initiating the procedure had been sent to an address other than the one of the

---

[383] Luxembourg Court of Appeal, Judgment of 26 June 2014 (case 40006).

[384] National Report, Luxembourg, question 3.2.2.

[385] National Report, Sweden, question 3.2.2.

[386] National Report, Romania, question 3.2.2, cf. Alba Iulia Court of Appeal, Section I Civil for Labour and Insurance Law Conflicts, Decision No 570/13.08.2015.

[387] CA Nancy, 11 June 2013, n°12/02657.

headquarters of the debtor company.[388] Similarly, in a case the **Austrian** Supreme Court had to deal with in 2008, the documents initiating the proceedings in the Member State of origin were served to the branch office and not to the principal place of business of the defendant. In this case, however, the Austrian Supreme Court granted enforcement stating that the defendant had in fact received the document and had also failed to explain why these irregularities had prevented him from exercising his rights in the original proceedings.[389]

(c) Notification via public announcement

490. The means of service had to be examined by courts in cases where enforcement was challenged due to the fact that the notification in the original proceedings had been conducted via public announcement. In most of the cases this was regarded as unlawful "fictitious service" and the default decision was, therefore, refused to be recognized.[390] In **Greece**, some courts considered these cases as a violation of public policy.[391] In another Greek decision, however, a foreign judgment was granted enforcement even though service was rendered via publication ("*[t]he sufficiency of time has been confirmed even in cases where the claim was served by publication*").[392]

(d) Proof of service

491. A significant number of the reported decisions dealt with questions of proof of due service to the defendant.[393] The examples range from certificates of service that

[388] Bucharest General Court, Commercial Section Decision No. 14351/2009; the decision was upheld by the Bucharest Court of Appeal, Decision No. 326/26 May 2010.

[389] Supreme Court 08.05.2008, 3 Ob 34/08h, ECLI:AT:OGH0002:2008:0030OB00034.08H.0508.000.

[390] Court of Appeal of Madrid, 12 February 2002 [AP de Madrid (Sección 13ª) Sentencia de 12 febrero 2002, JUR\2002\132026)]; Austrian Supreme Court 21 January 2015, 3 Ob 232/14k, ECLI:AT:OGH0002:2015:0030OB00232.14K.0121.000; see also CA Riom, 4 October 2016, n°15/02034 (this decision was, however, rendered under French national law). Also the German Federal Court had to deal with a case of fictitious service in Poland. Enforcement was denied due to a violation of public policy (BGH 10 September 2015, IX ZB 39/13, NJW 2016, 160).

[391] Drama 1st Instance Court 251/2000, Armenopoulos 2001, 535; Thessaloniki CoA 2321/2007, unreported.

[392] National Report, Greece, question 3.2.2; cf. Thessaloniki CoA 164/2010, Civil Procedure Law Review 2010, 709.

[393] Vrancea General Court, Decision No. 63/15.06.2015; CA Bordeaux, 31 March 2016, n°14/05833; in the proceedings before the Regional Court Bratislava, 14 November 2012, File Nr. 22CoE/407/2012, the service could indeed be proved.

could not be provided,[394] receipts that had not been signed by the recipient[395] to service via diplomatic channels, where the actual service upon the defendant could not be verified.[396] In several judgments it was stressed that the burden to prove that the document was duly served upon the defendant lies with the claimant.[397]

(e) Translation requirements

492. Translation requirements for documents served upon the defendant were also to be examined in several cases that were referred to in the National Reports. A lack of translation was considered to be a ground to refuse the enforcement of the default judgment, since the defendant was not able to arrange for a suitable defense and/or to challenge the default decision.[398] This does not apply, however, if the defendant in fact became aware of the proceedings and was able to participate within a sufficient period of time.[399]

493. The **Austrian** Supreme Court granted enforcement even though the default judgment had not been served to the defendant. Since the initial action had been translated into German and the defendant had been informed about his rights and the legal consequences of the default judgment against him, his rights of defense in terms of Art 34(2) of the Brussels I Regulation had been sufficiently preserved.[400]

494. The **Polish** Supreme Court “stressed that Regulation 1397/2007 does not require the translation to be prepared by a specialized group of professionals, such as certified translators. The court also noticed that the defendant failed to indicate what part of the translation was incomprehensible to him. Moreover, the defendant managed to

[394] CA Pau, 12 April 2013, n°13/1582; Athens CoA 1356/2007, Hellenic Justice 2008, 1498.

[395] National Report, Luxembourg, question 3.2.2, with reference to a judgment whereby a Belgian default decision was denied enforcement in Luxembourg.

[396] National Report, Luxembourg, question 3.2.2., cf. Judgment of 19 June 2014 (case 36918).

[397] Court of Appeal of Islas Baleares of 15 March 2005 [AP de Islas Baleares (Sección 3ª) Auto num. 40/2005, ECLI:ES:APIB:2005:103A]; see also National Reports question 3.2.2.: Denmark, Poland, Spain, Luxembourg (cf. Judgment of 10 February 2011 (case no 35005)).

[398] OLG Hamburg, 7 November 2008, 6 W 22/08, BeckRS 2009, 04375; National Report, Denmark, question 3.2.2; National Report, France, question 3.2.2, cf. Cass. Com, 3 April 2013, n°11-19.000.

[399] BGH, 3 August 2011, XII ZB 187/10, NJW 2011, 3103-3106.

[400] Austrian Supreme Court 19 June 2013, 3Ob 84/13v, ECLI:AT:OGH0002:2013:0030OB00084.13V.0619.000.

respond to the document instituting the proceedings by filing a comprehensive reply filled with professional legal reasoning."[401]

(f) Sufficient time period for defence

495. Another crucial issue to be examined at the enforcement stage was the time period provided for the defendant to arrange for a defence in the original proceedings. In this context, eight days[402] and fifteen days[403] were considered to be too short, whereas two and a half months[404] and even three weeks[405] were considered to be sufficient.

496. According to the **Greek** National Report, a violation of public policy was affirmed, "when the service of the complaint took place after the originally scheduled date of hearing, even if the hearing is postponed".[406]

497. A **French** court refused to enforce a decision rendered in Luxembourg, since the notification letter (provided by the claimant) contained no indication as to its sending or receiving date. The certificate did not contain the notification date.[407]

(g) Lack of service of other documents

498. Some courts emphasized that under Art 34(2) Brussels I Regulation only the due service of the document initiating the proceedings needs to be examined and is, thus, crucial for the question of granting enforcement. Subsequent documents (not) duly served in the course of the proceedings are, however, not subject to scrutiny under this provision.[408]

---

[401] National Report, Poland, question 3.2.2.

[402] OLG Düsseldorf, 11 October 1999, 3 W 258/99, NJW 2000, 3290-3291.

[403] National Report, Germany, question 3.2.2.

[404] BGH, 6 May 2004, IX ZB 43/03, NJW 2004, 2386-2388.

[405] OLG Köln, 6 October 1994, 7 W 34/94, NJW-RR 1995, 446-448; Athens CoA 10698/1995, Hellenic Justice 1996, 1402; similarly Thessaloniki CoA 267/1999, Armenopoulos 1999, p. 718 = Commercial law Survey 1999, p. 275.

[406] National Report, Greece, question 3.2.1.; referring to Single Member District Court Thessaloniki 15948/2009, Armenopoulos 2014, 258.

[407] CA Metz, 19 April 2016, n°14/00029.

[408] Thessaloniki CoA 3299/2000, Armenopoulos 2001, p. 377; Austrian Supreme Court 19.06.2013, 3Ob 84/13v, ECLI:AT:OGH0002:2013:0030OB00084.13V.0619.000 (here: judgment was not served); BGH, 21 March 1990, XII ZB 71/89, NJW 1990, 2201-2203.

(h) Possibility to challenge the default judgment

499. The majority of the decisions referred to in the National Reports dealt with the opportunity to challenge the default judgments, the lack of which being a potential ground to deny the enforcement in another Member State.[409] Conversely, enforcement was granted in cases where it could be verified that the defendant did indeed have the possibility to appeal against the decision and he/she did, however, not make use of it.[410]

500. In **Luxembourg**, enforcement was denied in a case where an appeal had been filed in the State of origin and the appeal proceedings were still pending.[411] Under similar circumstances, a court in the **United Kingdom** decided to stay the enforcement proceedings until the "*opposition procedure*" in the state of origin (in this case: Belgium) had come to an end.[412]

501. Furthermore, there were cases reported where the defendant had in fact appealed against the default decision. Since, however, difficulties arising out of procedural requirements in the appeal proceedings had prevented him/her from being successful, the courts at the enforcement stage refused to enforce the default decision. For example, in **Luxembourg** the enforcement of an Italian decision was denied in a case where the defendant had raised an appeal before the Italian courts. The power of attorney he had provided was, however, not in conformity with Italian requirements. The Luxembourg court found that it was not possible for the defendant to raise an effective appeal and refused to enforce the Italian judgment.[413] The **French** Cour de Cassation denied enforcement in a case where the defendant's challenge of the original decision was rejected because he had not paid the court

[409] E.g., Vrancea General Court, Decision No. 63/15.06.2015; see also CJEU, 6 September 2012, C-619/10, Trade Agency, ECLI:EU:C:2012:531.

[410] Court of first instance of Brussels, 13 October 2004, Tijdschrift voor Belgisch burgerlijk recht 2005, 125; Reeve & Others v Plummer [2014] EWHC 362 (QB), 18 December 2014; cf. National Report, Latvia, question 3.2.2.; National Report, Finland, question 3.2.2., with reference to VaaHO:2015:9.

[411] National Report – Mutual Trust, Luxembourg, question 3.2.2.

[412] Reeve & Others v Plummer [2014] EWHC 362 (QB), 18 December 2014; in this case, the Belgian judgment had been rendered against three defendants that had all not been served with the claim. Only one of them challenged the subsequently rendered default judgment. The English and Welsh court granted enforcement of the decision against the other two defendants that had not raised an appeal against the original decision.

[413] National Report, Luxembourg, question 3.2.2.; cf. Judgment of 19 June 2014, case no 36918.

fees in advance. According to the Cour de Cassation, the Court of Appeal had not examined whether the absence of translation had deprived the defendant from the possibility to oppose the judgment.[414] When enforcement was sought in a case before the CA Versailles, the defendant submitted that he had opposed the Italian ex parte injunction that granted provisional enforcement. However, by means of such an opposition enforcement can be suspended only in very rare cases (in case it jeopardized the finance of the company). In this case, however, company was huge and the debt small – hence, there was no realistic chance that the enforcement could have been suspended. The CA Versailles, therefore, considered that the defendant had no effective possibility to challenge the decision before it became enforceable and refused the enforcement of the decision in France.[415] In **Belgium**, the Antwerp Court of First Instance denied enforcement of a French decision, as "*[t]he defendant had appealed this judgment, but the applicable rules of French civil procedure placed him in a weak position: he was not allowed to file (for the first time) a counterclaim or a claim in intervention during the appellate proceedings*".[416]

502. The **Hungarian** Report referred to a case, where enforcement of a Finnish decision was granted despite the fact that the defendant had been deprived of the possibility to lodge an appeal in due time. The Hungarian court stated that "*the decision of the Finnish court is enforceable irrespective of any appeal, the debtor is entitled to lodge a claim to suspend the enforcing procedure, thus he is in a position to avoid the enforcement of the decision, and at the same time, the violation of the right to the due process of law.*"[417] Conversely, the **Austrian** Supreme Court ruled that it is "possible" for the defendant to challenge a default judgment in terms of Art 34(2) of the Brussels I Regulation (now Art 45 para. 1 (b) Brussels Ibis) only if he had in fact taken notice of the judgment in a timely manner which would have allowed him to defend himself in front of the court of origin. The court held that since, in this case, the default judgment had not been served to the defendant, the mere fact that the

[414] Cass. Com, 3 April 2013, n°11-19.000.

[415] CA Versailles, 2 October 2014, n°14/01687.

[416] Court of First Instance of Antwerp 4 February 2003, unpublished; a petition in cassation (on ground of Article 37(2) 1968 Brussel Convention) against this judgment has been rejected by the Court of Cassation 28 January 2005, Pasicrisie 2005, Vol. 1, 224.

[417] National Report, Hungary, question 3.2.1.

defendant had taken notice of the default judgment during the enforcement proceedings was not sufficient to conclude that it was possible for the defendant to challenge the judgment.[418]

503. Finally, the **Polish** National Report referred to a request for a preliminary ruling submitted by the Polish Supreme Court to the CJEU. It concerned the question whether "*the possibility of commencing proceedings to challenge a judgment laid down [in Art 34(2) Brussels I Regulation], covers both the situation in which such a challenge can be brought within the time-limit laid down in the national law as well as the situation in which that time-limit has already passed but it is possible to submit an application for relief from the effects of its passing*".[419] In this case, the defendant was informed about the default judgment only at a point in time when the deadline for challenging the decision had already expired. The defendant could have, however, filed an application for reinstating the expired deadline, but he did not make use of this possibility. In the meantime, the decision of the CJEU (C-70/15) has been rendered. The CJEU stated that "*The concept of 'proceedings to challenge a judgment' referred to in Article 34(2) […] must be interpreted as also including applications for relief when the period for bringing an ordinary challenge has expired.*" With regard to the time periods within which an application for relief can (still) be submitted, the CJEU ruled that Art 19(4) of Reg. No 1393/2007 shall be considered, whereby provisions of national law concerning the period for filing such applications are overruled.[420]

(i) Other issues:

504. In some cases, the enforcement had to be denied due to the fact that the certificate referred to in Artt 53, 54 of the Reg. No. 44/2001 was not produced before the court where enforcement was sought.[421] In the *Trade Agency* case, the CJEU held that the court in the Member State where enforcement of a default judgment is sought has

[418] Austrian Supreme Court, 31. January 2007, 3 Ob 9/07f, ECLI:AT:OGH0002:2007:0030OB00009.07F.0131.000.

[419] Polish Supreme Court, 27 November 2014, V CSK 487/13.

[420] CJEU, 7.7.2016, C-70/15, Lebek, ECLI:EU:C:2016:524.

[421] National Report, Romania, question 3.2.2., cf. Olt General Court, Decision No. 1067/19.10.2010.

jurisdiction to verify whether the information in the accompanying certificate issued pursuant to Art. 54 of that Regulation is consistent with the evidence.[422]

505. The Court of Appeal of Nürnberg denied enforcement of a maintenance order due to a violation of **German** (procedural) public policy, since, *inter alia*, the defendant had not been informed of the procedural consequences following from the receipt of the order.[423]

506. In **Luxembourg**, enforcement of a French judgment was denied because the defendant had supposedly not been informed of the transfer of the case from the French court to another.[424]

507. In two cases that were reported, the national courts, when examining the application to enforce the foreign default judgment, did not only refer to the grounds provided by the Articles of the Brussels I Regulation, but (additionally) *applied their national procedural law.* In this context, the **Greek** Supreme Court held that a foreign ex-parte decision – that could not be enforced under the Brussels I regulation – could be recognized and enforced in Greece under Greek domestic law if certain prerequisites were met.[425] The **Romanian** National Report referred to a judgment by the Vrancea General Court as follows: "*The particularity of the assessment of the court is that the judge does not proceed only on assessing the compliance with the grounds of refusal provided by Article 32 Brussels I. The court verifies also the fulfilment of the criteria contained in with Articles 1095-1097 NCPC that generally mirror the European provisions regarding the grounds of refusal. However, Article 1094 NCPC mentions that Title III (Effectiveness of foreign judgments) does not concern decisions issued in other Member States.*"[426]

[422] CJEU, 6 September 2012, C-619/10, Trade Agency, ECLI:EU:C:2012:531.

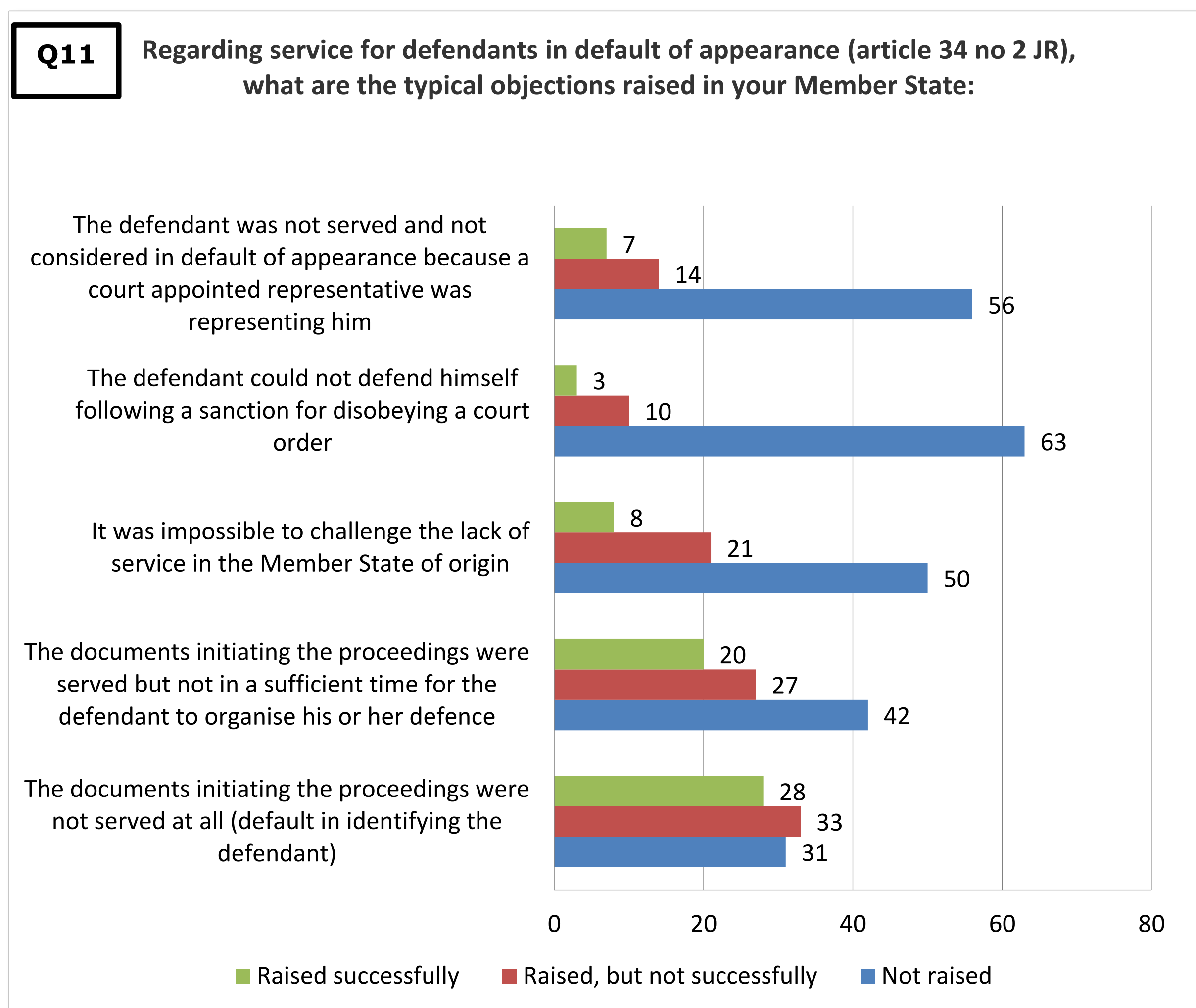
[423] National Report, Germany, question 3.2.1.

[424] Judgment of 10 February 2011 (case no 35005).

[425] Greek Supreme Court 1028/2009, Civil Procedure Law Review 2010, p. 55.

[426] National Report, Romania, question 3.2.2., Vrancea General Court, Decision No. 63/15.06.2015.

3.2. Problems Pointed Out by Participants in the Online Survey

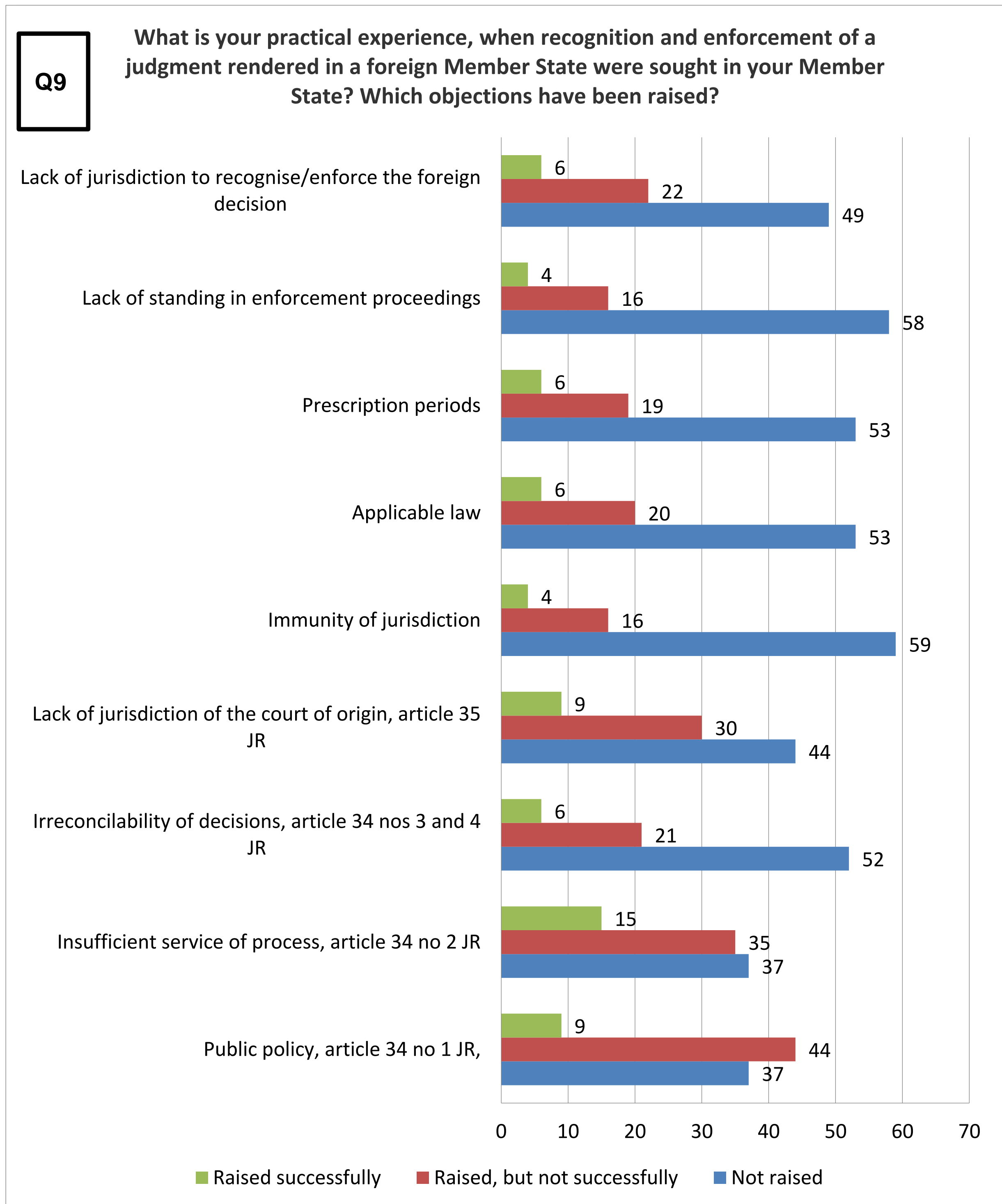


508. Q11[427] of the online questionnaire shows the aspects of cross-border service which are usually subject to an objection raised for defendants in default of appearance. (Art. 36 (2) Brussels Ibis) The major problems arise out of the process of the service itself, as those objections were often raised and had success. The documents were either not served at all or served too late to match national time limits. The practical importance of an effective cross-border service can also be extracted out of the answers to Q8, which ask for difficulties concerning the enforceability of a Brussels I judgment rendered in the own Member State and enforced in a different member state. The objection regarding an insufficient service has been at least once successfully raised by 15% of the respondents[428], the highest number compared to

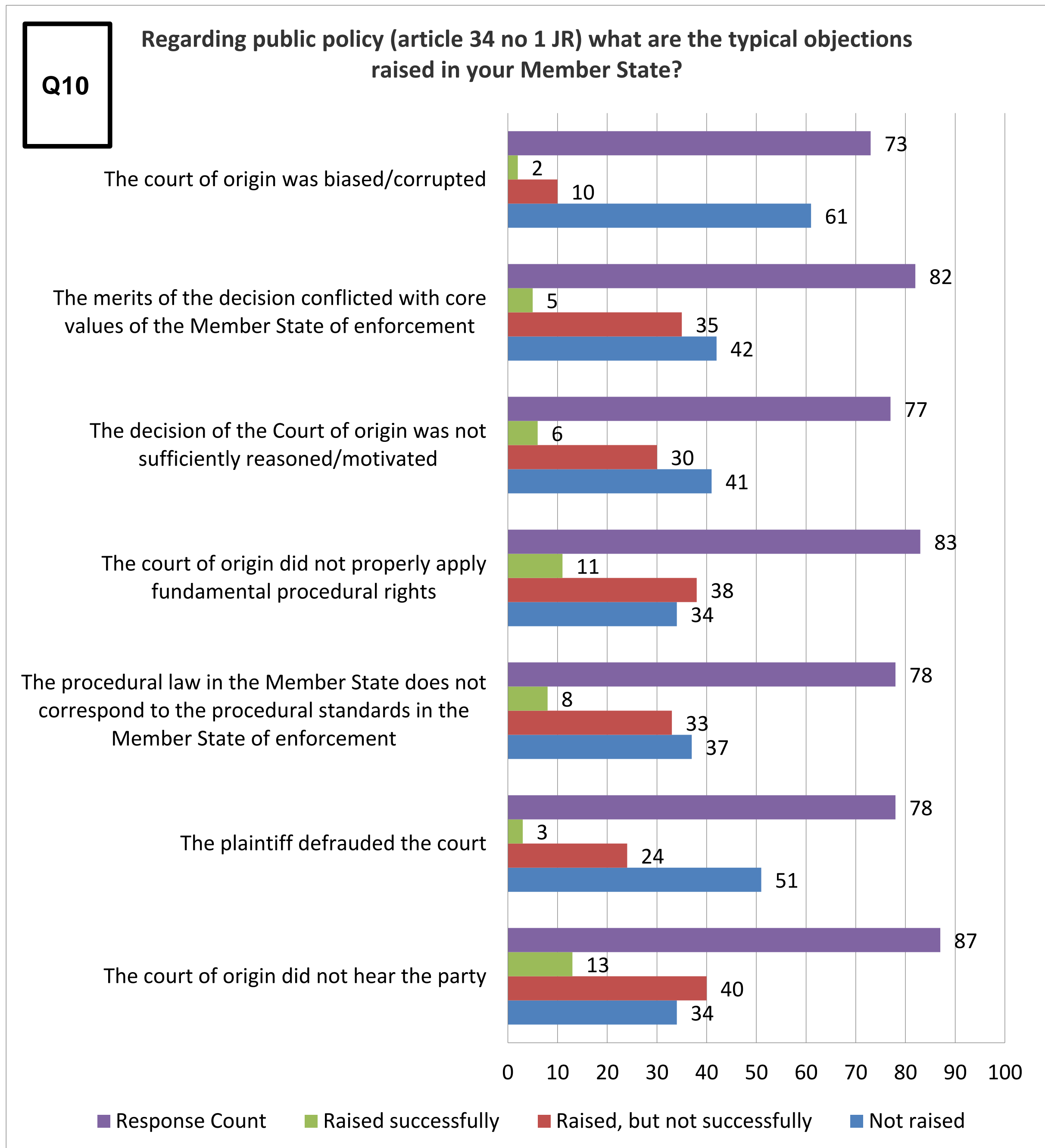
[427] Q11 was answered by 96 out of 588 respondents.

[428] Q8 *re*garding the insufficient service of process was answered by 74 out of 588 respondents.

other possible objections. All this clearly shows that service is of the essence here. Of course, the overview on national case-law has shown many other reasons for the non-enforcement of default judgments. However, none of these aspects turned out to be as important as problems arising from the service of the document initiating the proceedings.



509. Q9 shows, again, that service can be problematic in cross-border litigation, as those objections are often raised and relatively successful. 15 out of 50 respondents reported that these objections have been accepted by the judge. Regarding public policy, Q10 asks for the specific content of the objections:



510. Procedural problems as well as divergences in procedural law between the Member States are a regular content of objections concerning public policy. The violation of

the right to be heard[429] is the most frequently raised objection (61%) and the most successful one (25%). This ground is followed by the improper application of procedural rights[430] (60%, 22% successful) and the non-consistency of the two divergent procedural rights regimes in the state of origin and the state of enforcement[431] (53%, 20% successful). The relative frequency of objections concerning the respect of fundamental procedural rights could be an indicator of uneven procedural rights standards across the Member States. It is telling that substantive public policy plays no significant role here.

3.3. Interview Results

Brussels I Regulation:

511. A Lawyer from **Bulgaria**[432] argued that "although direct enforcement should be possible in the case, sometimes additional documents are requested by the court, proceedings are suspended etc.". Furthermore, two experts from **Hungary** are facing a lack of information about the enforcement rules in other member states in general.[433]

512. A **Croatian** judge[434] states that the "*typical objections are mainly related to the violation of the right of hearing (Art. 34.2 Brussels I)*", but they turn out to be unsuccessful. Moreover, a judge from **Germany** and one **Romanian** Academic with 15 years of experience reported that most of the objections regarding the default of the defendant concern the service of documents. Although, many experts state that those objections are rarely successful.[435] Additionally an **Estonian** reports that this objection is often raised abusively to gain time.

[429] Q10 concerning the right to be heard was raised according to 53 out of 87 respondents, 13 times successfully.

[430] Q10 concerning the improper application of procedural rights was raised by 49 out of 83 respondents, 11 times successfully.

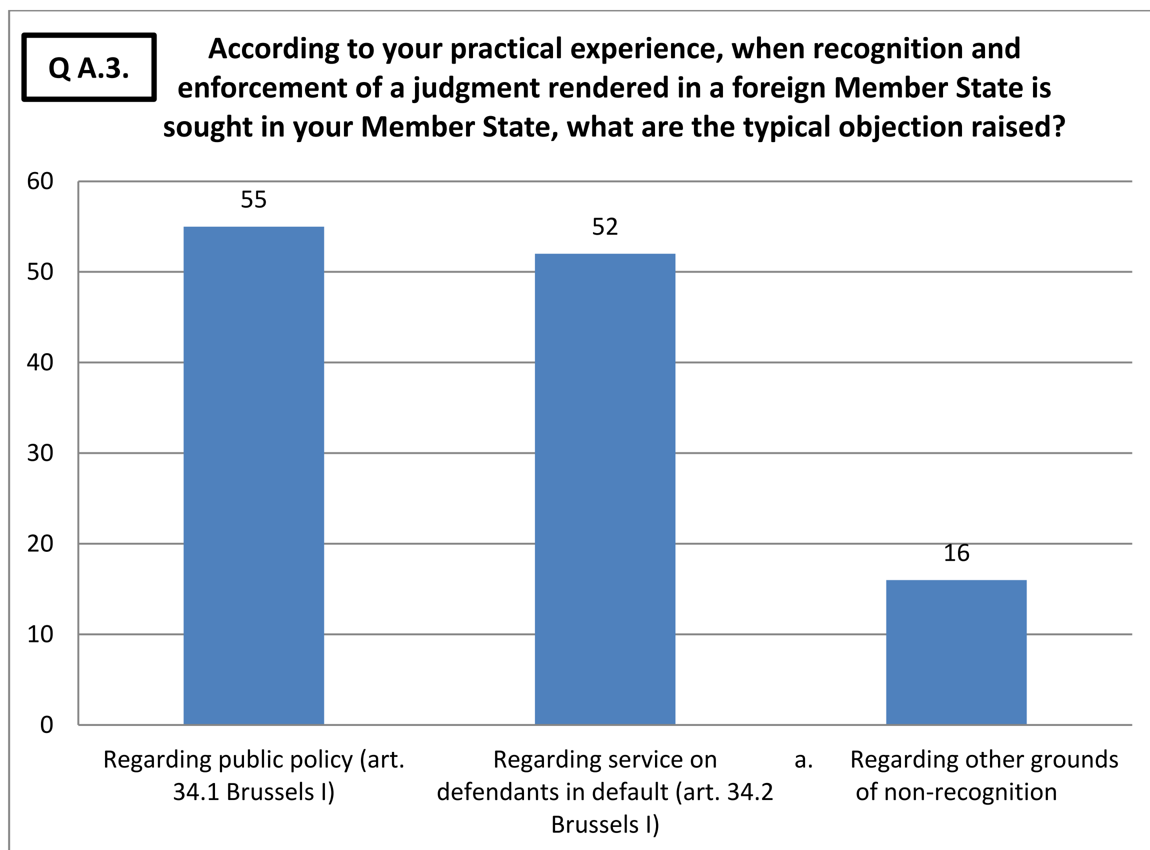
[431] Q10 concerning the improper application of procedural rights was raised by 41 out of 78 respondents, 8 times successfully.

[432] With 15 years of experience.

[433] Lawyer, 12 years of experience, Hungary; Notary, 10+ years of experience, Hungary

[434] With 24 years of experience in this job.

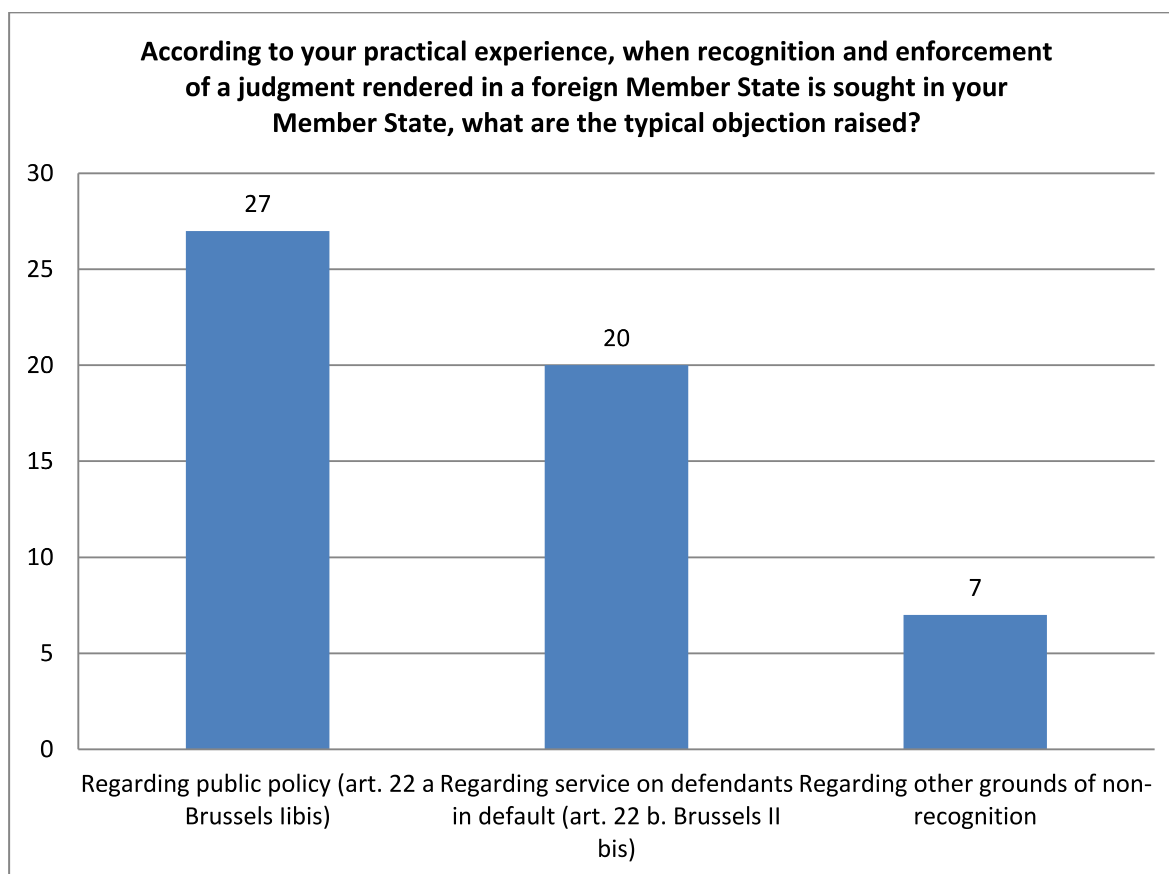
[435] Expert from Cyprus; Academic, 25 years of experience, Denmark; Lawyer, 16 years of experience, Finland; Judge from Germany; Academic, 8 years of experience, Malta; Academic, 13 years of



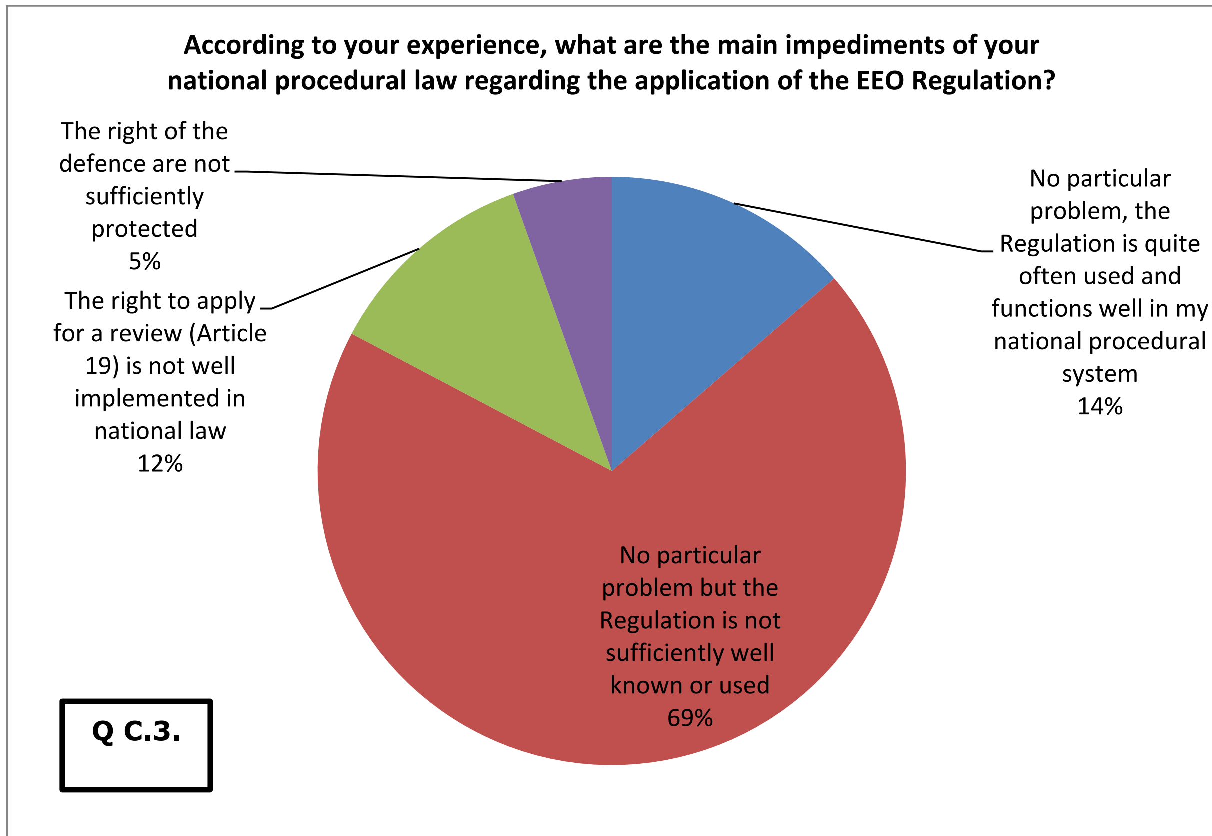
513. The bar chart Q A.3. shows that a majority of respondents has to deal with objections regarding the service on defendants in default under Brussels I, as well as public policy while objections regarding other grounds of non-recognition are infrequently raised.

---

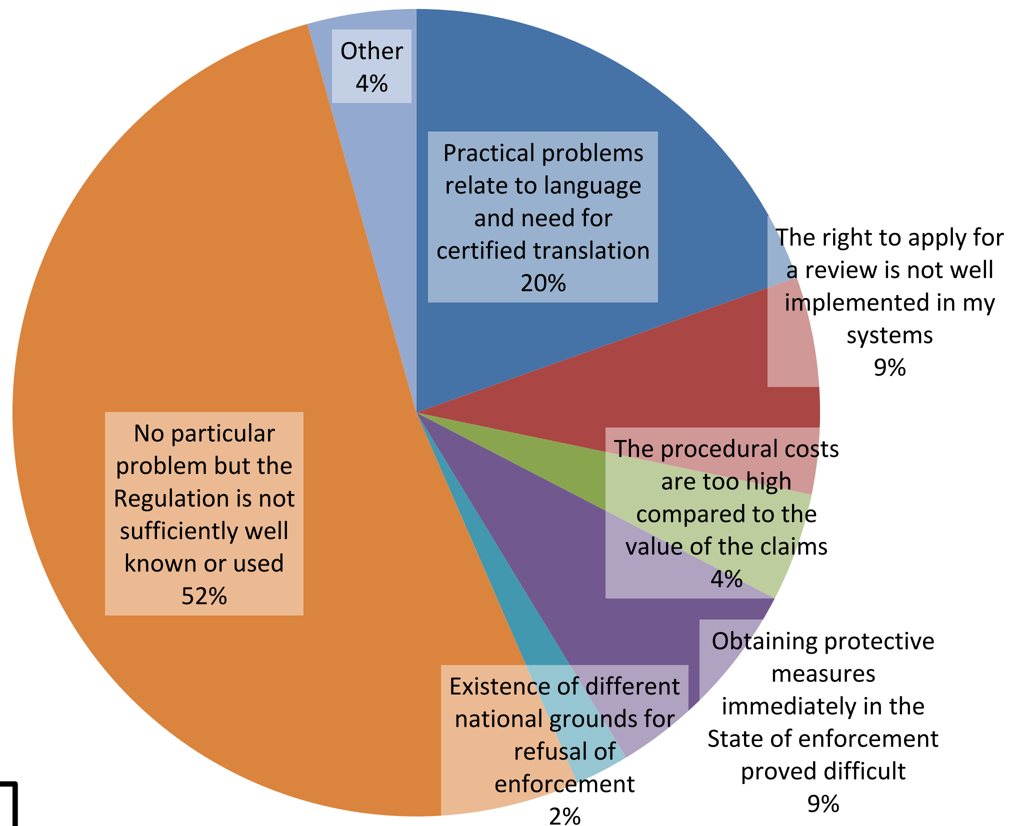
experience, Malta; Judicial officer, 26 years of experience, The Netherlands; Academic MT, Poland, regarding the deprivation of the possibility of defence; Lawyer, 24 years of experience, Spain.



514. The above chart, instead, indicates that the public policy objection is raised most often under Brussels II bis Regulation, while the objection regarding service on defendants in default is almost as important, although its application is limited to specific, i.e. default situations. .



515. It can be seen from chart Q C.3. that only 12% of the experts regard the right to apply for a review (Article 19 EEO) as not well implemented, while other impediments especially the knowledge about the Regulation are experienced more often.



516. Likewise in applying the Maintenance Regulation (Q F.3.) the insufficient knowledge or use of the Regulation is seen as a problem by the great majority of the experts. It can be highlighted that practical problems relating to language and need for certified translation are also mentioned frequently.

517. An Academic from **Poland** expresses his view that “establishing that the service of the document instituting the proceedings was done effectively causes practical problems due to the fact that service of documents in different Member States is characterized by some divergent and incompatible features”.

Brussels II Regulation:

518. The Head of the Division on Private International Law and Procedural Law at the Ministry of Justice of the Republic of **Latvia** complains that "*not always all guarantees set in Paragraph 2 of Article 42 are met when certificate on the return of child is issued*" but "*Member State of enforcement of such a certificate on the return of child do not have any possibility to oppose to the enforcement of such a certificate*".

519. Only few experts have experience with the automatic enforcement of decisions concerning right of access and the return of the child.

3.4. Proposals and Improvements

520. This chapter recommends preventive measures against problems arising from default judgments in cross-border cases in Europe. Such measures have been specified in this chapter above. All of them refer to the actual default proceedings in the state of origin. Therefore, we believe that no changes in the field of enforcement law are required here.

521. The enforcement stage, however, will be affected by measures improving the default proceedings in the state of origin in order to justify the principle of mutual trust, as problems in the course of the default proceedings normally become relevant only at the enforcement stage when a debtor raises objections against the enforcement; accordingly, improvements with respect to the default proceedings in the state of origin should also reduce problems at the enforcement stage.

522. Today's rules on the grounds for the refusal of recognition and enforcement should not be changed. On the one hand, the 2015 recast of the Brussels I Regulation was a big and recent step forward in order to do away with unnecessary procedural steps in that respect. On the other hand, it was a wise decision of the European legislator to abolish exequatur proceedings, but keep the grounds for non-recognition and non-enforcement as "emergency brakes" for cases where severe errors occurred in the state of origin. This is especially true for the enforcement of default judgments.

523. The same applies to the defense of public policy. As we have shown above, the main and almost only field of application of this objection against the enforcement of a

foreign judgment, including default judgments, is procedural public policy, that is, cases where something simply went dramatically wrong in the state of origin. Improving mutual trust in this respect should include measures aiming at avoiding such severe errors in the state of origin rather than criticizing the public policy objection. Public policy, after all, is only the criterion used to assess whether such errors occurred and to identify the remedy, in case they actually happened. It is still true today that such severe procedural errors, in particular violations of the right to be heard, are more likely to occur in a cross-border situation than in a domestic one. It is also true that, after all those years of talking about mutual trust in Europe, the actual standards of legal protection before European courts in civil and commercial matters differ strongly from one jurisdiction to another, both with respect to the efficiency and the fairness of the proceedings. Moreover, while European Civil Procedure has been based on the principle of mutual trust for decades, it seems as if European citizens do not actually have sufficient trust in the judiciaries of foreign countries and often believe (to some extent for very good reasons) that it will be a disadvantage to proceed before foreign courts where the opponent is a domiciliary.

524. All this, however, cannot be simply changed by means of European legislation. It requires that the European Union cares much more about the quality of the judiciaries of the individual Member States by firstly examining the respective standards and existing problems and secondly starting programs in order to improve all this. Therefore, the Commission should invest into a broad and ambitious program in order to improve the quality of the judiciary in the Member States with the objective of obtaining really equal standards of due process before all European Courts. Such measures would have to start with identifying jurisdictions having problems in this respect and could contain training and examination of judges, minimum standards of judiciary infrastructure and a system of disciplinary measures both for Member States and for judges who do not comply with certain minimum standards of fairness and efficiency.

525. A first step could be an evaluation of the case-law of the European Court of Human Rights with respect to Art. 6 of the European Convention on Human Rights which contains a wealth of information on such problems also in Member States of the European Union. It might also be useful to create a data base on cases where such

problems have been reported either by national courts, by the European Court of Human Rights or the CJEU, or by individual businesses and citizens in order to help the European Commission understand the nature and scope of the problem.

Chapter 3: Provisional Measures

GILLES CUNIBERTI AND EVA STORSKRUBB[436]

1. Arrest/Provisional Attachment

1.1 Summary

526. The need to afford provisional remedies to arrest or attach assets where there is a risk or danger that future enforcement might be impaired is widely recognized in the European Union.[437] However, the specific rules regulating *inter alia* when such relief may be awarded, on what grounds such relief may be awarded as well as the safeguards available for the party against whom the measures is sought may differ. In addition, the specific procedural approaches differ, for example under certain circumstances it is possible to hear such an application *ex parte* in many but not in all Member States. Finally, it is notable that how such a remedy is legally constructed differs in the European Union, and is closely connected to the law on enforcement or execution, this relates to whether the measure is directed towards the assets (*in rem*) or against the debtor (*in personam*)[438] as well as whether the measure is directed towards specific enumerated assets or all potential assets of the defendant.[439] The main rules and the differences that emerged in the National Reports are dealt with in brief below but before that it is important to acknowledge the parallel relevant development in the form of Regulation (EU) No 655/2014.

1.1.1 Regulation (EU) No 655/2014

527. For many of the matters mentioned above in the introduction a European Union wide solution has been found in Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil

[436] Section 1 was drafted by Eva Storskrubb. Section 2 was drafted by Gilles Cuniberti.

[437] See earlier conclusions that identified the general similarities and development but also the specific divergences between Member States COM (1997) 609 final, paragraphs 22-24.

[438] See B. Hess, T. Pfeiffer and P. Schlosser, "The Heidelberg Report", Study JLS/C4/2005/03 Report on the Application of Regulation Brussels I in the Member States, 2007, available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. Explaining this difference and the issues arising at paragraphs 690-710, 724 and 747-754.

[439] See B. Hess, Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions in the European Union, 120-121.

and commercial matters.[440] It has become operational on January 18th, 2017. Albeit that it relates only to cross-border matters,[441] it provides a reference-point for our review of the domestic rules in the Member States. This comparison can also be relevant because the EAPO Regulation is only an optional instrument. Parties may in some instances still wish to apply for domestic provisional attachment even in cross-border cases. According to its article 1(2), the EAPO Regulation only applies to attachment of bank accounts. To the extent that an applicant for provisional relief knows that there are other assets that may be useful to attach, the domestic regimes remain the sole route available in cross-border matters.

528. In Recital 5 to the EAPO Regulation it is stated that national procedures for obtaining protective measures exist in all Member States, but the conditions for the grant of such measures and the efficiency of their implementation vary considerably. Moreover, recourse to national protective measures may prove cumbersome in cases having cross- border implications, in particular when the creditor seeks to preserve several accounts located in different Member States.

529. The cumbersome route of attaching assets in several Member States arises from the *Denilauler* case that confirmed that a French provisional measures "*saisie conservatoire*" decision (i.e. an interim attachment) that was ordered *ex parte* could not be enforced cross-border based on the Brussels I Regulation simplified enforcement regime.[442] A string of later cases has confirmed that the simplified enforcement scheme is only available for judgments where the proceedings have been able to have an adversarial nature.[443]

530. Thus, if a party wants to apply for provisional attachment *ex parte* and the defendant's assets are located in several jurisdictions the only practical way has been to make separate applications in each Member State where the debtor's assets are located.[444] This issue has not been fully addressed in the recast of the Brussels I

[440] Hereinafter "the EAPO Regulation". Note that the UK and Denmark have opted out.

[441] As broadly defined in Art. 3.

[442] Case 125/79 *Denilauler v. Couchet Frères*, EU:C:1980:130. In this case, the ECJ applied the Brussels Convention.

[443] Inter alia cases C-394/07 *Gambazzi,* EU:C:2009:219 and C-514/10 *Wolf Naturprodukte* EU:C:2012:367.

[444] The situation may be different if a world-wide freezing order is granted *in personam*, see "The Heidelberg Report" (n 438).

Regulation, Article 2(a), as cross-border enforcement of an *ex parte* provisional order still requires the prior service upon the defendant of the order and provisional measures can only circulate across national borders if the issuing court has jurisdiction on the substance of the matter.

531. Pursuant to Article 42(2) of the Brussels I bis Regulation, for the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional (including a protective) measure, the applicant must provide the enforcement authority with:

    a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

    b) the certificate issued by the court of origin pursuant to Article 53, containing the description of the measure and certifying that the court has jurisdiction as to the substance and the judgment is enforceable in the Member State of origin;

    c) proof of service of the judgment, if the judgment was issued without the defendant being summoned to appear.

532. As noted in the literature, the rationale justifying the requirement of a separate proof of service (in addition to the certificate provided for in Article 53) is the protection of the debtor.[445]

533. For the attachment of bank accounts, however, the EAPO Regulation now provides a possibility via its special procedure of cross-border enforcement *ex parte*. This is a significant development that will be reverted on in our proposals and conclusions below.

1.1.2 Availability and Grounds for Provisional Attachment

534. Based on the National Reports, such a provisional measure exists in the majority of Member States.[446] However, there are differences in scope/availability as in some

---

[445] A. Dickinson and E. Lein, The Brussels I Regulation Recast (OUP 2015) 425.

[446] Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden as well as England and Wales.

Member States only bank accounts may be attached, i.e. the type of provisional relief is very specific, whereas in other Member States the scope of the interim relief is broader and is not limited to a specific type of asset.

535. In addition, there is a significant difference in respect of towards which entity the order for provisional attachment is directed. Nevertheless, the more common solution in the Member States appears to be that the order is directed at the assets themselves (*in rem*) in the custody of the opposing party or even in the custody of a third party, whereas the model in England & Wales, Ireland and Malta[447] is that the so called freezing order is directed against the opposing party itself (*in personam*) forbidding the party to use or dispose of its assets.[448]

536. There is also the issue of *when* such provisional relief can be applied for. Not all National Reports mention whether it can be applied for prior to initiating proceedings on the substance of the matter, at any stage during such proceedings and/or to a creditor who has already obtained a judgment. If there is a possibility of applying before the initiation of proceedings on the merits, some National Reports mention that there will be an obligation on the applicant to bring proceedings on the merits within a set time frame.[449] It also appears as if not all Member States have procedures for provisional relief subsequent to obtaining a judgment (rather there may be protective measures that the execution officer may take during the course of the enforcement proceedings.) A few National Reports specifically mention the possibility to apply also for provisional attachment subsequent to obtaining judgment on the merits.[450] However, if a judgment becomes provisionally enforceable, there is no need for any additional provisional relief.

537. The grounds for obtaining provisional attachment are also relevant. In the majority of Member States the requirement of urgency (*periculum in mora*) exists for obtaining

---

[447] National Report, question 2.4.1: 'In Ireland, orders for arrest and provisional attachment are unusual outside of admiralty proceedings. The type of provisional measure most frequently sought is the injunction, which can be given to secure assets from which an ultimate judgment may be satisfied (operating *in rem*), including the Mareva injunction (operating *in personam*)'.

[448] See National Report for England and Wales, see also "The Heidelberg Report" (n 438). See also National Report, question 2.4.1: Germany, mentioning the possibility to arrest the debtor in person if this is required to ensure compulsory enforcement against the property of the debtor.

[449] Austria, Finland, Germany, Greece, Malta, Romania, Spain, Sweden as well as England and Wales.

[450] Austria, Croatia, Denmark and Poland.

provisional attachment.[451] In other words that there is a threat that future enforcement will be impaired if provisional relief in the form of attachment of assets is not urgently obtained.[452]

538. According to all National Reports, the issuance of an attachment order is generally made conditional on the applicant's ability to substantiate the existence of his claim on the merits. In the majority of Member States, the proof of the *prima facie* plausible existence of the right for which the measure is sought as protection is deemed sufficient for the purpose of issuing a provisional attachment order[453]. Other Member States appear to adhere to a slightly higher standard, by requiring a more detailed presentation of the claim. This threshold may however be lowered in maintenance cases[454]. The common law standard the "good arguable case" – as conceived by English Courts - falls as well within this second category[455]. In addition to a *prima*

[451] National Reports, question 2.4.1:Austria (the plaintiff has to show that the future enforcement of the claim is in danger), Lithuania (the applicant has to show that were the provisional measures not granted, the future enforcement of a court judgment would be impeded or simply impossible), Bulgaria ('proof that without such a measure, it will be impossible or difficult for the plaintiff to realize the rights under the judgment'), Spain (728(1) LEC: situations which may impede or complicate the effectiveness of the legal protection granted through the judgment on the merits), Latvia ('…if there is a reason to believe that enforcement of the court judgment in the case at hand may become problematic or impossible), Slovakia (there must be the risk that the enforcement of the debtor´s claim will be in jeopardy).

[452] National Reports, question 2.4.1.: Austria, Bulgaria, Czech Republic, Cyprus, France, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Portugal Slovenia, Spain, Sweden, Romania (not necessary in all cases).

[453] National Reports, question 2.4.1: Finland ('The existence of the debt or the prior right must be plausible based on a summary prima facie assessment of facts'), Germany ('the applicant shall establish prima facie (Glaubhaftmachung) that the claim exists'), Spain (Art. 728(2) LEC) , Bulgaria (supported by convincing written evidence), Sweden (probable grounds for the claim), Italy (the prima facie existence of the right sought to be protected through the requested measure), Portugal (the probable existence of a credit right shall be demonstrated). Some Member States appear to have a lower threshold with regard to the substantive merits of the case, see National Report for Denmark: "It is unnecessary for the creditor to prove his money claim, but the court cannot make a provisional attachment if it must be assumed that the money claim does not exist."

[454] National Report, question 2.4.1: Poland ('In maintenance cases, making the existence of the claims plausible, shall be the only requirement for receiving security, i.e. the party does not have to make plausible legal interest in obtaining the security').

[455]In *Ninemia Marine Corporation v Trave Schiffahrtgeseelschaft GmbH* (The Niedersachsen) [1983] Comm LR 234, the Court specified that the test of 'a good arguable case', required for the issuance of a Mareva injunction, is somewhat stricter than the 'serious case to be tried' grounding the application for other form of interim injunctions (see National Report, question 2.4.1, United Kingdom). The former has been defined, in fact, as 'a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'. The same judgment evidences, however, an 'holistic approach' to the interpretation of this requirement, by stating that such an assessment 'is only the beginning of the exercise', and that 'evidence, including the evidence on the second question [dissipation of assets] posed by the judge…., must be looked at as a whole'.

facie likelihood of success on the merits, the applicant must in certain Member States prove the fulfilment of a varied range of other procedural and/or substantive pre-conditions[456].

539. In addition, some Member States appear to have a more elaborate test that also requires amongst other a balance of convenience test and an evaluation of the damage that may be caused by a provisional measure.[457] Some also have a different test if the measure is applied for before initiation of the main action.[458]

540. In comparison, under the EAPO Regulation a creditor should be able to obtain an EAPO preventing the transfer or withdrawal of funds held by a debtor if there is a risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult. The preservation of funds should have the effect of preventing not only the debtor himself, but also persons authorised by him, from using the funds.[459]

541. When a creditor applies for an EAPO before initiating proceedings on the substance of the matter, the creditor is under an obligation to subsequently initiate such proceedings within a specified period of time[460] and to provide proof of such initiation (Art. 10(1) EAPO Regulation). Should the creditor fail to comply with this obligation,

A similar standard applies in Cyprus: see National Report, question 2.4.1 ('the applicant must prove the existence of "a serious issue for trial (an arguable case), a possibility that the plaintiff is entitled to relief (something more than a mere probability but much less than the balance of probabilities).)

[456] National Reports, question 2.4.1: Germany ('The request has to set out and substantiate the designation of the claim ("Anordnungsanspruch"), specifying the amount of money or the monetary value as well as the grounds for a writ of seizure to be issued'), Romania ('hav[ing] a debt that has fallen due and is proved by a written document, and a court procedure [must have been] initiated'), Poland ('a party is supposed to render credible the claim as well as the legal interest in obtaining provisional relief'). This also applies to Belgium ('Not every claim can support a request for conservatory attachment. So the claimant shall additionally prove that his claim is prima facie certain, due and liquid': see P. Taelman, 'Belgium', in L.W. Newman (ed), *Attachment of assets* (Juris 2016) BELG-8), Luxembourg (art. 933 NCCP, 'the claim must not be seriously disputed', see also T. Berger, 'Luxembourg', in L.W. Newman (ed), *Attachment of assets* (Juris 2016) LUX-8) and The Netherlands ('the claim must be due at the moment when the conservatory arrest becomes executory': see Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions in the European Union, question 2.3.1.1, The Netherlands, Questionnaire concerning provisional measures.

[457] England and Wales as well as Cyprus. Again citing the National Report for Cyprus: "…it must be shown that without the issuance of the order, it will be difficult or impossible for justice to be afforded at a later stage (the adequateness of damages is examined). In addition, the Court examines whether it is just and reasonable to issue or maintain such an order in force."

[458] For example in Latvia the bad faith of the opposing party is required in such circumstances.

[459] Recital 7 to the EAPO Regulation.

[460] Usually the creditor must initiate main proceedings within 30 days after the lodging of the application.

the EAPO shall be revoked by the court of its own motion or terminate automatically (Art. 10(2) EAPO Regulation).

542. The conditions required for an EAPO are that the creditor has submitted: (i) sufficient evidence that there is an urgent need for a protective measure 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; and (ii) sufficient evidence that he is likely to succeed on the substance of his claim against the debtor.[461] The application shall be lodged by a form (Articles 8 and 52 EAPO Regulation).

1.1.3 Ex Parte Relief and Safeguards

543. In order to guarantee the effectiveness of attachment, it is often crucial to obtain it quickly and to ensure a 'surprise effect' on the debtor. Were the debtor made aware of the existence of an interim relief application, before attachment measures have been adopted, the prospects of future enforcement may be endangered, especially in situations where there is a real risk that the debtor may dissipate his/her assets.

544. Therefore, it is in many jurisdictions possible to obtain provisional attachment without hearing the opposing party before the order is issued, i.e. obtaining an attachment order *ex parte*. Fourteen National Reports explicitly mention such a possibility.[462]

545. Some Member States that allow an *ex parte* application, set up additional criteria of urgency that have to be proven as a separate ground from the ones required otherwise.[463]

546. Closely connected to the issue of *ex parte* provisional attachment is the possibility to appeal the order. Some Member States that provide for *ex parte* applications have a system whereby, in any case, after the order is issued and enforced *ex parte*, a

[461] Article 7. The second condition does not apply where the creditor has already obtained a judgment but is seeking provisional relief pending enforcement. Further clarification on the conditions is provided in the Recital 14.

[462] Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Spain, Sweden as well as England and Wales.

[463] For example Germany (urgency), Greece (extreme urgency) and Sweden (added risk/fear in the event of delay).

second phase of the provisional relief application procedure commences automatically and at this second stage the proceedings are *inter partes*.[464]

547. The possibility to apply for provisional attachment *ex parte* favours the claimant/creditor. In order to balance the rights of the parties and to avoid abuse or vexatious and unwarranted applications there need to be safeguards in the system. The main safeguards are provision of security by the applicant for any harm caused to defendant and the corresponding liability of the applicant for such damages. This is the case in: Austria, Germany, Hungary, Greece, Estonia, Luxembourg, Lithuania, Italy, Latvia, Belgium, The Netherlands and Romania.

548. Under the EAPO Regulation, the debtor shall *not* be notified of the application for an EAPO or be heard prior to the issuing of the Order (Article 11).[465] Thus, the procedure usually has an *ex parte* phase.[466] The usefulness of the tool is emphasized as the reason for this policy choice and the fact that no discretion is left to the national judges of whether an *ex parte* order is warranted.[467]

549. Articles 12 and 13 of the EAPO Regulation also establish both the provision of security by the applicant and the liability of the applicant. The obligation to provide a security is the main rule in cases where the applicant has not already obtained a judgment. By way of exception, the court may though dispense with the requirement if it considers that the provision of security is inappropriate in the circumstances of the case.[468] In relation to damages, the EAPO Regulation provides a minimum standard, for the liability of the creditor where the damage caused to the debtor by the preservation order is due to fault on the creditor's part. Furthermore, the Member States are specifically entitled to maintain or introduce in their national law grounds for liability other than those specified in the Regulation.[469]

[464] National Report, question 2.4.1: Italy (art. 669 *sexies*); United Kingdom.

[465] Article 11.

[466] The situation is different when the creditor has already obtained an enforceable title, Article 5(b) EAPO-Regulation.

[467] Recital 15.

[468] Article 12, see further Recital 18.

[469] Some authors consider that the major shortcoming of Article 13 is the reference to the national laws of the Member States, see B. Hess K Raffelsieper, *Die Europäische Kontenpfändungsverordnung: Eine überfällige Reform zur Effektuierung grenzüberschreitender Vollstreckung im Europäischen Justizraum,* in IPRax 2015, 401 ff.

1.1.4 Additional Procedural Divergences

550. Finally, it is notable that the National Reports demonstrate further divergences with respect to how a provisional attachment application is handled, e.g. in relation to litigation costs[470], expediency[471] and whether a hearing is held or whether the matter is dealt with on documents only[472].

1.2 Problems and Assessment

551. It is notable from the survey answers that 17 of the online survey respondents[473] had sought a seizure or attachment of assets in an international cross-border dispute (based on the reference to national law in the Brussels I Regulation (recast) Article 35, formerly Article 31).[474] This was the most common type of provisional measure sought based on the survey results. Furthermore, 46% of the provisional measures were sought specifically to support proceedings pending in another Member State[475].

[470] The Latvian National Reporter expresses her concerns with respect to the high and non-refundable court fee.

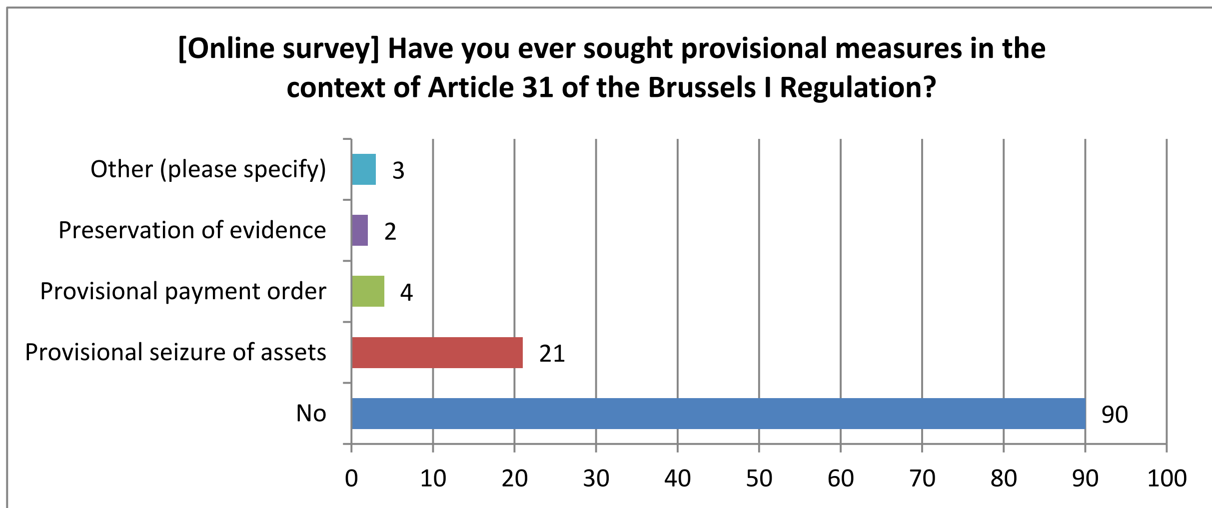
[471] The Court may be required to decide on the application on the same day of the submission of the application (Bulgaria) or on the working day immediately after (Latvia, Estonia). The deadline is longer in Poland (1 week) and Slovakia (1 month). Other Member States just provide that the application shall be dealt with ‘in a speedy way’ (Cyprus) or ‘in an expedited proceedings’ (Romania).

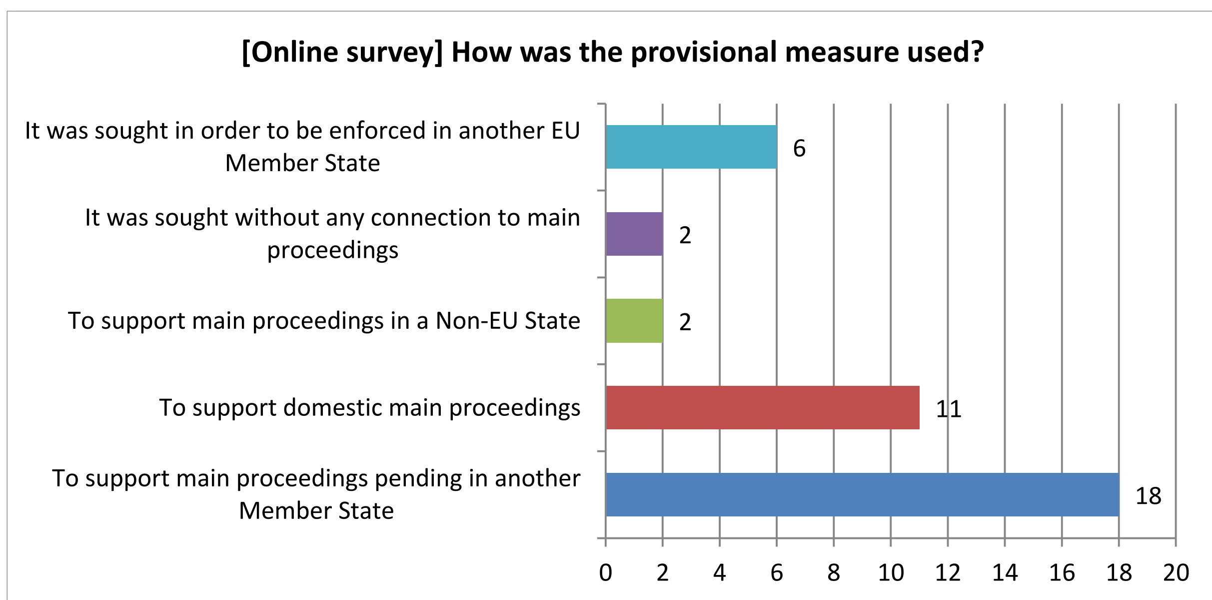
[472] See National Reports, question 2.4.1: Bulgaria (the Court decides in camera without summoning the parties); Belgium (The judge can call for the presence of the plaintiff though this does not happen often in practice (Article 1028 BJC). He rules behind closed doors).

[473] Overall, the question was answered by 120 respondents.

[474] The Article provides that: “Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.”

[475] Overall, the question was answered by 39 respondents.





552. According to the responses to Question 3[476], a majority of respondents (57%) consider the divergent Member State laws on the availability and types of provisional relief to be a minor obstacle or no obstacle at all to cross-border litigation in the European Union. The same applies when asked how the divergences may impact on the free circulation of judgments (Question 6). Only a very small percentage consider the divergent Member State rules to be a very significant obstacle (7%). The interviews and national reports did not either provide a significant amount of concerns.

553. However, it is clear that since January 2017 the European Union provides for a parallel system, in which cross border cases concerning the attachment of bank

[476] Overall, the question was answered by 263 respondents.

accounts are based on a European-wide procedure and on rules that is intended to facilitate and make more efficient cross-border attachment based on *ex parte* orders. Going forward in relation to other assets than bank accounts, resort will have to be made to the domestic rules. The divergences between the Member State systems are not of a structural nature (if one disregards the different approach with *in personam* freezing orders in England & Wales, Ireland and Malta). Rather they are more detailed regarding both such issues as the specific grounds as practical issues regarding provision of security or legal costs. However, also practical differences may cause hurdles for claimant creditors that quickly need to secure attachment of assets but will need to engage local counsel and understand the domestic requirements in relevant jurisdictions.

1.3 Proposals and Improvements

554. The divergences identified between the Member State domestic systems for provisional attachment have not been the main structural problem in the European Union context. The main structural problem has been the limited cross-border enforcement of provisional *ex parte* attachment orders. In the context of attachment of assets, and in particular funds on bank accounts that can today be moved extremely swiftly from one jurisdiction to another, speed as well as the surprise element offered by an *ex parte* determination is often of crucial importance to the effectiveness of the such a measure.

555. This problem has now been addressed for the attachment of bank accounts by the enactment of the EAPO Regulation. In the cross-border context, it appears at the current stage premature to propose any additional improvements. The EAPO Regulation also at some instances leaves matters to domestic procedural law. How the EAPO Regulation will interact with domestic rules in the Member States will be important to its functioning. In due time the practice arising from the EAPO Regulation will be evaluated and there will be room to consider whether further approximation is needed and whether its scope could be extended to some other types of assets.

556. In addition to the divergences between the Member State systems the National Reports also show that some national systems may differ from the EAPO Regulation

in specific details. As noted above these differences may cause hurdles of time and cost to claimant creditors. The question is how to address these issues. There is notably some potential for the future gradual development and voluntary harmonization between domestic systems to align themselves with the EAPO Regulation if its uptake and usage become common and are considered useful by creditors and national legislators. Thus, the enactment of the Regulation may come to have wider effects, but such a development will also take time.

557. In the meantime European Union rules to harmonize domestic rules on provisional attachment of other types of assets seems premature. In particular since there is no lack of such a remedy in many Member States and as such no significant lack of redress identified. What can be done, however, is focus on best practices between the Member State courts and systems of provisional attachment and further dissemination of information.[477]

2. Provisional Payment

2.1 Summary

558. Provisional payment orders are decisions ordering payment of a given claim on an interim basis. Such decisions do not resolve finally the dispute, and the parties are either entitled or under the obligation to initiate or continue proceedings on the merits in order to obtain a final decision on the claim. Provisional payment orders are thus to be distinguished from remedies such as payment orders, which aim at accelerating the rendering of final decisions on uncontested claims.

559. Contrary to many other judicial remedies which are available, in one form or another, in all Member States, provisional payment orders can only be obtained in twelve Member States.[478] It is therefore a remedy which is unavailable in the majority of Member States.[479] It remains, however, a remedy of the highest practical importance in those Member States where it is used to improve the efficiency of the judicial

[477] See the considerable amount of information available on the EU e-Justice Portal: https://e-justice.europa.eu/content_interim_and_precautionary_measures-78-en.do

[478] See National Reports, question 2.4.1: Austria, Belgium, Czech Republic, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, United Kingdom.

[479] See National Reports, question 2.4.1: Bulgaria, Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Ireland, Latvia, Malta, Poland, Romania, Slovakia, Slovenia, Spain, Sweden.

system (below 2.1.1), as it often replace final judgments and is used to recover uncontested claims. The issue of the enforcement of such judgments therefore arises in all Member States.

560. Despite being available in only about 40% of the Member States, there is significant diversity in the requirements for obtaining provisional payment orders. This reveals that the remedy can serve different functions. They can be used to improve the efficiency of the judicial system (2.1.1), to provide financial support to impecunious creditors (2.1.2), and to favour certain creditors (2.1.3).

2.1.1 Improving the Efficiency of the Judicial System

561. The first function that provisional payment orders can serve is to improve the efficiency of the judicial system. Provisional payment orders enable courts to resolve certain disputes quicker and at a much lower cost. In France, for instance, such orders can sometimes be obtained within a few weeks while it often takes more than a year to obtain a final (first instance) judgment.[480] The court handling those applications will dedicate much less resources to each case, because the court will be composed of only one judge, and will dedicate less time to the resolution of the case as it will decide on the basis of straightforward evidence.[481] Of course, those gains would be illusory if the parties were to resume litigating for the purpose of obtaining a final decision. But experience shows that defendants will typically not initiate proceedings on the merits, at least in those jurisdictions where provisional payment orders are granted on the ground that the existence of the claim of the applicant could not be seriously disputed.[482] In such disputes, defendants typically do know the weakness of their case, and will thus not even try to obtain a contrary decision on the merits. In effect, therefore, the provisional order will have finally decided the dispute, and no additional cost will be incurred, either by the creditor or by the judicial system.

562. Provisional payment orders serving this first function are controversial remedies for two reasons. The first is that they might sacrifice accuracy of adjudication for

[480] S. Guinchard, C. Chainais and F. Ferrand, Procédure civile (Dalloz 32nd ed. 2014), 2158.

[481] As a consequence of the requirement that the claim should be undisputable. Where this requirement is not met, the claim is not eligible for a provisional payment order.

[482] S. Guinchard, C. Chainais and F. Ferrand (n 480).

efficiency. There is no doubt that such accelerated procedures are a trade-off in this respect. However, the trade-off is limited where the granting of provisional orders is conditional upon the demonstration by the applicant of high chances of success on the merits. Belgian courts go even farther and rule that that the claim should be so undisputable that there is no risk that the provisional decision to award a payment would be affirmed by the court having jurisdiction on the merits.[483] The second critique could be that the docket of first instance courts might eventually be absorbed by courts having jurisdiction to grant such provisional orders. Again, where the requirements for granting such orders are strict enough, the only effect is to divert those cases which can be resolved satisfactorily on an interim basis, and allow courts of common jurisdiction to focus on more complex cases/or truly disputed which deserve more resources.[484] In those jurisdictions where no such requirement exists, however, those issues could clearly arise.

563. The fundamental requirement for obtaining provisional payment in jurisdictions where it serves this function is that the claim of the plaintiff appears as so obvious, in particular in so far as the defendant does not or is unable to articulate any serious defence, that it is highly unlikely that the defendant will be able to win on the merits. European jurisdictions rely on various criteria to assess the strength of the case of applicants seeking provisional payment orders.

564. First, the laws of several Member States expressly allow courts to grant provisional payment orders where the defendant has admitted the claim. This is the first ground for granting provisional payment under English law: "*the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant*".[485] Italian law provides a similar ground in the context of the proceedings on the merits; at any stage before the final hearing, a party may apply to the judge managing the case, for a provisional payment order for claims which appear to be undisputed by the other party.[486]

---

[483] See, e.g., First Instance Court of Brussels, 4 May 2012, (2012) Rev Gen Ass Resp 14905.

[484] L. Cadiet, E. Jeuland, Droit judiciaire privé (Litec 6th ed 2013), 642.

[485] See National Report: England (Civil Procedure Rule 25.7(1)(a)).

[486] See National Report, question 2.4.1: Italy (Italian Code of Civil Procedure, art 186 bis).

565. In a number of Member States, uncontested claims can also be handled by payment order procedures. This shows that the function served by provisional payment orders can, to some extent be served by alternative procedures. This is the case in Sweden, for instance, where provisional payment orders are not available, but where payment orders allow courts to dispose at a lower cost of uncontested claims.

566. Secondly, in cases where the defendant has not admitted liability, provisional payment orders may be granted in several Member States where the creditor can demonstrate that his chances of success on the merits are very high. In France and Luxembourg, the court should be satisfied that "*the existence of the claim cannot be seriously disputed*".[487] English courts may also grant provisional payment orders if "*satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment*".[488] While the provision is not as clear as the French and Luxembourgish ones, it has been interpreted similarly. Applicants should not only show that the existence of their claim is likely, they should demonstrate that it will succeed if it goes to trial.[489]

567. A variant of the rule is the right to apply for provisional payment during the proceedings on the merits, where the proceedings and evidence exchanged have clarified that certain sums are clearly due. The rule is found in Italian civil procedure.[490]

568. It is hard to discern any convincing reason for granting provisional payment orders *ex parte*. One cannot see how a debtor could influence the existence of his obligations before the competent court considers the application of the creditor. Provisional payment orders are thus granted *inter partes* in most Member States, including Belgium, France, Italy and England.[491] A surprising exception exists in Luxembourg, where two paths are available to obtain provisional payment orders. The first is

[487] See National Reports, question 2.4.1: France (Art 809 CCP, while other provisions of the Code of Civil Procedure repeat the same rule for various French courts); Luxembourg (Art 933 New CCP) .

[488] See National Report: United Kingdom (Civil Procedure Rule 25.7(1)(c)).

[489] See, e.g., *Test Claimants in FII Group Litigation v Revenue and Customs Comrs (No 2)* [2012] EWCA Civ. 57.

[490] See National Report, question 2.4.1: Italy (art 186 quarter CCP).

[491] See National Report: United Kingdom (Civil Procedure Rule 25.6(3)(a)).

inspired from French civil procedure, and requires to give notice to the respondent.[492] The second, however, is a payment order procedure resulting in a provisional payment order. The creditor applies *ex parte* for a payment order, which will be granted if the court is satisfied that the existence of the claim cannot be seriously disputed.[493] Only then will it be notified to the respondent, who may oppose the payment order within 15 days. If he does not, the order will not become a final decision, but rather a provisional payment order, which does not have res judicata on the merits.[494] The scope of this procedure is limited to cases where the respondent has his domicile or residence in Luxembourg, [495] which limits the chances that issues of cross-border enforcement might arise.

2.1.2 Providing Financial Support to Impecunious Creditors

569. The second function that provisional payment orders can serve is to support certain parties by granting them financial resources. In theory, this second function can be neatly distinguished from the first. The goal is not to decide more efficiently certain kinds of disputes which do not seem to deserve dedication of extensive judicial resources. It is rather to protect certain parties. It is then only logical that Member States affording such a remedy either limit its scope to certain pre-defined categories of creditors considered as typically needing such payment, or insist that the creditor demonstrates that he needs the payment. By contrast, it would be perfectly acceptable to require that the creditor merely demonstrate that he is likely to succeed on the merits.[496] In some Member States, however, the creditor is required to prove not only that he is impecunious, but also that his chances of success on the merits are very high.

570. In certain Member States, the remedy is only available to certain pre-defined categories of parties considered as needing payment of their claims for supporting themselves and their immediate family. Provisional payment is specifically available

[492] See National Report, question 2.4.1: Luxembourg (Art 933 NCCP).

[493] See National Report, question 2.4.1: Luxembourg (Art 919 NCCP).

[494] See National Report, question 2.4.1: Luxembourg (Art 930 NCCP), referring to Art 938.

[495] See National Report, question 2.4.1: Luxembourg (Art 919 NCCP)

[496] This is the case in Portugal for maintenance creditors, for instance: See National Report, question 2.4.1: Portugal (Art 368(1) CCP)

to maintenance creditors in several Member States.[497] The creditor may have to demonstrate that he could not wait for the final judgment, as in Portugal, but his quality may release him from this burden, as in Austria. In Lithuania, provisional payment orders are also available to employees seeking payment of claims related to their employment contract.[498] Finally, in Portugal, victims of personal injuries (or their heirs in case of death) may seek provisional payment in the form of a monthly allowance if they can demonstrate that their injury has put them in a state of necessity.[499]

571. In other Member States, the power to grant provisional payment to impecunious creditors is derived from general rules on provisional measures. In theory at least, the scope of the remedy is thus not limited to certain categories of parties.

572. In Germany, courts have derived the power to grant provisional payment from the general power of courts to issue provisional injunctions for the purpose of maintaining the status quo.[500] Besides the two kinds of provisional injunctions expressly provided by the German code of civil procedure, courts have developed a third one for the purpose of providing provisional satisfaction to the applicant.[501] The general requirements of provisional measures apply, and the applicant must demonstrate that he has an urgent need for the remedy and that the existence of his claim is likely.[502] In practice, the remedy is essentially used to grant provisional payment.[503] German courts have issued provisional injunctions requiring payment of a variety of claims, including maintenance, salaries, pensions or tort claims.[504]

573. Under Belgian law, provisional payment can be awarded under the general power of the president of first instance courts to grant provisional measures in case of

[497] See Nationals Report, question 2.4.1: Austria (Enforcement Regulation, §382a), Czech Republic, Lithuania and Portugal (Art 384 CCP).

[498] See National Report, question 2.4.1: Lithuania.

[499] See National Report, question 2.4.1: Portugal (Art 388. Paragraph 4 of Art 388 extends the scope of the remedy to any loss entailing danger for subsistence and accommodation of the victim).

[500] See National Report: Germany (§ 940 ZPO: “Einstweilige Verfügung zur Regelung eines einstweiligen Zustandes”).

[501] Known as Leistungs- or Befriedigungsverfügung.

[502] See also M. Vollkommer in Zöller, ZPO (OttoSchmidt, 30th ed 2014) § 940 ZPO no 6.

[503] See also Musielak, Voit and Huber, ZPO (Franz Vahlen, 12th ed 2015) § 935 ZPO no 8.

[504] *Ibid*

urgency.[505] However, Belgian courts have gradually developed distinct requirements for the granting of provisional payments orders. Three conditions must be met.[506] The first is the lack of financial resources of the applicant. The second is the urgency to remedy this situation by awarding provisional payment. The third is that the claim of the applicant appears to be undisputable so that there is no risk that the provisional decision to award a payment will be affirmed by the court having jurisdiction on the merits.

574. Similar rules apply in the Netherlands. Provisional payment is available under the general power of Dutch courts to grant provisional relief (*kort geding*) in case of urgency.[507] Three conditions must be met. The first is the urgency requirement, which is also interpreted as referring to the need of the creditor to be paid. Dutch courts have found that not only the typical weaker parties (maintenance creditors, employees, etc.) could demonstrate such an urgent need of payment, but also small businesses which cannot wait for payment of their invoices. The second requirement is that the existence of the claim of the creditor should be "sufficiently plausible". The Dutch Supreme Court has explained, however, that these two first requirements should be considered as interconnected ("communicating vessels"). Where the existence of the claim can barely be disputed, the requirement of urgency is lowered considerably. Finally, the third requirement is, in theory, that the creditor should be able to pay back the money received on this ground, but again the requirement can almost disappear in cases of great urgency (i.e. great financial need. There would otherwise be an obvious tension between the first and third requirements) and where the existence of the claim cannot be seriously disputed. It seems, therefore, that the flexibility in the interpretation of these requirements allow Dutch provisional payment orders to serve both the function of accelerating payment of undisputable claims and the function of protecting impecunious creditors. *Kort geding* proceedings are always

[505] See National Report, question 2.4.1: Belgium (Art 584 BJC). Provisional payment can also be granted in the course of the proceedings on the merits: Art 19 (BJC).

[506] See, e.g., First Instance Court of Brussels, 4 May 2012, (2012) Rev Gen Ass Resp 14905; Civ. Bruxelles (réf.), 22 février 2010 et 31 mars 2010, Entr. & Dr., 2011, 169 et 174, note J. Rikkers et J. Teheux ; Bruxelles, 25 octobre 2007, JT, 2008, 10 ; Bruxelles, 19 mai 2005, JT, 2005, 774 ;- Civ. Neufchâteau, 21 juin 2005, RGAR, 2006, n° 14097.

[507] See National Report, question 2.4.1: The Netherlands

inter partes. There is no requirement under Dutch law that proceedings on the merits be initiated after issuance of provisional relief, and this is indeed very rarely the case.

2.1.3 Favouring certain categories of parties

575. In some Member States, certain categories of parties are entitled to provisional payment of their claim without demonstrating either that they have high chances of success on the merits or that they urgently need the payment. A topical example is landlords in Austria, who are entitled to seek provisional payment of their rent by merely certifying that it is due.[508] While rents could be the sole income of certain landlords, they are not typically considered as weaker parties, and they certainly need not show that they urgently need the payment of the rent under Austrian law. The purpose of the remedy is not to speed up the resolution of the relevant disputes, since the remedy cannot be self-standing and landlords are required to initiate proceedings on the merits.[509]

2.2 Problems and Assessment

2.2.1 Availability of Provisional Payment

576. When asked to evaluate several factors in terms of their impact on cross-border litigation, more than 40% of the respondents to the survey[510] identified ‘Availability and types of provisional relief’ as either a ‘Very Significant Obstacle’ (9.67%) or a ‘A Significant Obstacle’ (31.45%).

577. There are two possible interpretations for these answers. The first is that diversity creates a problem for cross-border enforcement, as equivalent measures may not exist in the enforcing State. This issue should not arise with courts decisions ordering payment, which are common in all Member States, and thus do not require to identify any equivalent measure in the Member State of enforcement.

---

[508] See § 382 of the Enforcement Regulation.

[509] E. Kodek, ‘§ 382f EO, no 3‘ in P. Angst and P. Oberhammer (eds), Exekutionsordnung (Manz 3rd ed. 2015)

[510] Overall, this question was answered by 124 respondents.

578. The second possible interpretation is that practitioners are worried that other jurisdictions offer interim remedies with unacceptably severe consequences. A Polish academic and lawyer explained:

“There is no definition of the European protective measure, which is profitable to countries which have severe protective measures, e.g. freezing injunction (England, Cyprus).”[511]

579. The third possible interpretation, however, is that the lack of availability of a given remedy in a particular Member State is cause for concern for European practitioners.

580. The remark of the same Polish academic and lawyer supports this conclusion:

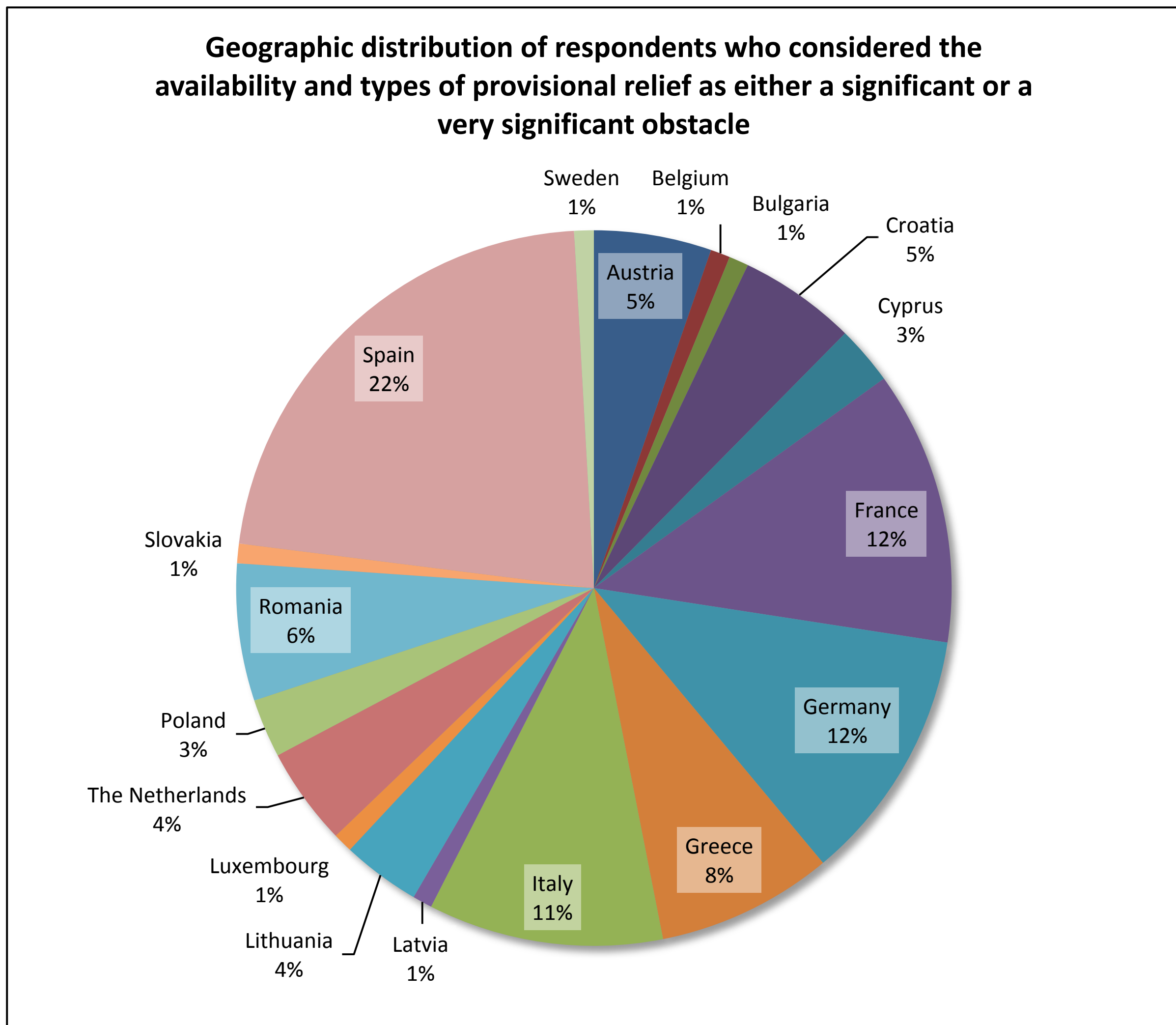
“Application of provisional measures is problematic in cross-border litigation. The main problems stem from divergences in national laws of different Member States. This leads to problems in ensuring effective legal protection.”[512]

581. Under this third interpretation, it is possible that provisional payment orders would be among the remedies contemplated by respondents, since it is not available in the majority of the Member States. But respondents might also have contemplated other remedies. In this respect, it should be underlined that the geographical distribution of the respondents does not correspond to Member States where the remedy is either available or unavailable.[513]

[511] Interview conducted by the Polish national reporter.

[512] Interview conducted by the Polish national reporter.

[513] 22% of respondents came from Spain, a jurisdiction where the remedy is unavailable, while 12% and 11% came respectively from France and Italy, where the remedy is available to serve one function (supra 2.1.1), and 12% came from Germany, where the remedy is available to serve another function (supra 2.1.2): see Chart at the end of para. 567.



582. The claim that the lack of availability of a particular remedy in certain Member States might be an issue is, in effect, a claim for harmonizing the law of remedies in the European Union. The main rationale for establishing European civil remedies in recent years has been to address issues of cross-border enforcement. Yet, there is no discernible issue of cross-border enforcement for provisional payment orders.[514] As they will almost always be granted *inter partes*, they can be freely and directly enforced under the Brussels Ibis Regulation. It would therefore be difficult to justify infringing the competence of Member States in the field of civil procedure in this respect.

583. An exception might arguably exist for provisional payment orders serving the function of providing financial support to impecunious creditors. The unavailability of such a

[514] See, e.g., BGH, 20 October 2016, IX ZB 11/16 (enforcement of an Italian provisional payment order in Germany).

remedy could be analysed as a limitation to the right of impecunious creditors to access to justice, which is recognized by Art 47 of the Charter of Fundamental Rights of the European Union. Extending the availability of such payment orders could usefully complement the Legal Aid Directive.

2.2.2 Jurisdiction to Grant Provisional Payment under EU Regulations

584. A few respondents to the survey have identified issues with European jurisdictional rules to grant provisional measures.[515] Yet, a surprisingly high proportion of the respondents have explained that they never use the special rule in Art 31 of the Brussels I Regulation (now Art 35 of the Brussels Ibis Regulation).[516] It cannot be excluded that this limited relevance could be explained by a limited need for protective relief, but this is hard to believe. Rather, it is submitted that, in many Member States, the complexity of the rule is simply ignored by practitioners, lawyers and judges alike, in proceedings where time is often of the essence.

585. If European rules are ignored but not perceived as a problem, the status quo could arguably be the best way forward. This, however, would raise an issue of legal certainty, as court decisions would not be predictable. A preferable solution would be to clarify and simplify the rules governing the jurisdiction to grant interim relief, so that they can be known and observed in speedy proceedings. The rules governing the jurisdiction of courts of Member States to grant provisional payment orders are a good example. They are highly complex, and for no good reason. They could be drastically simplified.

586. The initial cause for the complexity of the regime of provisional payment orders under the E.U. law of jurisdiction has been the unwillingness of the European lawmaker to distinguish between the various types of provisional and protective measures, and the adoption of a single rule for all. Provisional and protective measures, however, include very different remedies, and it seems clear that the same size does not fit them all. The issue has been addressed by the European Court of Justice which offered a complex definition of provisional, including protective measures in the meaning of Art 24 of the 1968 Brussels Convention. With respect to provisional

[515] The issue was mentioned by three Polish academics and lawyers in interviews conducted by the Polish national reporter.

[516] 75% of 120 respondents.

payment orders, the court ruled that such orders could be so characterized, but only provided that certain conditions were met.[517]

587. Under European law, the characterization of provisional measure triggers two legal consequences. The first is that courts which do not have jurisdiction on the merits may also grant provisional, including protective measures.[518] The second is that provisional measures may only benefit from the provisions facilitating recognition and enforcement if the defendant was informed about their issuance before such enforcement.[519] As provisional payment orders are almost always granted *inter partes*, the rule which is fundamentally at stake is that of the jurisdiction of courts other than the court having jurisdiction on the merits.

588. The Court has repeatedly explained the rationale of the additional head of jurisdiction for provisional, including protective measures, as follows:

> "38. The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15).
>
> 39. In that regard, the Court held at paragraph 16 of Denilauler that the courts of the place or, in any event, of the Contracting State where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.
>
> 40. It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the

[517] Case C-391/95 *Van Uden Maritime BV* EU:C:1998:543; Case C-99/96, *Hans-Hermann Mietz* EU:C:1999:202.

[518] Regulation (EU) 1215/2012 (Brussels Ibis), Art. 35.

[519] Regulation (EU) 1215/2012 (Brussels Ibis), Art. 2(a) and Art.42(2)(c).

> territorial jurisdiction of the Contracting State of the court before which those measures are sought."[520]

589. While it is easy to understand this rationale in the context of assets or evidence preservation, it seems much less meaningful for more abstract measures such as provisional payment orders.[521] Yet, the court drew the consequence that the additional head of jurisdiction is only available where the debtor has or will have specific assets within the jurisdiction of the court. In *Van Uden*,[522] the Court elaborated on the rationale of the special jurisdictional rule for provisional payment orders as follows:

> "45. (…) interim payment of a contractual consideration, even in an amount corresponding to that sought as principal relief, may be necessary in order to ensure the practical effect of the decision on the substance of the case and may, in certain cases, appear justified with regard to the interests involved.
>
> 46. However, an order for interim payment of a sum of money is, by its very nature, such that it may preempt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under Articles 2 to 18 of the Convention, and thereafter to have the order in question recognised and enforced in the defendant's State, the rules of jurisdiction laid down by the Convention could be circumvented.
>
> 47. Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made."

590. The Court insisted that the function of provisional payment orders should be to ensure the practical effect of the decision on the substance, and that they should be genuinely provisional so that the jurisdictional rule does not circumvent the rules establishing jurisdiction on the merits.

591. It seems clear that this is not the case for provisional payment orders which serve the function of improving the efficiency of the judicial system. Their purpose is not to

[520] Case C-391/95, *Van Uden Maritime* (n 517).

[521] M. Nioche, La décision provisoire en droit international privé européen (Bruylant 2012), 468.

[522] Case C-391/95, *Van Uden Maritime* (n 517).

ensure the practical effect of a future decision, but to grant immediate satisfaction to the creditor. In effect, such provisional payment orders replace the final decision. As a consequence, they have great potential for circumventing European rules of jurisdiction on the merits. Furthermore, it is doubtful whether it is useful in any way to grant additional jurisdiction to the court of a Member State for such a remedy.[523] The goal pursued in these Member States is to adjudicate more efficiently certain disputes so that the caseload of courts of common jurisdiction is reduced. It would therefore seem logical that such remedy is only available in a given Member State where the courts of the same Member State would have jurisdiction to decide the dispute on the merits. This is even more logical in a Union where only a few Member States have made the policy decision to grant provisional payment orders for this purpose.

592. The purpose of provisional payment orders serving the function of providing financial support to impecunious creditors is genuinely protective, as they are meant to give the necessary means to the creditor to continue the litigation. It seems clear, however, that they will rarely be provisional: creditors will typically be unable to reimburse them, and indeed the law of certain Member States provides that they may not be asked to do so.[524] It must also be recognized that, contrary to preservation orders, the justification for allowing such creditors to seek such remedy from courts other than the court having jurisdiction on the merits is hard to discern. There is no reason why any other court would be best situated to assess the chances of success of the creditor or his financial situation. Additionally, after the abolition of the exequatur procedure,[525] the enforcement of provisional payment orders should not be significantly easier if obtained in one or in another Member State. The real reason why a creditor might want to insist to seek the remedy in a particular Member State is that it might be available there while it would not in the courts of the Member State having jurisdiction on the merits. In such cases, granting jurisdiction to another court would indeed allow the creditor to circumvent European jurisdictional rules, at least if it results in an order for payment of the biggest part of the claim.

[523] M. Nioche (n 521) 468.

[524] Under Portuguese law for maintenance payment orders, for instance: see National Report, question 2.4.1: Portugal (Art 2007(2) CCP).

[525] Whether under the Brussels Ibis Regulation or Regulation 4/2009 for maintenance claims.

593. Finally, provisional payment orders aiming at favouring a party have no protective purpose. Most of the arguments put forward above also apply: there is no discernible rationale for granting jurisdiction to courts other than those having jurisdiction on the merits, and the remedy could be used to circumvent the jurisdiction of those courts.

2.3 Proposals and Improvements

594. Although provisional payment orders are only available in about half of the Member States and the availability of interim remedies has been pointed out as a significant issue by many respondents to a survey, there does not seem to be a solid justification for adopting a uniform provisional payment procedure. Yet, in the context of the European policy to facilitate access to justice, provisional payment orders could usefully supplement existing tools such as European legislation on legal aid.[526] This could be achieved by a targeted intervention of the European lawmaker upgrading either an existing instrument facilitating access to justice (for instance, the legal aid directive) or an existing instrument concerned with creditors who are typically confronted with difficulties to access justice (for instance, the maintenance regulation). The European remedy promoted in this context would be limited to cases where creditors could demonstrate an urgent need for receiving provisional payment of their claim. The European lawmaker could leave it open to Member States to make such remedy available in the context of proceedings on the merits or in autonomous interim proceedings.

595. The operation of the European rules on jurisdiction with respect to provisional payment orders could be simplified by excluding them from the scope of Art 35 of the Brussels Ibis Regulation (and similar rules found in other European Regulations). To the extent that the future report on the application of the Brussels Ibis Regulation would confirm this need, such evolution of the law could be made by a targeted intervention of the European lawmaker upgrading the Brussels Ibis Regulation. This could be done either by clarifying the concept of provisional, including protective measures in a recital of the preamble to the regulation (for instance, Recital 25), or by including a substantive definition in Art 2 of the regulation. Given that the proposal would actually change the law as it currently stands after the interpretation offered by

[526] Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

the European Court of Justice,[527] it is submitted that the most appropriate way would of doing so would be to include a substantive definition in Art 2 of the regulation.

[527] *Supra*, para. 589.

Chapter 4: Appeal and Third Instance

CHRISTOPH KERN AND KAROL WEITZ

1. First Appeal (Second Instance)[*]

1.1. General Assessment of Appellate Proceedings

596. All Member States are familiar with second instance proceedings, commonly called appeals. From a general point of view, it can be said that the appellate procedure serves both private and public interests. As a legal remedy, the appeal enables the court, upon party request, to set aside a defective decision of a lower court and to correct errors itself or have them corrected by a lower court. At the same time, it is in the public interest to guarantee the correctness of judgments and thereby increase citizens' trust in the functioning of the judicial system. Moreover, the appeal also helps to ensure the uniform application of the law – a goal which is typically said to be in the public interest and is most relevant in third instance proceedings[528].

597. Despite private and public interest in allowing an appeal, all Member States limit the right to appeal in one way or another. At first glance, such limitations seem to be in contradiction with private and public interest. However, at a closer look, the limitations can be justified. Suffice it to mention that the parties and the State have an interest in finality and legal certainty[529] as well as in a reasonable use of the resources of the judicial system.

598. In some procedural systems, there are two "types" of appeal procedures depending on the type of decision against which an appeal is lodged. In Austria and Germany, for instance, there are separate sets of rules for appeals against final judgments[530]

[*] Prepared by Prof. Dr. Christoph A. Kern, Heidelberg University, Ole Jena, Valesca Profehsner and Christian Uhlmann, Ph.D. candidates, Heidelberg University.

[528] On public and private interest, see generally Christoph A. Kern, The Role of the Supreme Court, RePro 228, ano 39, fevereiro 2014, 15, 16-23.

[529] Cf. Adrian Zuckerman, Zuckerman on Civil Procedure (3rd edn, Sweet & Maxwell 2013) 1112 et seq.; Leo Rosenberg, Karl Heinz Schwab and Peter Gottwald, Zivilprozessrecht (17th edn, C.H. Beck 2010) 770.

[530] "Berufung", German Code of Civil Procedure, sec. 511 et seqq. and Austrian Code of Civil Procedure, sec. 461 et seqq.

and complaints against other court decisions[531]. As this Study focuses on the procedure for appeals against a final judgment, the legal remedies against other court decisions are mentioned only occasionally.

599. In the first instance, cases are tried by a district, local or city court. The appeal goes to the higher instance, encompassing the regional courts[532], country courts[533] and high courts[534]. If the decision was given by the higher court in first instance, the appeal will, ordinarily, be heard by the higher appeal courts, high or supreme court[535]. Thus the proceeding is wholly transferred to a higher instance when an appeal has been lodged. Such a devolutive effect is a common characteristic in the EU Member States' appellate proceedings.

1.1.1. Parties

600. Generally, an appeal can only be sought by a person who had already been one of the main parties to the first instance proceedings, i.e., the plaintiff or the defendant. However, in some Member States, third parties to the first instance proceedings may seek permission to appeal in very special circumstances[536].

601. Concerning England and Wales[537], irrespective of CPR 52.1(3)(d) which states that "'appellant' means a person who brings or seeks to bring an appeal", the Court of Appeal ruled in *George Wimpey UK Ltd v. Tewkesbury Borough Council (MA Holdings LTD intervening)*[538] that the above-mentioned provision does not necessarily limit the possibility to lodge an appeal exclusively to the parties who took part in the first instance proceeding. Therefore, third parties may become parties (in

[531] "Beschwerde", German Code of Civil Procedure, sec. 567 et seqq. and "Rekurs", Austrian Code of Civil Procedure, sec. 514 et seqq.

[532] National Report, question 2.2.1: Germany; Bulgaria (the regional court is the first instance and the district court is the second instance court).

[533] National Report, question 2.2.1, England.

[534] National Report question 2.2.1: Denmark; Ireland.

[535] National Report question 2.2.1: Denmark; England and Wales; Latvia.

[536] National Report question 2.2.1: Belgium (third party opposition); England; Malta ("An appeal may be entered not only by the contending parties but also by any person interested").

[537] It must be explicitly mentioned that the references in this chapter which concern England and Wales do not apply to Scotland and Northern Ireland. Additionally, the Civil Procedure Rules are only valid for England and Wales (Stuart Sime in Blackstone's Civil Practice (Oxford University Press 2014) 42).

[538] [2008] EWCA Civ 12.

the cited case: plaintiff) in an appellate proceeding where the decision of the first instance affects their legitimate rights[539]. Seeking a theoretical justification, one might explain the possibility of a third party appeal with the principles of access to justice and the right to be heard. If a party who did not take part in the first instance proceedings is seriously affected by the judgment, she should be permitted to appeal. Granting third party admissibility rights can also be considered a matter of fairness since CPR 52.1(3)(e)(ii) empowers the court to permit a non-party as defendant to appeal, which in turn must apply a fortiori to a party acting as plaintiff in appellate proceedings[540].

602. France is another prominent example of a country which knows a remedy open to a party who did not participate in the main proceedings. This so called “third party application” is usually used in situations where the decision has an *erga omnes*-effect and thus does not only affect the respective parties but everyone[541]. Since the judgment has to be taken into account in substantive law, it has no *res judicata* effect on third parties. Again, one might explain the existence of such a remedy with the principle of access to justice[542].

1.1.2. Substantive jurisdiction regarding where to lodge the notice of appeal and the particulars of the appeal

603. The appeal must be lodged with the court of first instance, *iudex a quo*[543], or the court of appeal, *iudex ad quem*[544]. Additionally, in some countries, the appeal must be served directly on the other party[545].

604. Some countries distinguish between the notice of appeal, which is a declaration stating merely that an appeal is being lodged against a designated judgment, and the particulars of the appeal, i.e., the indication of the grounds for appeal and their

[539] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1140 et seq. with further references.

[540] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1140.

[541] French Code of Civil Procedure, Art. 583.

[542] Emmanuel Jeuland, Introduction to French Business Litigation (1st edn, Joly éditions 2016) 185 et seq.

[543] National Report , question 2.2.1: Finland; Hungary; Latvia; Lithuania; Poland; Romania; Spain.

[544] Germany, German Code of Civil Procedure, sec. 519(1); National Report, question 2.2.1: England; Slovenia.

[545] National Report, question 2.2.1: Italy.

substantiation[546]. The particulars of the appeal may, of course, already be included in the document with which the appeal is lodged. In Finland, a declaration of intent must be filed with the court which rendered the decision (*iudex a quo*) prior to the lodging of an appeal[547].

1.1.3. Content of the notice of appeal or particulars of appeal

605. All legal systems provide for minimum requirements regarding the content of the act introducing the appeal. It must commonly be lodged in writing or committed to the records. The requirement of a written form can be explained with the principle of legal certainty. As an appeal generally suspends *res judicata*, the conditions for its admissibility as well as their fulfilment must be specified clearly and unequivocally. This also applies to the scope of the lodged appeal. An additional purpose of the formal requirements can be seen in the need for clarification of who is standing behind the lodged appeal: It must be clear who takes the responsibility for the appellate proceedings, and it must be made sure that the brief introducing the appeal is not simply a draft[548].

606. All legal systems require that the appellant specify the first instance judgment[549]. Typically, the appellant is also required to submit an official copy[550]. As far as the particulars of the appeal are concerned, the appellant must state the grounds of appeal and set forth fully the reasons relied upon for the grounds stated. If the scope of review also covers the factual determinations[551], the notice of appeal or the particulars of the appeal normally have to contain additional information: If the appellant claims that the first instance court erred in determining the facts, she must name concrete indications giving rise to doubts about the first instance court having correctly or completely established the facts. If the appellant wants to introduce new

[546] See, e.g., Germany, distinguishing the notice of appeal (“Berufungsschrift”, German Code of Civil Procedure, sec. 519), and the particulars of the appeal (“Berufungsbegründung”, German Code of Civil Procedure, sec. 520).

[547] National Report, question 2.2.1: Finland.

[548] Bruno Rimmelspacher in Münchener Kommentar zur Zivilprozessordnung (5th edn, 2016) vol. 2, sec. 519 mn. 1.

[549] National Report, question 2.2.1: Germany (German Code of Civil Procedure, sec. 519(2) and 520(3)).

[550] National Report, question 2.2.1: Bulgaria.

[551] See 1.4. for further details.

facts, she must plead these facts and designate evidence proving these facts; if national procedural law restricts new facts and evidence, the appellant must also plead the circumstances based on which these new facts or evidence are to be admitted[552].

1.1.4. Leave to appeal or certain value of the subject matter required for appeal

607. Regarding the requirement of leave to appeal, one can distinguish between three groups of countries. In the first group, leave to appeal, either by the *iudex a quo* or by the *iudex ad quem*, is generally required. In the second group, the requirement of leave to appeal is unknown. In the third group, to which most of the countries belong, a mixed system applies.

608. In a first group of countries (England and Wales, Lithuania, Finland and Sweden) leave to appeal is mandatory[553]. In England and Wales, permission to appeal is granted if the court considers that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard[554]. In Sweden, the grounds for granting leave to appeal are, essentially, that the legal matter is of fundamental significance for the further development of the law or there are other extraordinary reasons[555]. These are very high requirements – a situation which appears to be typical for common law countries. The historical reason may be that in these countries, the facts were determined by a jury. As the fact-finding process involving a jury is very costly, procedural systems which provide for jury trial try to avoid that all the costs were spent in vain by imposing high requirements for appeals[556]. As far as England and Wales are concerned, it should be noted that since the Supreme Courts Act 1981 (sec. 69(1)), a jury trial has been available only in very few cases, e.g., in cases involving issues of fraud against a party or claims in respect of libel. However, it goes without saying that even in procedural systems where a jury

[552] See, e.g., German Code of Civil Procedure, sec. 520(3) no. 3 and 4.

[553] National Report, question 2.2.1: England (with minor exceptions e.g. against committal orders or refusals to grant habeas corpus, cf. CPR, 52.3(1)(a)); Lithuania; Finland; Sweden.

[554] CPR, 52.6(1) (CPR, 52.3(6) old version). Leave to appeal is granted by the Court of Appeal (CPR, 52.7(1)).

[555] National Report, question 2.2.1: Sweden.

[556] Cf., with respect to the United States of America, Rolf Stürner and Christoph A. Kern, 'Comparative Civil Procedure – Fundamentals and Recent Trends' in Gedächtnisschrift für Halûk Konuralp I (Yetkin Yayinlari 2009) 1002 et. seqq.

plays no or almost no role, high requirements for an appeal save judicial resources and express a principle according to which, as a general matter, the first instance should (finally) decide the case, leaving the appeal open only against judgments which can be considered as evidently incorrect[557]. Regarding Sweden, the high requirements for a leave to appeal may be a consequence of the fact that Swedish civil procedural law tends to allow for full second instance proceedings[558]. If the barrier of permission for appeal was too low, finality could almost never be achieved on the first instance level.

609. The second group has the characteristic that every decision rendered in first instance is open to appeal without a need for permission and irrespective of the value of the claim, the gravamen or the relief sought. Member States that can be counted to this group are Italy, Romania, Poland and Slovenia[559]. Italy and Romania are particularly open for appeals, as even (second) appeals against judgments of the appeals courts filed to the highest court on the third instance level are not restricted[560]. It seems that in these countries, three "instances"[561] are guaranteed to the parties in any case. However, there is no clear rule according to which no restrictions on the second instance level always go hand in hand with no restrictions on the third instance level[562]. In Poland, in third instance proceedings the value of the subject matter must be at least 50 000 PLN and in labour matters at least 10 000 PLN[563].

610. Most EU Member States belong to the third group – the group of countries in which a mixed system of requirements applies. As a general matter, these countries allow appeals only if the value of the claim at issue, of the gravamen or of the relief sought exceed a certain threshold. In some of these countries, the first instance decision is always final if the value of the claim, the gravamen or the relief is too low. In other

[557] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1113 et seq.

[558] National Report, question 2.2.1: Sweden.

[559] Italy, see Andrew Colvin, Vincenzo Vigoriti and Roberto Calabresi, 'Italy' in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 335; National Report, question 2.2.1: Romania; Poland; Slovenia.

[560] National Report, question 2.2.3: Italy,

[561] Not in a technical sense.

[562] Cf. for such a rule J.A. Jolowicz, 'Introduction: Recourse Against Civil Judgments in the European Union: A Comparative Survey' in Chase and Hershkoff (general eds), Civil Litigation in Comparative Context (Thomson/West 2007) 331.

[563] National Report, question 2.2.3: Poland.

countries, the *iudex a quo* or the *iudex ad quem* may grant leave to appeal if the case does not meet the minimum value requirement. Countries of the first group are, inter alia, Belgium, where the judgment is not appealable (except for extraordinary appellate remedies) if the amount in dispute does not exceed 2 500 EUR[564], the Czech Republic, where, converted into Euros, the value of the dispute has to exceed 370 EUR[565], France, where the value of the subject matter of the appeal must exceed 4 000 EUR[566], Greece, where judgments rendered in small claims proceedings are not appealable[567], Luxembourg, where the value of the dispute must exceed 1 250 EUR[568], the Netherlands, where the minimum threshold is 1 750 EUR[569], Portugal, where the decision has to be unfavourable to the appellant in the amount of at least 2 501 EUR and must exceed 5 000 EUR in total[570] and, with the highest value-threshold, Spain, where the value of the dispute must be more than 3 000 EUR[571]. Member States where courts may grant leave to appeal if the subject matter of the appeal does not meet the minimum value requirement are Germany and Denmark. In Germany, the value of the subject matter of the appeal must exceed 600 EUR unless the court of first instance has granted leave to appeal[572], and in Denmark, it has to exceed 20 000 DKK (2 689 EUR) unless the appellant has a permission of the Danish Appeals Permission Board[573]. In Germany, the appeal is admitted if the legal matter is of fundamental significance or wherever the further development of the law or the interest in ensuring uniform adjudication require a decision by the court of appeal, German Code of Civil Procedure, sec. 511(4) no. 1. This is basically similar to the Danish appellate procedure. A peculiarity can be found in French civil procedure. Although an appeal is inadmissible if the subject matter of the appeal does not exceed 4 000 EUR, filing a third instance remedy ("pourvoi en

[564] National Report, question 2.2.1: Belgium.

[565] National Report, question 2.2.1: Czech Republic ("10.000 CZK").

[566] National Report, question 2.2.1: France (French Court Constitution Act, R211-4 and R221-4).

[567] National Report, question 2.2.1: Greece.

[568] National Report, question 2.2.1: Luxembourg.

[569] National Report, question 2.2.1: The Netherlands (Code of Civil Procedure of the Netherlands, Art. 332).

[570] National Report, question 2.2.1: Portugal.

[571] National Report, question 2.2.1: Spain, question 2.2.1.

[572] National Report, question 2.2.1: Germany (German Code of Civil Procedure, sec. 511(2)).

[573] National Report, question 2.2.1: Denmark.

cassation") against the judgment rendered in first and thus final instance is still possible[574]. This might be due to the fact that in France a two-instance proceeding is (mostly) considered as a para-constitutional right[575].

611. Generally speaking, requiring a minimum value can be considered as a way of balancing the general interest in saving judicial resources and the individual interest of the parties – or, more precisely, the appellant – in a correct judgment: If the value of the subject matter does not meet or exceed the required value, the principle of saving judicial resources outweighs the legitimate interest of the parties in obtaining a correct judgment[576]. However, regarding Germany, if the legal matter is of significance not only for the parties but for the judicial system as a whole, the right of appeal shall be upheld[577]. A special case in this sense is Austria where, if the subject matter of the dispute does not exceed 2 700 EUR, an appeal may only be based on legal issues or grave procedural errors[578].

1.1.5. Gravamen

612. In some countries, procedural law requires that the first instance decision constitute a gravamen for the party lodging the appeal. In German civil procedure there is a further distinction between the so-called formal gravamen ("formelle Beschwer") and the so-called substantive gravamen ("materielle Beschwer")[579]. The formal gravamen is the prerequisite for the plaintiff who wants to lodge an appeal. There is formal gravamen for the plaintiff if and to the extent that the decision against which appeal is sought differs from her demand. The substantive gravamen is the prerequisite for the defendant who wants to lodge an appeal. It is met if and to the extent that the court entered a judgment against the defendant.

[574] Cf. French Code of Civil Procedure, Art. 605 in connection with French Court Constitution Act, R211-4, R221-4 and R231-4.

[575] Cf. Serge Guinchard, Frédérique Ferrand and Cécile Chainais, Procédure civile (4th edn, Dalloz 2015) 600.

[576] Leo Rosenberg, Karl Heinz Schwab and Peter Gottwald, Zivilprozessrecht (17th edn, C.H. Beck 2010) 779.

[577] Cf. German Code of Civil Procedure, sec. 511(2) no. 2, (4).

[578] National Report, question 2.2.1: Austria (Austrian Code of Civil Procedure, sec. 501(1)).

[579] National Report, question 2.2.1: Germany; Leo Rosenberg, Karl Heinz Schwab and Peter Gottwald, Zivilprozessrecht (17th edn, C.H. Beck 2010) 776 et. seq.

613. The gravamen requirement is a part of the requirement of legal interest in bringing the proceedings ("Rechtsschutzbedürfnis"). As far as appeals are concerned, a party has no such legal interest when the judgment was rendered as demanded. In these cases, the party lacks a legitimate interest in appealing against that decision[580]. A comparable gravamen requirement exists in Belgian civil procedural law[581].

1.1.6. Problems and assessment

614. Obviously, the variety of the Member States' procedural law concerning (first) appeals makes it more difficult for a foreign party – and the preferred lawyer of this party in her home country – to decide on whether to lodge an appeal and to meet the requirements for an appeal. At the same time, this variety may prima facie affect mutual trust for such observers who believe that anything that does not correspond to her national procedure is doubtful.

615. However, the difficulties for a foreign party and potential doubts which result of such a prima facie perspective are an inevitable consequence of different political, historical and doctrinal preferences and decisions of the national legislatures and courts. They could only be eliminated if all national procedural laws governing appeals – and probably even the whole body of national procedural law – were eliminated and superseded by a uniform European procedure. This is neither advisable nor feasible.

616. Regarding appeals as well as all other elements of (procedural) law, it would be more realistic and promising to identify individual problems and to think about a remedy for them. With respect to what has been discussed so far, the only problem one could address is the complete lack of appeals proceedings in countries with an absolute minimum value regardless of the error which could be alleged by the aggrieved party and regardless of the significance of a legal question raised by the case at issue. Such a complete lack of appeals proceedings might be surprising for a foreign party and be considered unjust by an observer. It must be noted, though, that even if a regular (first) appeal is not available in these countries, the law of these countries

[580] Bruno Rimmelspacher in Münchener Kommentar zur Zivilprozessordnung (5th edn, 2016) vol 2, pre sec. 511 et seqq. mn. 13.

[581] National Report, question 2.2.1: Belgium ("the appellant must have a legitimate interest in bringing the case before the appellate court").

may provide for an extraordinary remedy. Thus, before taking action on the European level, further research seems to be necessary.

1.2. Time Limits

617. All procedural systems set time limits within which an appeal must be lodged. This is a natural consequence of the need for finality. Differences concern the beginning and the length of the time limits and the possibility to extend a time limit. Moreover, sometimes, additional time limits may apply.

1.2.1. Beginning of the time limit

618. Regarding the beginning of the time limit that national civil procedural systems grant the parties for lodging an appeal, one can distinguish between countries where the starting point is the date on which the judgment is served, *ex officio* or by the prevailing party, to the other party, and countries where the time limit begins on the day of the pronouncement or rendering of the decision.

619. In most Member States the period for lodging an appeal starts with the service of the judgment, respectively of a certified copy thereof, on the respective party[582].

620. In the remaining Member States, the time limit begins on the day when the judgment is pronounced or rendered. In Sweden and the Netherlands, the parties are informed by the court when the judgment is orally pronounced or rendered; this moment triggers the time limit for lodging an appeal[583]. In the other Member States belonging to this group, the time limit commences at the time when "the judgment or order becomes binding on the intending appellant"[584], (also) with the rendering of the judgment[585], with "the date of the judgment"[586], "within 30 days of the judgment"[587],

[582] National Report, question 2.2.1: Austria; Belgium; Bulgaria; Czech Republic; Estonia; France; Germany (German Code of Civil Procedure, sec. 517); Greece; Italy; Luxembourg; Poland; Spain.

[583] National Report, question 2.2.1: Sweden (rendering or, in exceptional cases, service of the judgment); the Netherlands (pronouncement of the judgment except for default judgment where service is required).

[584] National Report, question 2.2.1: Cyprus.

[585] National Report, question 2.2.1: Bulgaria ("in commercial cases").

[586] National Report, question 2.2.1: Denmark.

[587] National Report, question 2.2.1: Finland.

with the "announcement of the judgment"[588], with the "date of the judgment"[589], with "notification" of the judgment to the parties[590] or with the "communication of the decision"[591]. In Belgium the time limit can also be triggered by notification by judicial letter[592].

1.2.2. General length of the time limit

621. Regarding the length of the time limits, one can generally distinguish between countries providing a "longer" period and countries granting a rather "short" period of time.

622. In the countries of the first group, i.e., countries which provide a rather long time limit, the party is entitled to lodge an appeal against the first instance decision within four weeks[593], thirty days[594] or one month[595]. In Luxembourg and the Netherlands, the time limit is even longer: forty days in Luxembourg[596] and as long as three months in the Netherlands[597].

623. In the second group of countries, i.e., countries which provide a shorter period of time, the appeal must be lodged within ten days[598], two weeks[599], fifteen days[600], twenty days[601], or twenty-one days[602].

---

[588] National Report, question 2.2.1: Latvia.

[589] National Report, question 2.2.1: Malta.

[590] National Report, question 2.2.1: Portugal.

[591] National Report, question 2.2.1: Romania.

[592] National Report, question 2.2.1: Belgium ("gerechtsbrief"/"lettre judicaire").

[593] National Report, question 2.2.1: Austria (except the judgment is pronounced orally, a notice to appeal must be filed immediately or within two weeks after the party has been served with the written record); Denmark; Spain ("twenty working days").

[594] National Report, question 2.2.1: Estonia; Finland; Greece; Italy; Lithuania; Portugal; Romania.

[595] National Report, question 2.2.1: Belgium; France; Germany (plus another month to substantiate the appeal, German Code of Civil Procedure, sec. 517 and 520(2)0.

[596] National Report, question 2.2.1: Luxembourg.

[597] National Report, question 2.2.1: the Netherlands.

[598] National Report, question 2.2.1: Ireland.

[599] National Report, question 2.2.1: Bulgaria; Cyprus; Poland.

[600] National Report, question 2.2.1: Czech Republic; Hungary; Slovakia; Slovenia.

[601] National Report, question 2.2.1: Latvia; Malta.

[602] England and Wales, CPR, 512.12(2)(b) (CPR, 52.4(2)(b) old version); National Report, question 2.2.1: Sweden.

624. The time is calculated in some Member States starting from the day after the *dies a quo* until and including the *dies ad quem*[603].

1.2.3. Extension or shortening of the time limit

625. In particular cases, the time limit is extended by law. Reasons are, for instance:

a) the party has no residence in the country of the first instance[604],

b) the judgment includes incorrect information about the possibility to appeal[605],

c) a judgment of a higher court as first instance court is appealed by a party[606], or

d) if the judgment is not served or not properly served on the parties, the appeal must be lodged within six months as of the date on which the decision is published/pronounced[607].

626. The time limit might also be extended or shortened at the court's discretion under certain circumstances[608]. This is prohibited in Belgium, even with the agreement of the parties[609]. The possibility of reducing or extending time limits is also excluded in Germany insofar as filing the notice of appeal is concerned[610].

627. In case of final or summary (court) orders or disputes involving bills of exchange and checks, the time limit might be shorter[611].

[603] National Report, question 2.2.1: Belgium (Belgium Judicial Code, Art. 52 et seq.); Germany (German Code of Civil Procedure, sec. 222 in connection with German Civil Code, sec. 187 et seq.).

[604] National Report, question 2.2.1: Belgium, France (three month in cross border proceedings); Greece, (60 days if the party is domiciled abroad).

[605] National Report, question 2.2.1: Czech Republic.

[606] Denmark, Danish Competition Act, sec. 372 and see Erik Bertelsen, Morten Kofmann and Jens Munk Plum, Competition Law in Denmark (Wolters Kluwer 2011) sec. 956.

[607] National Report, question 2.2.1: Italy; Germany (German Code of Civil Procedure, sec. 517).

[608] National Report, question 2.2.1: Cyprus; Denmark; England and Wales (CPR, 52.12(2)(a) (CPR, 52.4(2)(a) old version)); Ireland; Lithuania.

[609] National Report, question 2.2.1: Belgium (Belgium Judicial Code, Art. 50(1)).

[610] See German Code of Civil Procedure, sec. 517 in connection with sec. 224(1); the period for submitting the particulars can be extended by the presiding judge upon a corresponding petition, German Code of Civil Procedure, sec. 520(2).

[611] E.g. National Report, question 2.2.1: Austria; Germany; Slovenia (8 days if the law-suit deals with bills of exchange and cheques). See in relation to France Emmanuel Hayaux du Tilly, 'France' in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 170.

1.2.4. Additional time limits

628. In some countries the party must additionally file a declaration of intent to appeal before submitting the notice of appeal to the respective court[612]. The declaration can be presented orally in the court hearing in which the judgment is pronounced or at the court registry in written form within a certain number of days. If the party has not filed a declaration of intent to appeal him- or herself, but the opponent did so, she may file a counter appeal within two weeks of the deadline for lodging the appeal[613]. One could say that the requirement of first having to file a declaration gives the appellee early notice that the decision may be challenged and thus avoids that the appellee is given a false sense of security.

629. In some countries there are also fixed time limits for the party on whom the appeal is served. This party shall or may in these countries file a response within a specific period of time from the date of the service of the notice of appeal. Those time limits vary, for instance, from two weeks[614] to up to twenty days[615].

1.2.5. Problems and assessment

630. The importance of time limits can hardly be overstated. On the one hand, time limits are indispensable in order to achieve finality. On the other hand, it is always hard for a party to accept that she lost her right to appeal just because a time limit elapsed.

631. Again, it is evident that differences with respect to time limits make it more difficult to litigate abroad. At the same time, the beginning, calculation and length of time limits are issues which have been developed by every legal system over years, decades and centuries. In most countries, there is abundant jurisprudence on time limits. Introducing uniform time limits with an EU instrument would, first, destroy the numerous clarifications which have been brought about by a country's case-law and legal doctrine, and second, burden the European Court of Justice with an incredible

[612] National Report, question 2.2.1: Finland; Sweden (Swedish Code of Judicial Procedure, 49:3 and 49:6).

[613] National Report, question 2.2.1: Finland. The possibility of filing a cross appeal is also given in the German appellate proceeding, German Code of Civil Procedure, sec. 524.

[614] National Report, question 2.2.1: Poland; Spain ("ten working days").

[615] National Report, question 2.2.1: Malta.

number of cases on the interpretation of a legal instrument on time limits until a certain level of clarity would have been reached.

632. This being said, it must also be noted that the details concerning time limits are first and foremost of practical importance. According to approximately 48% of participants of the online questionnaire different time limits with respect to appeal are regarded as a 'significant' or 'very significant obstacle' to cross-border litigation.[616] At a closer look at the results of the conducted interviews the issue becomes even clearer. Almost 75% of interviewees are in favour to introduce a common set of rules regarding essential procedural aspects such as, inter alia, time limits.[617] Politically, time limits appear to be much less sensitive than other questions of procedural law. However, as mentioned above, a strict unification of time limits would be an important intervention in the national laws and thus impair legal certainty which has been build up by the national jurisprudence. Instead of introducing a uniform instrument on time limits, harmonization of minimum and maximum time limits or of additional time limits in international settings could be a step forward without causing too much disorder.[618]

1.3. Representation

633. While in first instance proceedings, mandatory representation by a lawyer often depends on the case at issue, e.g., the value in controversy or the type of claim, in second instance proceedings representation by a lawyer may be mandatory just for the fact that the proceedings have been brought up to a second instance court. In this respect, two groups of countries can be distinguished. In the first group, legal representation is mandatory in second instance proceedings. In the second group, legal representation is, as a matter of principle, not mandatory but optional.

634. The first group, i.e., the group of countries where legal representation before a second instance court is mandatory, comprises Austria, the Czech Republic, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Portugal and the

[616] Overall, the question was answered by 273 interviewees.

[617] Overall, the question was answered by 151 interviewees.

[618] Unfortunately we are not able to provide any empirical data with respect to this topic. However, this recommendation is based on the result of the meeting of the Consortium and the Advisory Board which took place on the 18th November 2016 in Luxembourg. It can be regarded as the common opinion that the Consortium proposes a time limit which ranges from four to eight weeks.

Netherlands[619]. In these countries, the requirement of legal representation in second instance proceedings is justified by both private interests of the parties and public interests. On the one hand, the requirement is said to protect the parties who are mostly not familiar with the law: Not only is there already a decision of the first instance court which should only be attacked if this decision is wrong, but also the appellate procedure is more difficult and entails additional, and often higher, costs which should only be risked by a party who has professional advice. On the other hand, the requirement of mandatory legal representation serves the public interest in the proper functioning of the judicial system: Professional advice is said to reduce the number of futile appeals and, once an appeal has been lodged, guarantees a certain quality of the arguments and procedural behaviour, which both reduces the workload for the courts[620].

635. The other group, i.e., the group of countries in which legal representation is optional even at the appeals level, consists of Bulgaria, Denmark, England and Wales, Estonia, Finland, Ireland, Latvia, Lithuania, Poland, Romania and Sweden[621]. In respect to England and Wales the right of self-representation before a court can be explained as a prevalent characteristic in common law systems. Everyone should have the possibility to conduct a lawsuit on her own[622].

636. It must be noted that especially the Nordic and the Baltic countries are not familiar with the requirement of mandatory legal representation. One could perhaps argue that these countries, as well as England and Wales and Ireland, have in this respect a very strict understanding of the right of access to justice: access to justice should not be impeded by the obligation to choose a legal representative to conduct court proceedings. If this is correct, one can conclude that in the second group of countries the possible interest of a party to conduct a lawsuit on her own even on the appellate level outweighs the policy arguments which in the first group of countries justify this

[619] National Report, question 2.1.1: Austria (Austrian Code of Civil Procedure, sec. 27(1)); Czech Republic; France (French Code of Civil Procedure, sec. 751); Germany (German Code of Civil Procedure, sec. 78(1)); Greece; Hungary; Italy (Italian Code of Civil Procedure, Art. 82(3)); Luxembourg; Malta; Portugal; The Netherlands.

[620] Guido Toussaint in Münchener Kommentar zur Zivilprozessordnung (5th edn, 2016) vol. 1, sec. 78 mn. 2.

[621] National Report, question 2.1.1: Bulgaria; Denmark; Estonia (only in consumer disputes); Finland; Ireland; Latvia; Lithuania; Poland; Romania; Sweden.

[622] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 143 et seq.

requirement. However, it must be stressed that even in Member States where representation by a lawyer is optional, it is a very common practice to be legally represented, even more so on the appellate level[623].

637. For this reason, a European instrument introducing uniform rules on legal representation or harmonizing this area would not have much effect. Nevertheless, it can be predicted that any European instrument would face strong opposition by the group of countries which would be forced to abandon its tradition. For this reason, any legislative initiative in this area is not advisable.

1.4. Scope of Review

638. When it comes to the scope of review, three aspects must be considered. First, one has to ask whether in the second instance proceeding questions of law can be reviewed – which is generally the case. The second aspect is whether and, if so, to what extent also questions of fact may be reviewed. The third aspect is the question of new facts, i.e., the question of whether and, if so, to what extent a party may introduce facts in the second instance which have not been dealt with at all in the first instance (*ius novi*).

1.4.1. Review of law

639. As indicated above, all Member States allow a review of questions of law in the second instance. However, some countries have limitations within the reviewability on questions of law. The most common limitation is that the court is bound to matters of law which are provided by the parties in the notice of appeal[624]. In Spain, a change of arguments is excluded[625]. Similarly, in England and Wales, the court is bound to the legal arguments the party lodging the appeal states in her notice of appeal[626]. In other countries, the principle *iura novit curia* also applies in appellate proceedings

[623] See, e.g., National Report, question 2.1.1: Romania.

[624] Bulgaria, Code of Civil Procedure, Art. 269; National Report, question 2.2.1: Czech Republic (exceptions are possible); France; Italy; Poland; Romania; Sweden; the Netherlands.

[625] National Report, question 2.2.1: Spain.

[626] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1179.

without restrictions. This means that the court undertakes a full assessment on the merits on its own motion, notwithstanding the petitions filed[627].

1.4.2. Review of facts

640. In most Member States, the appellate court has the power to actually rehear the evidence from the first instance and is thus not bound to the assessment of the lower court[628]. However, many countries giving their courts the competence to do so impose significant limitations on the taking of evidence. A very common limitation is that the appellate court only rehears such evidence which is demanded in the notice of appeal[629].

641. In Germany a rehearing of evidence will only take place if specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision, German Code of Civil Procedure, sec. 529(1) no. 1.

642. In England and Wales, broadly spoken, two appeal procedures must be distinguished. The appeal by the way of review, where principally the court forms its decision on the facts established by the court of first instance, and the appeal by the way of rehearing which basically allows the court to completely issue a new decision unaffected from the first instance proceeding[630]. However, an appeal of rehearing is the exception and, unless otherwise provided, will only take place if it "would be in the interests of justice"[631].

1.4.3. Admissibility of introducing new facts/evidence

643. The most salient feature in respect of the scope of review is whether a national civil procedural system allows for introducing new facts which were not part of the first instance proceedings. At a closer look, it is possible to distinguish three groups of Member States: first, Member States which grant the parties a full *de novo* review on

[627] E.g., in Germany, cf. German Code of Civil Procedure, sec. 529(2) and Leo Rosenberg, Karl Heinz Schwab and Peter Gottwald, Zivilprozessrecht (17th edn, C.H. Beck 2010) 803.

[628] Cf. German Code of Civil Procedure, sec. 538(1): "The court of appeal is to take the evidence required" and Austrian Code of Civil Procedure, sec. 488(1).

[629] National Report, question 2.2.1: Bulgaria; Czech Republic; Ireland; Italy; Poland; Romania; Sweden; the Netherlands.

[630] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1177 et. seqq.

[631] CPR, 52.21(1)(b) (CPR, 52.11(1)(b) old version).

both factual and legal issues; second, Member States which strictly forbid new fact-finding in the second instance; third, Member States which allow the introduction of new facts if certain requirements are met.

644. The first group is relatively small. Indeed, only few Member States give the parties the possibility to introduce new facts and evidence without any limitation. Most notably, this is the case in France[632] and other countries which have close ties to the French procedural model[633]. The fact that this group of Member States allows for a full *de novo* review of both factual and legal issues might be linked to the "cassation model" which characterizes the second appeal in these Member States[634]. If in second appeal proceedings the court can only confirm or quash the contested judgment and refer the case back to a lower court, it may be necessary that this court rehear the case de novo.

645. Even smaller is the second group, i.e., Member Stats which strictly forbid the introduction of new facts and evidence on the appellate level. In Austria, it is a characteristic element that the second instance court bases its decision solely on the facts established by the lower court – the so called "Neuerungsverbot"[635]. It seems that Austrian civil procedural law is very strict regarding the submission in means of challenge or defence to the court. Probably, the idea behind this rule is that the lawsuit should be resolved primarily in the first instance, and that parties should not have any incentive to hold back facts or evidence. The same applies for Portugal[636].

646. The overwhelming number of Member States, however, is relatively generous in granting parties the possibility to plead new facts and present new evidence, i.e., facts and evidence which have not been introduced in the proceedings on the first instance level. As a common rule, it can be said that the introduction of new facts and evidence is admissible if the facts could not have been pleaded and the evidence

[632] National Report, question 2.2.1: France (French Code of Civil Procedure, Art. 563: "To support on appeal the claims submitted before a lower judge, parties may raise new grounds, produce new documents or offer new evidence").

[633] National Report, question 2.2.1: Belgium; Romania; Greece; Luxembourg (Guy Harles and Thea Walch, 'Luxembourg' in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 346)) Estonia.

[634] See, for France, French Code of Civil Procedure, Art. 626.

[635] Irene Welser, 'Austria' in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 33.

[636] National Report, question 2.2.1: Portugal.

could not have been obtained for use at first instance by a party acting with reasonable diligence[637].

647. In Germany, for instance, the appellate court must admit new means of challenge or defence if they (i) concern an aspect that the court of first instance failed to consider or erroneously held to be insignificant, (ii) were not asserted in the proceedings before the court of first instance due to a defect in the proceedings or (iii) were not asserted in the proceedings before the court of first instance without this being due to the negligence of the party, German Code of Civil Procedure, sec. 531(2). Before the introduction of this rule in 2001, second instance proceedings in Germany virtually allowed the new factual allegations and evidence without any limitation. With, inter alia, the introduction of this rule, the legislature intended to shift the role of the appellate procedure from a full *de novo* review to a review of the first court's decision. Apart from saving judicial resources, the legislature also wanted to speed up court proceedings by forcing the parties to present all their evidence in the first instance and thus as soon as possible[638].

648. In England and Wales, irrespective of an appeal by the way of review or an appeal by the way of rehearing, the appeals court will generally not receive evidence which was not presented before the lower court[639]. However, the so called Ladd v Marshall rule[640] allows the parties to introduce new evidence "(i) if the evidence could not have been obtained with reasonable diligence at trial, (ii) […] if the evidence had been available at trial, it would have influenced the result and (iii) […] the evidence appears credible". Although the requirements that were put up in Ladd v Marshall seem, at first glance, quite similar to the common rule outlined above, the limitation to introduce new evidence in the second instance proceeding is not primarily regarded as a matter of saving judicial resources, but of finality of litigation and fairness. This is

[637] National Report, question 2.2.1: Bulgaria; Germany; Finland; Hungary; Italy; Latvia; Lithuania; Poland; Slovenia; Spain (Spanish Code of Civil Procedure, Art. 460(1) and (2)).

[638] Peter Gottwald, 'Civil Procedure in Germany after the Reform Act 2001' in Chase and Hershkoff (general eds), Civil Litigation in Comparative Context (Thomson/West 2007) 353.

[639] CPR, 52.21(2)(b) (CPR, 52.11(2)(b) old version).

[640] Established in Ladd v Marshall [1954] 3 All ER 745, 1 WLR 1489.

insofar in line with the above mentioned principle that in England and Wales it is in the first place the task of the first instance court to fully decide the case[641].

649. A special situation exists in Poland. It is generally possible to introduce new facts and the pertaining evidence but it is within the discretion of the court to accept them. As the court may reject the new facts if they could have been provided in the first instance, the Polish system tends to be more comparable with the third than the first group. To sum up, one can say that these countries permit to introduce new facts and evidence for different reasons, and that, generally speaking, new facts and evidence are possible in situations of grave procedural defects and free from one party's fault.

1.4.4. New claims/modification of the complaint

650. Generally speaking, when it comes to the question of new claims and a modification of the initial claim in the cause of appellate proceeding, the picture is quite vague.

651. In some countries like Greece, neither may new claims be raised nor are modifications to the initial claim admissible[642]. The situation is similar in Latvia and Poland[643]. We also know from the European Court of Justice's decision in the *Duarte Hueros* case[644] that Spain used to forbid modifications to the initial claim[645].

652. In other countries, the law is more flexible. In Germany, for instance, the claim, or means of defence as filed in first instance may be modified (i) if the opposing party consents to this being done or the court believes this to be expedient and (ii) if the modification can be based on facts and circumstances on which the court of appeal is to base its hearing and decision regarding the appeal in any case, German Code of Civil Procedure, sec. 533. Consent of the opponent will be presumed if the opponent does not raise any objection to the modification. According to a disputed

[641] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1196 et. seqq.

[642] National Report, question 2.2.1: Greece.

[643] National Report, question 2.2.1: Latvia; Poland.

[644] Soledad Duarte Hueros v Autociba SA, Automóviles Citroën España SA, case C-32/12, judgment of 3 october 2013, ECLI:EU:C:2013:637; on this case, see Christoph A. Kern, 'Der spanische Zivilprozess vor dem EuGH – zwischen Parteiherrschaft und Gemeinwohlinteressen' in Stumpf, Kainer and Baldus (eds), Privatrecht, Wirtschaftsrecht, Verfassungsrecht, Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff zum 70. Geburtstag am 29. September 2015 (Nomos 2015) 400 et seqq.

[645] Spanish Code of Civil Procedure, sec. 412(1).

jurisprudence of the German Federal Supreme Court, even the change of a party as well as the extension on a party who did not participate in the first instance proceeding is possible, subject to consent of both the old and the new defendant if there is a change on this side, or to a declaration of both the old and the new plaintiff if there is a change on that side[646]. The right to modify the initial claim in the German legal system can be explained with the principle of procedural economy since it helps to avoid that another lawsuit between the same parties be commenced. However, this concept is pushed back by the requirement that the modifications must be based on facts on which the court of appeal bases its decision anyway. This, on the one hand, prevents that the parties circumvent the provisions dealing with the admissibility to introduce new facts and, on the other hand, guarantees that – according to the approach of the 2001 reform – the appeal remains primarily an instrument of corrective review than a form of retrial.

653. The situation in France is quite similar to the situation in Germany. Although French Code of Civil Procedure, Art. 564 states in its first part that the introduction of new claims is inadmissible, the next article provides that claims are not new as far as they are directed towards the same purposes as those submitted before the lower judge even where their legal ground is different[647].

1.4.5. Problems and assessment

654. It is part of general comparative civil procedure wisdom that there have always been differences concerning the scope of review in different countries and at different times. Suffice it to mention the German legislature's shift in 2001 from a full de novo review to a limited review of facts and a limited admission of new facts. Whether the court of appeal rehears the case de novo or has only a limited scope of review is a fundamental policy decision which has to do with the role ascribed to the court of first instance and, last but not least, with the judicial budget. For this reason, any attempt to unify or harmonize the law with respect to the scope of review would, without any doubt, receive fierce opposition by those Member States which would be forced to modify their system. Moreover, a sudden and unwelcome change might create

[646] Leo Rosenberg, Karl Heinz Schwab and Peter Gottwald, Zivilprozessrecht (17th edn, C.H. Beck 2010) 802.

[647] French Code of Civil Procedure, Art. 656.

chaotic situations. Therefore, the European legislature should refrain from any attempt in this respect. What might be done, though, is a suggestion that new claims or a modification of claims be more readily accepted by the courts of those Member Sates which, up to now, take a very strict position. Before any such measure, however, more comparative research in this field is necessary.

1.5. Decision of the Appeal Court

655. Concerning the nature of the decisions the appellate court may hand down, there are two general concepts: reformation and cassation. A cassation leads to an annulment of the first instance judgment, combined with a referral of the case to a lower court. A reformation in this context means that the appellate court is allowed or even incentivised to issue a new decision on the appealed case, normally in addition to the option of remitting the case to a court of lower instance[648].

656. On the second instance level, most Member States follow the reformation concept and only in particular circumstances allow the appeals court to refer the case back to a lower court. This is the case, e.g., for Germany where, as a matter of principle, the appellate court has to decide the case itself, but may refer it back to a first instance court if, inter alia, the proceedings before the first court were subject to a material irregularity and, due to this irregularity, it will be necessary to take evidence in a comprehensive way or with considerable expenditure of time and effort (German Code of Civil Procedure, sec. 538(2) no. 1). The situation is similar in Austria where, generally speaking, the case can only be remitted to a lower court in case of grave procedural errors (cf. Austrian Code of Civil Procedure, sec. 494, 496(1) and 497(1)). The same principles apply more or less also for Hungary[649], Poland[650] and Greece; in Greece, the appellate court has a broad discretion as to how to proceed[651]. The English Civil Procedure Rules also vest the appellate court with a wide range of competences. It has the power to, inter alia, refer any claim or issue for determination

---

[648] Cf. J.A. Jolowicz, 'Introduction: Recourse Against Civil Judgments in the European Union: A Comparative Survey' in Chase and Hershkoff (general eds), Civil Litigation in Comparative Context (Thomson/West 2007) 328 et. seq.

[649] National Report, question 2.2.1: Hungary.

[650] Poland, Polish Code of Civil Procedure, Art. 386.

[651] Haris Tagaras and Haris Meidanis, 'Greece' in Layton and Mercer (general eds), *European Civil Practice* (Sweet and Maxwell 2004) 237.

by the lower court or to order a new trial or hearing[652]. Again, the court of second instance will normally only remit the case, in whole or partially, to a lower court ordering a new trial for serious procedural errors of the first instance proceedings[653]. That the appellate court is vested with the power to decide the case differently from the decision of the first instance court is, first and foremost, a matter or procedural economy, in particular of duration of proceedings. This aspect loses its weight when it comes to grave procedural irregularities: In such a case, it is considered more important that the parties have a full first instance, which is why a referral to a court of first instance takes place.

657. Interestingly, in Belgium, the second instance court always has to render a decision on its own and shall never refer the case to a lower court[654]. By and large, this also seems to be the case in Italy[655].

658. Only in a minority of Member States, the appeals court always has to refer the case back to a lower court if the appeal is found to be successful. In Portugal, for instance, the case will normally be referred back to the court of first instance with the order to proceed as the appellate court ruled unless a decision of the Supreme Court is sought[656]. This might be connected with the fact that the court in second instance here usually decides without an oral hearing[657]. The public nature of the proceedings as a fundamental principle shall apparently also be guaranteed in second instance proceedings.

659. As with the scope of review, the nature of the decision of the appellate court is an issue which is based on tradition and fundamental policy decisions. Legislating in this area does not seem advisable, even more so as no particular problems concerning mutual trust or the application of substantive EU law are linked to this aspect.

---

[652] CPR, 52.20(2)(b)-(c) (CPR, 52.10(2)(b)-(c) old version).

[653] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1192.

[654] National Report, question 2.2.1: Belgium.

[655] Michele Taruffo, ‘Civil Procedure and the Path of a Civil Case’ in Chase and Hershkoff (general eds), Civil Litigation in Comparative Context (Thomson/West 2007) 367.

[656] Miguel de Avillez Pereira and Bruno Sampaio Santos, ‘Portugal’ in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 492.

[657] Miguel de Avillez Pereira and Bruno Sampaio Santos, ‘Portugal’ in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 492.

1.6 Consequences on (Provisional) Enforcement

660. The consequences of an appeal on (provisional) enforcement depend, first and foremost, on the question of whether a first instance decision is provisionally enforceable between its effectiveness and *res judicata*. If a decision is not provisionally enforceable or has not been declared provisionally enforceable, an appeal obviously cannot have any effect on its enforceability and enforcement. If a decision is provisionally enforceable, an appeal may either have the consequence that the decision loses this quality and that any enforcement is stayed, or an appeal may be without any consequence on enforceability and enforcement. In other words, three basic situations can be distinguished: No provisional enforceability before *res judicata*, thus no effect of an appeal; provisional enforceability unless and until an appeal is being lodged; provisional enforceability regardless of any appeal.

661. In reality, things are, as often, more complicated. In countries where *res judicata* is, in principle, a prerequisite of enforceability, decisions may be declared provisionally enforceable. In countries where decisions are provisionally enforceable only until an appeal was lodged, provisional enforceability may, on application of the creditor, be prolonged and an automatic stay on enforcement proceedings may be lifted by court order. In countries where decisions are provisionally enforceable and an appeal has no immediate consequence, a court may have the power to end provisional enforceability and to stay enforcement on application of the debtor.

662. Among the Member States in which a judgment is not provisionally enforceable until it has become *res judicata* are Austria, Estonia, Hungary, Malta and Slovakia[658]. Austria seems to be particularly strict in this sense. The general rule is that only final judgments and other execution titles against which no remedy is available can be executed[659]. Only in rare exceptions, decisions are declared provisionally enforceable[660].

---

[658] National Report, question 2.2.1: Austria (Austrian Code of Civil Procedure, sec. 466); Estonia; Hungary (also question 2.1.1; however, some judgments, e.g., maintenance obligations, are provisionally enforceable but the appellate court may order a stay); Malta (with exceptions in respect of certain judgments which are enforceable after a short period of time which commences with the service of the decision); Slovakia.

[659] Austrian Law on Execution, sec. 1 no. 1.

[660] Cf. Austrian Law on Execution, sec. 370; Paul Oberhammer and Tanja Domej, Vorläufige Vollstreckbarkeit – Österreich, available at http://www2.ipr.uni-

663. A second group, formed by Member States in which judgments are basically declared provisionally enforceable and an appeal stays compulsory enforcement, comprises France, Luxembourg, Romania and the Netherlands[661]. However, the court may order provisional enforceability of the respective judgment.[662] In France, a first instance judgment can only be declared provisionally enforceable upon request against provision of security, French Code of Civil Procedure, Art. 515 and 517 et seqq., and this irrespective of a pending appeal[663]. The same is true for Luxembourg and the Netherlands[664]. If a judgment has been declared provisionally enforceable upon petition of the creditor, the court may, upon petition of the debtor, reverse this decision and order a stay for compulsory enforcement. However, it has to be stressed that there are very strict requirements for the court ordering a stay; among them a situation in which enforcement would lead to a very severe damage for the debtor[665]. As the party seeking compulsory enforcement must provide sufficient security, the request for stay of compulsory enforcement is rarely granted[666].

664. Member States in which judgments are provisionally enforceable and an appeal has no effect on enforceability are, inter alia, Belgium, Bulgaria, England and Wales, Finland, Germany, Greece, Ireland, Italy, Portugal and Spain[667]. In England and Wales, a judgment rendered at first instance is enforceable from the moment when it is issued. Provision of security by the creditor is not required. When an appeal is lodged, this has no effect on enforcement. However, both the court of first instance and the court of appeal have discretion to order a stay. Such a stay is usually granted to avoid gross injustice, e.g. if, in case enforcement continues, the existence of the

---

heidelberg.de/studie/National%20Reports/Austria/Report%20Austria%20Vorlaeufige%20Vollstreckbarkeit.pdf (last visited 30 November 2016); Irene Welser, 'Austria' in Layton and Mercer (general eds), European Civil Practice (Sweet and Maxwell 2004) 37.

[661] National Report, question 2.2.1: France (if no petition for provisional enforceability is filed, judgments are not enforceable before res judicata); Luxembourg; Romania; the Netherlands.

[662] National Report, question 2.2.1: Luxembourg; Romania; the Netherlands.

[663] Cf. French Code of Civil Procedure, Artt. 524 and 525.

[664] National Report, question 2.1.1: Luxembourg and the Netherlands (both with discretion of the court if provision of security is required from the creditor).

[665] French Code of Civil Procedure, Art. 526.

[666] Emmanuel Jeuland, Introduction to French Business Litigation (1st edn, Joly éditions 2016) 182.

[667] National Report, question 2.2.1: Belgium (concerning judgments rendered after the 1st of November 2015); Bulgaria; England (CPR, 52.16 (CPR, 52.7 old version)); Finland; Germany (German Code of Civil Procedure, sec. 719(1) in connection with 707(1)); Greece (no suspensive effect if judgment is declared provisional enforceable by the court); Ireland; Italy; Portugal; Spain.

appellant is at risk[668]. Generally speaking, it can be said that English civil procedure in this context tends to favour the party who prevailed in the first instance. This is in line with the idea that the lawsuit should normally be dealt with by the first instance court, as it shows great respect for the first instance court's decision[669].

665. In Italy a judgment of first instance is enforceable with its rendering and generally no provision of security by the creditor is necessary. Therefore, it seems quite logical that the lodging of an appeal does not stay compulsory enforcement automatically. However, a stay may be ordered by the court upon a corresponding petition by the debtor if she can prove good reasons, e.g., risk of insolvency of the creditor[670]. In principle, this also applies for Spain[671].

666. The situation is similar in Bulgaria, Finland and Ireland where compulsory enforcement may only be stayed upon request.

667. In Germany, every final judgment is declared provisionally enforceable by the court ex officio. However, if the judgment has not become final and binding, compulsory enforcement may generally only commence upon provision of security by the creditor (cf. German Code of Civil Procedure, sec. 709). The requirement of providing security by the creditor guarantees that in case the debtor prevails in the second instance, she can be sure to be reimbursed. This might explain why in this situation the interests of the creditor, who obtained a favourable judgment, outweigh the interests of the debtor for an effective legal remedy suspending enforcement. In case of an appeal, the court may order, upon corresponding application, that compulsory enforcement be temporarily stayed, but in most cases this order presupposes that the debtor provides security.

668. All in all, there are important theoretical differences between the Member States' laws. However, it seems that in many cases, the results could be similar, depending on how the exceptions from the general rules are applied by the courts. Remaining differences, in particular regarding the question of which party has to provide

[668] Adrian Zuckerman, Zuckerman on civil procedure (3rd edn, Sweet & Maxwell 2013) 1204 and CPR, 52.16 (CPR, 52.7 old version).

[669] Cf. 1.1.4.

[670] National Report, question 2.2.1: Italy.

[671] Cf. Spanish Code of Civil Procedure, Art. 528(3) (if a monetary claim is being enforced).

security, can sometimes be explained from within a system if one takes into account the weight accorded to the first instance court. This, in turn, may also depend on very general characteristics of a legal system like the question of qualification and career judges and the duration of proceedings.

1.7. The Cross-border Context

669. All Member States have at least some special rules for cross border cases which may be relevant in the context of appeals. The most important area in which special rules apply is service of process. Service of judicial and extrajudicial documents in another Member State is, of course, governed by Regulation (EC) 1393/2007 (Service Regulation). In addition to this regulation, some Member States have additional rules for service of process which may or may not be in line with European Law[672]. Only Ireland and Sweden seem to have no particular rules at all[673]. Optimally, the deadlines for lodging an appeal only start when the first instance judgment was served on the respective party.[674] Thus, long duration of service has not been advanced by any of the interviewees as a particular problem with respect to the *admissibility* of the appeal. In countries in which the appeal can be lodged without providing any reasons but in which the reasons for the appeal may be provided in a later moment,[675] time constraints are per se less acute. In addition, at least in Germany, the deadline for providing reasons may be prolonged by the court on application of the party if the opposing party agrees or if the applying party provides good reasons,[676]

670. One reason why particular rules for appeals in cross-border cases are scarce – with the exception of rules on service of process – might be that, once the appeals

[672] E.g. National Report, question 2.2.2: Austria (with special provisions in a different act regarding service where one party does not reside in Austria, cf. Austrian Service of Documents Act, sec. 10(1)); Belgium (with a kind of remise au parquet: “The judgment is deemed to have been served as soon as the bailiff delivers it to the post office in return for a receipt.”); Czech Republic; France (see also French Code of Civil Procedure, Art. 683 et seqq.); Germany (German Code of Civil Procedure, sec. 183 and 184 (service in accordance with agreements made in international instruments or to an authorized recipient)); England; Greece (time extension to 60 days); Romania; Spain.

[673] National Report, question 2.2.2: Ireland; Sweden.

[674] See, e.g., sec. 517 German Code of Civil Procedure.

[675] See, e.g., Germany, sec. 520(2) German Code of Civil Procedure.

[676] Cf. Sec. 520(2) sentence 2 German Code of Civil Procedure.

proceedings have begun, the parties are expected to understand the official language of the forum and to abide by the procedural law of the forum.[677] Thus foreign parties are condisdered to participate in the proceedings as any other party would do[678]. Moreover, in some countries, parties may be required to name a representative in the court's home country. Concerning Sweden one might explain the lack of special rules with the fact that judgments are not formally served but only pronounced in an oral hearing which will then trigger the time-limit for lodging an appeal[679].

671. On the appellate level, cross-border cases may also cause fewer problems because, in practice, foreign parties typically have resort to legal representation by a lawyer of the Member State in which the proceedings take place.[680] Therefore, in the cross-border context, the critical moment is when a foreign party has to decide whether to lodge an appeal and hire a local representative at all.

1.7.1. Documents provided to a defendant abroad who lost her first instance case

672. The situation of a foreign defendant who lost her first instance case depends on whether the defendant is informed at all and if so, what information she will be provided with.

673. In a few Member States, the judgment is not formally served on the parties but pronounced in a separate oral hearing. As mentioned above, the time limit for lodging an appeal will then commence at the day of pronouncement[681]. If the defendant is not present, it seems that she does not receive any information.

[677] This argument only refers to the court proceeding in a narrow sense, e.g. the oral hearing, and thus not on the service of judicial documents. In Germany, apart from provisions with respect to the service of process the proceeding where a party resides abroad is treated as a pure domestic proceeding.

[678] See, e.g., German Courts Constitution Act, sec. 184 ("The language of the court shall be German"); Austrian Code of Civil Procedure, sec. 185(1).

[679] National Report, question 2.2.2: Sweden.

[680] Interview conducted by the Slovak National Reporter of an 'average consumer' and the German National Reporter of Dr. Vollkommer. Cf. also the interview conducted by the German National Reporter of Dr. Häcker who indicates that legal representation in appellate proceeding in Germany is mandatory.

[681] National Report, question 2.2.1: Ireland; Sweden (declaratory copy is send to the parties by mail); the Netherlands (service of the judgment required by default judgments and for compulsory enforcement).

674. In other Member States the judgment is served only by, or on initiative of, one of the parties[682] or the party is not informed about the issuance of a judgment by the court at all but it is rather the party's own duty to obtain information[683].

675. In most Member States, the final judgment, or rather a certified copy thereof, must be served on the parties ex officio by the court[684].

676. The Member States in which there is some form of service can, in turn, be subdivided in Member States where only the judgment is being served on the parties, and Member States where the judgment contains additional information regarding possible legal remedies as well as the applicable time limit. In Austria, Germany and Poland, the judgment has to be provided with instructions on available legal remedies only in proceedings where the parties do not need to be represented by a lawyer[685]. The motivation behind this rule is that if a party was represented by a lawyer, it is the lawyer's task to provide the party with the necessary information in relation to legal remedies. Instructions on remedies are generally provided in Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France[686], Hungary, Latvia, Portugal, Romania, Slovakia, Slovenia and Spain[687]. However, one cannot simply say that in these countries legal representation is not mandatory and, therefore, additional information is necessary to compensate the lack of knowledge of the judicial system. This might only be an explanation for the situation in Denmark, England and Wales, Finland, Latvia and Romania[688].

---

[682] England and Wales, CPR, 6.41; National Report, question 2.2.2: France (French Code of Civil Procedure, Art. 683 (service will then trigger the appeal period)); Belgium (service to a party residing abroad on initiative of the prevailing party); Greece (service by the prevailing party); Ireland (service by the plaintiff); question 2.2.1: Luxembourg (service by the prevailing party but prior declaratory notification by the court).

[683] National Report, question 2.2.2: Malta.

[684] National Report, questions 2.2.1 and 2.2.2: Austria; Belgium (simple copy just for the purpose of information and only in domestic proceedings); Bulgaria; Czech Republic; Denmark; Estonia; Finland; Germany (German Code of Civil Procedure, sec. 317(1) in connection with sec. 183(1)); Hungary; Italy; Latvia; Poland (service ex officio "if the judgment was passed in camera"); Portugal; Romania; Slovakia; Slovenia; Spain.

[685] See especially for Germany German Code of Civil Procedure, sec. 232.

[686] See especially French Code of Civil Procedure, Art. 680.

[687] In Belgium it is disputed at the Supreme Court level if the provision of information on available legal remedies is required. According to one senate the lack of information on legal remedies will not trigger the time limit for lodging an appeal (National Report, Belgium, question 2.2.2.).

[688] Cf. 1.3.

1.7.2. Information of the parties about the judgment; the question of translation

677. As already mentioned above, in most Member States, the judgment or a certified copy thereof is served ex officio or by one of the parties on the defendant who lost the case in first instance. In other countries the judgment is pronounced in an oral hearing which will be announced to the parties. Only in Malta there is no information to the defendant by the court or the prevailing party at all but it is within the responsibility of the parties to inform themselves[689].

678. Only a few Member States provide the losing party with an official translation done by the court or other type of authority[690]. In England and Wales, the party seeking the judgment to be served abroad must provide a translation of the decision in order to effect service[691]. The national legal systems of the other Member States remain silent about any translation rules.

679. However, when the Service Regulation applies, the addressee may refuse to accept the document to be served if it is not written in a language which the addressee understands, Regulation (EC) 1393/2007, Art. 8(1). For this reason, the prevailing party who normally must prove service of the judgment on the defendant before she can enforce it, has an intrinsic interest in valid service and therefore, in practice, provides for a translation of the documents to be served[692].

1.7.3. Filing an appeal and time limits

680. In all Member States, the content of the notice of appeal does not depend on the question of whether the appeal is cross-border or purely domestic[693].

681. Some Member States provide for different time limits in cases in which either the plaintiff or the defendant resides in a different country[694]. In most Member States, the

[689] See 1.7.1.

[690] National Report, questions 2.1.1., 2.2.1. and 2.2.2: Belgium; Estonia (translation on request of the defendant); Finland (translation preferable into English); Hungary (certified translation done by the Hungarian Office for Translation and Attestation); Latvia; Lithuania; Romania (translation of the judgment is requested from the plaintiff); Slovakia; Sweden (translation depending on the court's discretion which shall be exercised restrictively).

[691] CPR, 6.41(2)(b).

[692] Cf. also Regulation (EC) 1393/2007, Art. 5(2).

[693] See 1.1.5.

general rules apply, but in some of them, the time limits may be extended by the court if a party resides abroad[695]. In Germany, the pure fact that one of the parties is a foreign party is not a reason on its own for a reinstatement or an extension of the deadline. However, with regard to the submission of the particulars of the appeal, serious translation difficulties or transmission errors might be a reason to get the deadline extended.

1.7.4. Effects of the proceedings on the enforceability of the judgment

682. None of the examined national legal systems provide special rules regarding effects on compulsory enforcement when lodging a cross-border appeal. In other words, the ordinary national provisions outlined in 1.6. apply.

1.7.5. Problems and assessment

683. In cross-border cases, problems occur if the foreign party is not informed of a judgment and of the fact that time limits for an appeal have started to run. Therefore, it seems very desirable that there be formal service of the judgment and that time limits start running only in the moment when service takes place.

684. Moreover, time limits may be too short in a cross-border situation, taking into account that the party may have to translate the judgment, to confer with her lawyer and to take a decision on whether to lodge an appeal or not. It could therefore be advisable that in cross-border cases, any time limit be not shorter than four weeks.

685. Moreover, a foreign party who does not have legal representation in the Member State of the first instance proceedings typically does not know where, until when and how to lodge an appeal. For this reason, it seems advisable that the judgment contain fundamental information on legal remedies, i.e., whether there is a remedy at all and if so, the name and address of the court with which the remedy must be filed, the necessary contents of the notice to appeal and the applicable time limits.[696]

[694] National Report, questions 2.2.1 and 2.2.2: Belgium (extension from 15 up to 80 days depending where the party resides); France (3 month in cross-border proceedings); Greece (extension to 60 days).

[695] See 1.2.3.

[696] Interview conducted by the German National Reporter of Dr. Häcker. Additionally it must be mentioned that the proposal of compulsory information on legal remedies in respect to cross-border proceedings is also based on the common opinion of the Consortium and the Advisory Board.

2. Second Appeal (Third Instance)**

2.1. General Assessment of the Second Appeal Proceedings

686. The so-called third instance proceedings exist in all Member States except for Malta, where judgments of the Court of Appeal are not appealable[697]. Third instance proceedings can be classified into three models: cassation, appeal and revision (combining elements of cassation and appeal). From a theoretical point of view, the term "third instance" cannot be correctly applied in relation to all the Member States. In countries following the cassation model, the appeal filed at the Supreme Court usually has an extraordinary nature and does not open the proceedings at the third jurisdictional level. In an attempt to refer to all the appeals in question, the term "second appeal" was considered as most convenient.

687. The means of recourse to the highest level of the judicial hierarchy – regardless of the adopted model and the technicalities that are inherently connected with it – enjoys a special status among the plethora of various – ordinary and extraordinary – appeals[698]. This special status manifests itself in a multifaceted way. First of all, in a significant number of jurisdictions, the Supreme Court is entrusted with special, public interest oriented functions. Exercising these functions means that the Supreme Court's role goes far beyond a mere correction of errors, no matter how grave they are. The priority is given to ensuring the uniformity of application and interpretation of law in the public interest[699]. The Supreme Court is supposed to address legal issues of fundamental importance, provide jurisprudence and guidance reaching beyond the dispute in question. Although this does not mean that private interests of an individual party are completely overlooked at this stage, the abovementioned aspect of the Supreme Court's role has clearly gained prominence in the past decades.

** Prepared by Prof. Dr. Karol Weitz, Judge at the Supreme Court of the Republic of Poland, Professor of law, Warsaw University, and Agnieszka Gołąb, Ph.D. candidate, Warsaw University.

[697] Instead, the Maltese law provides for an institution of retrial. See National Report, Malta, question 2.2.3.

[698] Cf. Manuel Ortells Ramos (coord.), Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe (1st edn, Difusion Juridica 2008).

[699] Cf. Tania Domej, 'What is an important case? Admissibility of appeals to the Supreme Courts in the German-speaking jurisdictions' in Alan Uzelac, Cornelis Hendrik van Rhee (eds), Nobody's perfect. Comparative Essays on appeals and other means of recourse against judicial decisions in civil matters (Intersentia 2014) 277 ff.

688. Therefore, in order to ensure an efficient exercise of the Supreme Court's functions, different filtering tools and restrictions in the access to the highest level of judicial hierarchy had to be put into place[700].

689. The limitations designed with a view to limit access to the Supreme Court manifest themselves in a number of ways such as: the creation of special proceedings which control the admission of second appeals; the fact that only a limited group of judgments are appealable to the Supreme Court – and only on limited grounds; generally stricter formal requirements in comparison to the "first appeal" and numerous other limitations barring many individual disputes – including consumer disputes – from being reviewed by the highest judicial authority.

690. Below we proceed with an overview of the main conditions of admissibility of the second appeal with a special emphasis on the elements which can be perceived as an impediment in cross-border disputes involving consumers. Although such elements can be identified, it is worth underlining that there are very few separate rules foreseen by the EU Member States' national laws specifically for the foreign parties. The only ones that can be identified, are connected with the length of the time limits, privileging parties domiciled in another Member State and – to a certain extent – methods of serving a judgment on a party domiciled abroad. Other than that, the mechanism of second appeal proceedings does not differ for foreign parties.

2.2. Conditions / Admissibility of Second Appeal

2.2.1. Judgments subject to second appeal

691. All countries, except for Malta, accept – either to a full or to a certain extent – a second appeal against decisions passed by a court of second instance. Under the term "the court of second instance"[701], one should usually understand the Court of Appeal, but in some countries[702] it may also refer to the Regional Court acting in the

[700] Manuel Ortells Ramos 'La selección de asuntos para su acceso a la casación en Derecho Español: Las técnicas de "unificación de doctrina" y de "interés casacional"' in Manuel Ortells Ramos (coord.), Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe (Difusion Juridica 2008) 233.

[701] See National Report, question 2.2.3: Austria (Revision – a remedy against second instance judgments); Poland; Bulgaria; Lithuania; Slovenia; Germany; Spain; Slovakia; Bulgaria; Czech Republic;England and Scotland; Sweden; Hungary; Portugal.

[702] See, for instance, National Report, question 2.2.3: Poland and Germany.

capacity of the appellate instance. In France[703] and in Belgium[704], judgments passed "in the last instance" (*en dernier ressort*) are subject to second appeal. By judgments passed "*en dernier ressort*" one should understand judgments against which it is no longer – or has never been – possible to lodge an ordinary appeal on points of fact and law[705]. A similar approach is adopted in Greece and the Netherlands, where every judgment (both first and second instance decision) that is final can be appealed to the Supreme Court[706]. By contrast, in some other Member States the admissibility of lodging a second appeal is limited exclusively to the judgments passed by the court of second instance[707].

692. The range of judgments that can be appealed to the second instance court may be enshrined on a constitutional level, for example in Italy there is a constitutional right to challenge every decision or order by way of a petition to the Supreme Court. Such an approach may be viewed as a constitutional peculiarity leading to the inefficiency of second appeal proceedings[708].

693. In some jurisdictions[709] it is possible, although rather rare, to make a so-called leapfrog appeal. The leapfrog appeal consists in appealing a judgment of the first instance directly to the highest court, leaving aside the first appeal. It happens in rare cases when parties are interested in the quick settling of legal questions of general importance[710]. The leapfrog appeal usually depends on the consensus of both parties, and is accompanied by some other, more detailed conditions.

---

[703] National Report, question 2.2.3: France (cf. French Code of Civil Procedure, Art. 605 et. Seqq).

[704] National Report, question 2.2.3: Belgium (cf. Belgium Judicial Code, Art. 608).

[705] National Report, question 2.2.3: Belgium.

[706] Likewise, National Report, question 2.2.3: The Netherlands.

[707] National Report, question 2.2.3: Belgium Austria; Bulgaria; Poland; Spain.

[708] Cf. Alan Uzelac, Cornelis Hendrik van Rhee, 'Appeals and other means of recourse against judgments in the context of the effective protection of civil rights and obligation' in Alan Uzelac, Cornelis Hendrik van Rhee (eds), Nobody's perfect. Comparative Essays on appeals and other means of recourse against judicial decisions in civil matters (Intersentia 2014) 8.

[709] National Report, question 2.2.3: Germany; the Netherlands; England and Wales.

[710] Peter Gottwald, 'Review appeal to the German Federal Court after the reform of 2001' in Manuel Ortells Ramos (coord.), Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe (Difusion Juridica 2008) 96.

2.2.2. Ratione valoris limitation

694. Consumer disputes usually represent lower value interests. Therefore, *ratione valoris* limitation plays an important role in such disputes, because in many cases it may result in a denial of access to the highest level of the judicial hierarchy. This approach sparks controversy, because the low value in dispute does not necessarily mean that the case does not involve intricate legal issues which might contribute to the development of law and the uniformity of its interpretation and application. In this context, it is worth mentioning the German civil procedure reform of 2001. Since the time when it was enacted, the value in dispute no longer constitutes a decisive criterion in the process of filtering the appeals to the German Supreme Court. The German legislator considered it unfair to use economic criteria in order to measure the importance of the case[711]. Therefore, it is now possible to contest decisions with a small value in dispute, provided that the court of appeal granted leave to second appeal. It should be noted, though, that a legal remedy against the court of appeal's decision not to grant leave to second appeal is only available if the gravamen against which the appellee seeks a second appeal exceeds 20 000 EUR[712].

695. The *ratione valoris* criterion is quite common in many countries[713], but it differs not only with regard to the required value in dispute, but also other details. In Austria, *Revision* is inadmissible if the value in dispute in the second instance judgment did not exceed 5 000 EUR (with an exception in employment matters). However, the Austrian legislator uses this criterion also when the leave to appeal is denied – in such a scenario a party can file an "extraordinary" Revision if the value in dispute exceeds 30 000 EUR. As one might easily imagine, in consumer disputes this will rarely be the case. A similar scheme is envisioned in Slovenia: namely, a legal review will be allowed if the value of the contested part of the final judgment exceeds 40 000 EUR ("allowed" legal review). Otherwise the review will be admissible only if it

---

[711] Before the reform of 2001, Revision had been always admissible in cases where the value in dispute exceeded an equivalent of circa 30 000 EUR. Since the time when the reform was enacted, appealing high value cases to the BGH has become more difficult. Cf. P. Peter Gottwald, 'Review appeal to the German Federal Court after the reform of 2001' in Manuel Ortells Ramos (coord.), Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe (Difusion Juridica 2008) 87 ff.

[712] Introductory Act of the German Code of Civil Procedure, sec. 26 no. 8.

[713] National Report, question 2.2.3: Lithuania; Romania; Poland; Slovenia; Spain; Austria; Bulgaria; Czech Republic.

is admitted by the court pursuant to Art. 367a (“admitted” legal review). However, a legal review will not be allowed if the value of the contested part of the final judgment does not exceed 2 000 EUR (except for labour and social disputes).

696. It is worth mentioning that some countries take advantage of the *ratione valoris* criterion by imposing different requirements for civil cases and commercial cases – for example the Bulgarian legislator sets this requirement at 5 000 lv (ca 2 500 EUR) for the former and 20 000 lv (ca 10 000 EUR) for the latter[714]. In some countries, the value in dispute criterion is limited to certain types of disputes, e.g. property disputes (Lithuania, over 5 000 litas), decisions on financial performance (over CZK 50 000, Czech Republic)[715] etc.

697. The severity of the *ratione valoris* limitation may vary significantly, e.g. in Romania claims below RON 500 000 (ca 110 800 EUR) are not subject to second appeal, whereas in Poland the bar is set at 50 000 zloty (ca 12 500 EUR)[716].

698. A different approach to the requirement of a specific value in dispute is adopted in Spain[717]. The high value cases exceeding 600 000 EUR are always accepted for examination in the third instance proceedings. As far as the lower value cases are concerned, they also may be subject to the third instance examination, but only provided that at least one of the following conditions is met: a) a case on judicial protection of fundamental rights different than those linked to the judicial proceedings; b) or a case with “cassational interest”[718].

2.2.3. Other monetary and fiscal requirements

699. In addition to the *ratione valoris* criterion, monetary requirements of a different kind are sometimes provided for by the Member States. By way of example, in Latvia a party wishing to file a second appeal is obligated to pay a security deposit (ca 300

[714] National Report, question 2.2.3: Bulgaria.

[715] National Report, question 2.2.3: Lithuania; Czech Republic.

[716] National Report, question 2.2.3: Romania; Poland.

[717] National Report, question 2.2.3: Spain.

[718] Under the Spanish law, a case with “cassational interest” requires such elements as: 1). contravention of the Supreme Court case law; 2). judgment contrary to judgments rendered by the Court of Appeals in similar cases; 3). the appealed judgment has applied “new” law, i.e. a law enacted no longer than years ago.

EUR). If the Supreme Court revokes or amends an appealed judgment in full or in part, the security deposit will be refunded[719].

700. The comparative analysis indicates that the fiscal requirements for filing the first and second appeal are roughly the same or slightly higher for the latter in a significant number of Member States[720]. However, it is also possible to indicate such Member States where the fiscal requirements for the second appeal are either significantly lower or higher in comparison to the first appeal. As far as the former situation is concerned, it is worth presenting a notable example of France, where there is no fiscal requirement for instigating the second appeal proceedings – in other words, the second appeal is free. A similar situation has been identified in Spain, where the Spanish Constitutional Court has recently annulled court fees for appeals[721]. Likewise, in Estonia the court fee for submitting the second appeal is usually lower than the fee for the first appeal and it amounts to 1% of the value of the case.

701. By contrast, the opposite situation is present, e.g. in Slovakia and Denmark[722]. In Slovakia, a court fee for lodging a second appeal equals twice the fee for submitting a first appeal. Needless to say, when calculating the overall cost of the second appeal proceedings, many other factors can also come into play such as e.g. the cost of service, translation, representation etc.

702. In conclusion, it can be claimed that if a Member State provides for higher court fees with regard to the second appeal, this factor may be perceived as an additional barrier in the access to the highest judicial authority.

2.2.4 Ratione iudicati limitation

703. As far as the other limitations are concerned, the *ratione iudicati* factor appears to be an interesting, although relatively rare restriction. The *ratione iudicati* criterion concerns the mutual interaction between decisions of the first and second instance courts. If the verdicts of both courts are the same, the second appeal examination will

[719] National Report, question 2.2.3: Latvia.

[720] See, for instance, National Report, question 2.2.3: Slovenia; Romania; Greece; Portugal; Lithuania;, Ireland; Germany; Luxembourg.

[721] Previously, the fees were higher for cassation than for appeal.

[722] See, for instance, National Reports for Slovakia and Denmark.

be excluded. This criterion is adopted to a certain extent in Hungarian law[723]. For example, judicial review may not be requested if the court of the second instance sustained the decision of the first instance in actions relating to any infringement of neighbourhood relations, trespassing etc.

2.2.5 Leave to appeal

704. The institution of leave to appeal is perhaps the most prominent and distinctive filtering tool that limits access to the Supreme Court. It is connected with the existence of special proceedings designed to sift through cases and pick out the ones whose examination may contribute to the development of law. This filter is provided for by the majority of Member States[724], including those with no cassation system[725].

705. Having said that, it is also possible to indicate Member States which do not regulate the institution of leave to appeal. Greece and Belgium may serve as an example of countries where the admissibility to lodge the second appeal revolves around the requirement of having an interest in bringing the case before the Supreme Court[726].

706. The grounds for granting the leave to appeal usually concern public interest oriented issues such as: the existence of a legal issue of significant importance, the need for the unification of case law, contribution to the development of law etc. The criteria for granting a permission to file a second appeal are sometimes formulated – to a more or lesser extent – in a way which gives some leeway to the court, allowing it to flexibly evaluate whether there is “some other compelling reason” for the Court to hear the appeal[727] or whether there is “some other important reason for appeal”[728].

707. The institution of leave to appeal serves as an important filter in the process of admitting cases for examination by the Supreme Court[729]. For instance, in Latvia

[723] National Report, question 2.2.3.

[724] See, for instance, National Report, question 2.2.3: Austria; England and Scotland; Denmark; Sweden; Finland; Latvia; Poland.

[725] See, for instance, National Report, question 2.2.3: Denmark; Finland.

[726] National Report, question 2.2.3: Greece; Belgium.

[727] National Report, question 2.2.3: England and Scotland.

[728] National Report, question 2.2.3: Finland.

[729] National Report, question 2.2.3: Latvia; Lithuania; Finland.

almost 72% of cases are not accepted for cassation proceedings[730], whereas in Finland only 50-60 cases are accepted on an annual basis. In Lithuania the rate of admission amounts to about 25-30% of all cassation appeals.

708. In some countries the leave to appeal constitutes an absolute prerequisite for the third instance proceedings[731], whereas in others this requirement is regulated in a more nuanced way[732]. By way of example, in Austria it is necessary to be granted a leave to appeal in order to lodge an “ordinary” Revision. If a party is denied such a leave, it will be nevertheless possible to lodge an “extraordinary” Revision, provided that the value in dispute exceeds 30 000 Euros – which will rarely occur in consumer disputes.

709. In Bulgaria, there is no leave to appeal, but the grounds of a cassation complaint are formulated in a way referring to the classic elements of the leave to appeal[733].

710. The interaction between *ratione valoris* limitation and the requirement of being granted leave to appeal is not regulated homogenously in the Member States. In some jurisdictions, there is a combination of filtering tools, i.e. the *ratione valoris* constitutes a *sine qua non* condition of admissibility, which must be obligatorily complied with along with the existence of conditions of the leave to appeal[734]; whereas in other systems, the compliance with at least one of these filtering requirements will suffice to proceed with the examination of a second appeal[735]. As was already mentioned, a specific interaction between the *ratione valoris* limitation (high value case: over 600 000 Euros in dispute) and the “cassational interest” of a case is present in Spain. Both requirements are treated autonomously by the Spanish legislator and the existence of at least one of them will allow to effectively instigate second appeal proceedings.

[730] Statistics of the Supreme Court of the republic of Latvia for 2013, available at http://at.gov.lv/files/uploads/files/4_Tiesvediba/Statistika/2013/at_darbibas_raditaji_kopsavilkums_2013.jpg (30 November 2016), in Latvian.

[731] National Report, question 2.2.3: Poland; Denmark; Finland; Latvia.

[732] National Report – Mutual Trust, Austria, question 2.2.3.

[733] In Bulgaria second instance decisions are subject to third instance if the court has decided a question on substantive or procedural law which is 1) either contrary to the practice of the High Court of Cassation; 2) or is decided in a different way by the lower courts, 3) or is of importance to the correct application of law and its development.

[734] National Report, Poland, question 2.2.3.

[735] National Report, Spain, question 2.2.3.

711. The level of formality with regard to lodging a request for leave to appeal varies. For instance, in Ireland the prescribed form of Notice of Appeal requires the applicant to answer a series of questions and to establish the matters of general public importance etc., whereas in Poland a separate legal reasoning must be included in the cassation with a view to substantiate the conditions of leave to appeal.

712. The way in which a leave of appeal must be sought is not homogenous, either. According to the model adopted in a given country, a leave to appeal should be sought either directly from the Supreme Court[736] or from the Court of Appeal[737]. Sometimes there is a special body which is entrusted with exercising this function, e.g. the Appeals Permission Board in Denmark[738].

713. If the leave to appeal must be sought from the Court of Appeal, a decision refusing to grant such a leave may be either appealable[739] or not appealable[740].

2.2.6. Problems and assessment

714. The overview of the main conditions of admissibility of the second appeal amply demonstrates that national procedural laws significantly vary when it comes to the specific requirements and technicalities connected with instigating the proceedings at the highest level of judicial hierarchy. The heterogeneity of national procedural systems should be perceived as their inherent feature and a fully natural consequence of the multitude of legal history, jurisdictional traditions and legislative developments that have been steadily taking shape over the centuries, or at least decades. It goes without saying that varied solutions adopted in respective Member States, involving complicated interactions between different requirements of admissibility, make it somewhat perplexing for a party to lodge a second appeal in a correct manner, even if she is assisted by a professional representative. Having said that, at this point in time it does not seem advisable, nor feasible to take action with a view to introduce uniform rules on the European level. However, if such a scenario

[736] National Report, Poland, question 2.2.3.

[737] See, for instance, National Report, question 2.2.3: Austria; England and Scotland.

[738] National Report, Denmark, question 2.2.3.

[739] National Report, Germany, question 2.2.3.

[740] National Report, England and Scotland, question 2.2.3.

should be put forward for consideration in the future, it would have to be preceded with a thorough, full-scale research as well as a great deal of careful reflection.

2.3. Time Limits

715. The shape of time limits, i.e. their length, the way of determining their starting point and the possibility of restoring them is generally of major significance for the parties, not least a foreign plaintiff or defendant. In the cross-border context, it is particularly important whether a given jurisdiction provides for two different deadlines – a shorter one for parties residing on its territory and a longer one for parties domiciled abroad. This is very important for safeguarding the procedural rights of a defendant from another Member State.

2.3.1. Beginning of the time limit

716. In a significant number of countries, the time limit for lodging a second appeal begins with the service of the contested judgment[741]. The service of the judgment may be undertaken by the court ex officio or on the application of a party. However, multiple other solutions have also been identified. The time limit may begin with the day of the perfection of the order of the lower court[742]; it can start after the date of the contested decision[743]; it is also possible to link the starting point with the moment when the judgment of the appellate court was “made available” to the parties[744]; the date when the appeal court rendered its judgment[745] or the time of its publication[746]; the day the judgment came into effect[747] or the day when the decision was communicated to the party[748].

[741] See, for instance, National Report, question 2.2.3: Poland; Belgium; Austria; Bulgaria; Czech Republic; Greece; Italy; Slovenia; Spain; Luxembourg.

[742] National Report, Ireland, question 2.2.3.

[743] National Report, England and Scotland, question 2.2.3.

[744] National Report, Finland, question 2.2.3.

[745] National Report, Sweden, question 2.2.3.

[746] National Report, Hungary, question 2.2.3.

[747] National Report, Lithuania, question 2.2.3.

[748] National Report, Romania, question 2.2.3.

2.3.2. General length of the time limit

717. The length of a time period for filing a second appeal varies from country to country so much that it seems quite arbitrary. The differences in this regard are quite significant, spanning from mere days to several months. Time limits for lodging the second appeal are usually longer in comparison to the first appeal – in this respect the formal requirements of a second appeal can be considered more lenient. More specifically, the time limits vary from 20 days (Spain), 21 days (England, Scotland), 28 days (Ireland), one month (Germany, Bulgaria), four weeks (Sweden, Austria, Denmark), 30 days (Romania, Portugal), 60 days (Finland, Hungary, Italy), 2 months (Czech Republic, Poland, Luxembourg) to 3 months (Lithuania, Belgium, the Netherlands).

718. Two groups of countries can be differentiated – the ones which have the same time limits for parties residing or domiciled on their territory and for parties from abroad[749]; and the ones which provide for longer periods for parties from abroad[750]. The first model is much more prevalent in the Member States.

719. Among the countries which regulate either longer deadlines or slightly different rules for foreign parties, some divergences are nevertheless noticeable: for example, France sets a time limit of 4 months for parties who are either foreigners or are domiciled abroad (in contrast to the standard time limit of 2 months); Greece (30 days for parties residing in Greece; 60 days for parties residing abroad).

720. An interesting and quite nuanced regulation is enacted in Belgian law[751]: if a party has no (elected) place of residence or domicile in Belgium, the time limit is extended by 15 days – if a party resides in France, Luxembourg, the Netherlands, Germany or the United Kingdom; by 30 days – if a party resides in another state of Europe and by 80 days – if a party resides in another part of the world. Moreover, when the term of appeal begins and ends during the judicial holidays (from 1 July to 31 August), it is automatically extended until the fifteenth day of the new judicial year (i.e. 15th September).

[749] See, for instance, National Report, question 2.2.3: Poland; Spain; Ireland; Romania; Bulgaria; Lithuania; Finland; Slovenia; Denmark; Croatia

[750] See, for instance, National Report, question 2.2.3: Slovenia; Greece; France; Belgium; Luxembourg.

[751] National Report, Belgium, question 2.2.3.

721. Likewise, the two-month period provided for by the Luxembourgish law is extended by 15 days for parties residing in other Member States of the EU[752].

722. A specific situation takes place in Latvia. Although the time limit for parties residing outside of its territory is the same (30 days) as for the nationals, it is counted differently for parties from abroad, namely from the day of service of the true copy of the judgment (whereas for parties residing in Latvia the time limit to submit cassation shall be 30 days from the day the judgment "is declared") – however, this rule does not apply if a foreign party has appointed an attorney in Latvia[753].

723. In Slovenia, the deadline depends on whether it concerns the so-called "allowed" legal review (30 days from service of a transcript of the judgment) or "admitted" legal review (at least 15 days from service of a decision of the Supreme Court about admission of a legal review)[754].

2.3.3. Extension or shortening of the time limit

724. As regards the procedural deadlines, usually it is not possible to shorten or extend the deadline by the court, even with the agreement of the parties[755] – however, there are exceptions to this rule. By way of example, the Supreme Court in Ireland may shorten or extend any deadline at its own discretion, whereas in Denmark the Appeals Permission Board may exceptionally permit an appeal if the request is submitted at a later point in time within one year of the judgment.

725. On the other hand, it is almost universally possible to file for reinstating a missed deadline, provided that specific conditions are met. An exception to this almost universal scheme has been identified in Spain, where neither a national party, nor a foreign party may successfully apply for having a deadline reinstated with a view to lodge an appeal. The reason for this strict preclusion resides in the fact that a party must have mandatory legal representation throughout the proceedings. Therefore, at the time of filing a second appeal, a foreign party is already assisted by a Spanish lawyer and a Spanish "procurador" (a proxy for the purposes of the procedure).

[752] National Report, Luxembourg, question 2.2.3.

[753] National Report, Latvia, question 2.2.3.

[754] National Report, Slovenia, question 2.2.3.

[755] See, for instance, See, for instance, National Report, question 2.2.3: Belgium; Poland; Germany; Finland.

726. Contrary to Spain, some countries provide for a possibility of both reinstating the missed deadline as well as extending it – for example, in Estonia it is possible to reinstate the deadline, if there was an “important reason” which made it impossible for the party to keep the deadline. At the same time the Estonian Supreme Court has the power to extend the deadline if there is “reasonable cause”. In Germany – regarding the submission of the particulars of the Revision the deadline may be extended upon request to up to two months with no consent of the opponent, if the appellant presents substantial grounds.

727. By way of example, in Greece any party missing the deadline is allowed to file an application for *restitutio in integrum*. With respect to parties residing abroad, three different categories should be differentiated:

a) Parties residing within the EU must follow the path provided by Art. 19(4) and (5) of the Service Regulation, in accordance with the recent CJEU ruling in the case C-70/15, Emmanuel Lebek/Janusz Domino, CJEU 7.7.2016, ECLI:EU:C:2016:524.

b) Parties residing in one of the non-EU Member States of the Hague Service Convention must follow the path provided by Art. 16 of the above Convention, or alternatively that of Art. 152-158 CCP.

c) Parties residing in any other country have the sole choice of invoking domestic provisions, i.e. Art. 152-158 CCP.

728. All in all, foreign parties have to respect the deadlines set by national laws, but – depending on the country – they can apply for an extension or a restoration of a deadline if there are justified grounds. For instance, in Germany the mere fact that a foreign party is taking part in the proceedings cannot be seen as a sufficient reason to obtain a reinstatement pursuant to German Code of Civil Procedure, sec. 233. However, serious difficulties concerning the translation of the judgment or the particulars of *Revision* as well as serious transmission errors might potentially be an issue which could justify reinstatement. Generally, such grounds are examined on a case by case basis. A party must prove or at least point at such issues as the justified reasons (e.g. Romania), unforeseen circumstances that were impossible to overcome (e.g. Bulgaria) or *force majeure* (e.g. Portugal).

2.3.4. Problems and assessment

729. The importance of time limits – their length, starting point and restoration – cannot be stressed enough. This issue, which is highly consequential in the course of any proceedings that one might think of, seems even more sensitive in the cross-border context. An adequate legislative shape of time limits is absolutely crucial for safeguarding the fundamental procedural rights of a party such as the right to defence. Against the background presented above, it is safe to say that solutions adopted by the respective Member States are far from homogenous. This fact should raise concern, given the highly sensitive nature of time limits and their importance for the correct exercise of the parties' rights. Therefore, it is advisable that all Member States apply longer time limits for parties residing abroad in contrast to the parties domiciled in the forum state. Additional arguments and suggestions presented under point 1.2.5. are fully applicable to the second appeal.

2.4. Representation

730. Given the scope of review of third instance proceedings and the emphasis on legal issues, it can be said that cassation proceedings are designed for professionals – therefore, they frequently entail the requirement of obligatory legal representation in the proceedings before the Supreme Court, or at least the requirement that a cassation appeal should be signed by a professional lawyer.

731. As far as the representation of a party is concerned, the divergent models revolve around such issues as whether a party must be obligatorily represented by a professional and in case of an affirmative answer, whether there is a group of specialized lawyers who are exclusively entitled to act in the cassation proceedings.

732. Most countries require a party to be obligatorily represented by an attorney (e.g. Slovakia – there are exceptions[756]; Poland; Lithuania; Greece; Czech Republic;

[756] Under provision 429 of CSP the person filing a review has to be represented by attorney. In CSP it is emphasized that review and other procedural pleadings and submissions have to be drafted by attorney. However, CSP states three exemptions out of this rule:

(i) if a person filing a review is a natural person and has a law master degree;

(ii) if a person filing a review is a legal entity and its employee or member of its statutory body has a law master degree;

(iii) if a person filing a review is a weaker party (i.e. consumer, employee or a person asserting claim under the Slovak Anti-Discrimination Act No. 365/2004 Coll.), then such a person may be represented

Luxembourg; Germany, Spain[757]). No obligatory legal representation is required in Ireland, Finland, Denmark – i.e. mainly countries with no cassation model where the Supreme Court fully (re)hears the case. The mandatory legal representation adds to the overall cost of the proceedings and – form this point of view – can be perceived as an impediment in the access to justice, leading to a lower number of second appeals. From another point of view, it is questionable whether a party will be able to deal with a second appeal correctly. Therefore, mandatory representation may be also perceived in terms of a protective mechanism for the parties.

733. In some jurisdictions, obligatory legal representation is required only in the second appeal proceedings as opposed to the first appeal[758], whereas in others legal representation is required both in "second" and "third" instance proceedings (e.g. Portugal, Germany).

734. In some countries, there is a special bar enjoying a monopoly in this regard. In France, the so-called *avocats au Conseil et à la Cour de cassation* filter petitions to the Cassation Court. In Germany, the parties must be represented by an attorney admitted to practice before the German Supreme Court. In other words, a "normal" lawyer cannot represent a party in the second appeal proceedings; such representation is reserved for specialized lawyers whose number is limited and who are selected by a special election committee.

735. It is worth noting that in Romania representation by a lawyer had been compulsory for a certain period of time but this requirement was later declared unconstitutional by a decision of the Constitutional Court (Decisions No. 462/2014 and 485/2015). As of today, the parties are free to choose whether they want to have a professional legal representative or not.

736. In Latvia the situation is not entirely clear – on the one hand the legislator allows both personal representation (by the parties themselves) and also through advocates, but on the other hand the Supreme Court suggested that the advocates shall have exclusive right to provide legal representation in the cassation proceedings.

---

either by consumer association, trade union or an organization established for the area of protection from discrimination.

[757] Under Spanish law, legal representation is always mandatory except for monetary claims under 2 000 Euros.

[758] See, for instance, National Report, question 2.2.3: Lithuania; Poland; Slovenia.

737. Theoretically, it is possible that a lawyer from another Member State will represent a foreign party in the third instance proceedings but in practice it is a rare occurrence. Such a possibility results from the freedom to provide and receive services. It is worth reminding that such a lawyer would have to comply with the requirements set out by the national law with regard to professional legal representatives who may act in the proceedings before the Supreme Court. By way of example, in Germany a lawyer from another Member State would have to be admitted to practice before the German Supreme Court. Up to now, as the German National Reporter indicated, no lawyer from another Member State has ever sought admission to the German Supreme Court. However, on a theoretical basis it is possible that a lawyer with a degree from another Member State would be admitted to practice before the German Supreme Court.

2.5. Scope of Review

2.5.1. Typically a review of law

738. The important elements of a dispute evolve around the issues of fact and law. Cassation proceedings are usually limited to strictly legal issues, concerning both substantive and procedural law. It is important how these issues are mirrored in the shape of the cassation grounds. The cassation grounds, depending on the way in which they are regulated by the lawmaker, are decisive when it comes to the scope and depth of the second appeal examination.

739. In the EU, a significant majority of countries limits the third instance proceedings only to the examination of strictly legal issues[759]. The review of facts by the Supreme Court is allowed by the minority of the Member States. This is mainly the case of countries with no cassation system, i.e. where the Supreme Court acts in the capacity of the second instance and allows for the full review and rehearing of the case[760]. It does not necessarily mean that the Supreme Court will interfere with the findings of fact made by the trial judge, but nevertheless, it retains discretion to hear full evidence. Interestingly, in these countries the special function of the Supreme

[759] See, for instance, National Report, question 2.2.3: Belgium; Austria; Czech Republic; Bulgaria; Lithuania; Romania; Spain; the Netherlands; Germany; Poland; Luxembourg; Portugal.

[760] See National Report, question 2.2.3: England and Scotland; Ireland; Denmark; Finland.

Court is still safeguarded by putting an emphasis on issues such as uniformity of law and producing precedent. In Finland it is also mirrored in a very small number of cases that are accepted for review by the Supreme Court (only 50-60 civil cases per year).

740. The question whether the third instance court can examine both the sphere of law and the sphere of facts, or only the former, determines the qualitative extent of the review. Examining factual issues significantly broadens third instance examination, and it usually opens the possibility of rehearing the case and carrying out – to a smaller or bigger extent – evidence proceedings. Therefore, the way in which the grounds for second appeal are formulated can play the role of a filtering tool, eliminating appeals which contest solely the factual sphere of the case and the assessment of evidence by the lower instance court.

741. The second appeal grounds are generally more limited in comparison to the grounds for filing a first appeal. Therefore, in countries following the cassation model, the case – or to be more precise: the contested judgment – is generally not subject to full review at this stage. Clearly, this remark does not apply to countries where the Supreme Court acts in the capacity of a second instance court.

742. The grounds for review may be formulated following one of the two models: the synthetic one (i.e. general) and the analytic one (i.e. detailed, enumerative). The first model usually prevails in the "first appeal" proceedings, whereas the other one is more frequent when it comes to the third instance. Having said that, the analytic model exists in a manifest way in Greece[761], where the legislator enumerates twenty grounds for filing a second appeal, eighteen of which sanction procedural faults and two of which concern errors in the application of substantive law. An interesting approach to the grounds of a second appeal exists in Hungary, where the legislator presents a long, enumerative list of situations, in which filing cassation is excluded[762].

743. As far as the scope of review is concerned, the examination may be restricted exclusively to the judgment of the second instance court or cover also the judgment of the first instance court.

[761] National Report, Greece, question 2.2.3.

[762] National Report, Hungary, question 2.2.3.

744. The scope of review aspect is closely intertwined with specific requirements of the second appeal as a procedural pleading. It is quite frequent in Member States following the cassation model that such requirements are stricter in comparison to the first appeal. In contrast to the latter, where the presentation of charges and the argumentation in their support are subject to more lenient conditions, when it comes to the second appeal, a party – or her (mandatorily appointed) representative – is obliged to properly formulate and substantiate the grounds for second appeal, abiding by a strict standard of precision – both with regard to the form and the content of this appeal (e.g. Slovakia, Poland, Belgium, Luxembourg; opposite: Romania, Denmark). It is worth mentioning that the ECHR has ruled that the requirement of precisely indicating the allegedly violated legal provisions is aimed at securing a legitimate goal[763]. Needless to say, filing a successful second appeal requires a party to provide sophisticated legal reasoning. This might be perceived as an additional challenge, especially if a party comes from another Member State and is not represented by a professional – either because there is no obligation of appointing such a representative or due to the decision of the party herself. The level of difficulty is also connected with the fact that the application of foreign law comes into play.

745. By contrast, the abovementioned assertion – with regard to the harshness of formal requirements – is not necessarily true in Member States following the appeal model of proceedings at the third instance level[764].

2.5.2. Problems and assessment

746. The synthesis provided above leads to the conclusion that a significant majority of Member States usually limit the scope of second appeal review exclusively to legal issues. The review of facts at the highest judicial level occurs only occasionally. Against this background, it is safe to say that no intervention on the European level is required in this respect. It is almost universally accepted that the proceedings before the Supreme Court serves different functions than the first appeal, as it is principally designed to operate in the public interest.

[763] See Dattel v Luxemburg no 18522/06 (ECHR, 30 July 2009).

[764] Cf. National Report, question 2.2.3: Portugal; Greece.

747. As the second appeal revolves primarily around the points of law, it usually requires an appellant to present sophisticated legal reasoning and fulfil strict formal conditions. Therefore, the requirement of mandatory legal representation comes across as a natural and frequent corollary of it. In this context, an efficient access to legal aid is of major importance at this stage of proceedings. Therefore, it might be advisable for the EU legislator to further review the efficiency of currently operating legal instruments in this respect.

2.6. The Judgment of the Supreme Court

748. In countries which do not follow the cassation model the Supreme Court has full powers to decide the case on its own without transferring it to the lower court[765]. According to the model adopted in these countries, the Supreme Court acts as a second instance court and fully hears the case.

749. By contrast, the situation is quite different in countries following the cassation model, where lodging the cassation does not open a third jurisdictional level. If the cassation complaint is successful, it will usually involve merely quashing a judgment in whole or in part and transferring the case for further examination to the court which previously examined the case. Alternatively, the Supreme Court will quash the contested judgment (and the judgment of the first instance court) and terminate the proceedings on procedural grounds on account of its inadmissibility.

750. However, there are some exceptions to this rule. By way of example, the Polish Supreme Court will exceptionally decide on the merits if the ground relating to infringement of substantive law is evidently justified and at the same time the cassation complaint was not based on the infringement of procedural law or this ground turned out to be unfounded[766] (likewise in Slovakia, Lithuania, Greece, Estonia).

751. According to the general rule laid out before, the judgment of the cassation court is usually not enforceable in another Member State, except for the ruling on the costs of the proceedings. Therefore, the impact of the third instance on the content of the judgment of the second instance court (in some countries, also the judgment of the

[765] National Report, question 2.2.3: Finland; Ireland; Portugal; Denmark.

[766] Polish Code of Civil Procedure, Art. 398^{16}.

first instance) and its enforceability and enforcement in another Member State – plays merely an indirect role. Having said that, the Supreme Court usually formulates instructions, which generally must or – at least – should be followed by the court to which the case was transferred for further examination. Therefore, the role of the Supreme Court in administering justice in cases with a cross-border context is still important.

2.7. Consequences on Provisional Enforcement

752. The decision issued by the second instance court (or the first instance court if the first appeal was dismissed) can be either enforceable notwithstanding the second appeal or not enforceable. If it is enforceable, the enforceability can be suspended either *ex lege* or on application of the party.

753. In this regard, Member States adopt solutions which differ in detail. Austrian law differentiates between the effects of filing an “ordinary” Revision and an “extraordinary” Revision. The first one suspends not only *res iudicata* effect but also the enforceability of the judgment, whereas the second one does not entail suspension of the enforceability of the judgment. In Denmark, if an appeal has been filed before expiry of the waiting period (which is usually 14 days from the date of the judgment), the judgment does not become enforceable unless this follows from the judgment.

754. Filing the second appeal does not automatically entail the stay of enforcement in the majority of the Member States[767]; in other words, the second appeal has no suspensive effect and the judgment serves as an execution title. The probability that the judgment will be annulled after it has been executed is seen as an acceptable systemic risk[768].

755. Even if a party applies for the stay of enforcement, it depends on the case law in a given country whether such a stay will be granted frequently or rarely. For instance, the National Report from England and Scotland suggests that according to the normal rule no stay will be granted. In Bulgaria a party must provide a sufficient

[767] See, for instance, National Report, question 2.2.3: Slovenia; Belgium; Bulgaria; England and Scotland; Finland; Greece; Poland; Hungary; Germany; Romania; Slovenia; Luxembourg.

[768] National Report, Greece, question 2.2.3.

security to obtain the suspension of enforcement proceedings. By contrast, in Spain and in Germany provisional enforcement is possible without the need to provide security.

756. If the enforcement may be suspended upon request under special circumstances, the court will usually take into consideration whether the original state can be restored following enforcement or whether the damage caused by the lack of enforcement outweighs the loss the suspension of enforcement is likely to entail. In some countries the compulsory enforcement will be temporarily stayed (upon request) if the enforcement might entail a disadvantage that would be impossible to compensate or remedy unless overriding interests of the creditor contravene this decision (Germany).

757. The court (either a second instance court or the Supreme Court, depending on the country) may suspend the enforcement proceedings or issue an order that the decision is not to be enforced. In countries with no suspensive effect of cassation, there are sometimes exceptions to this rule, e.g. in Greece with regard to matrimonial matters and cases concerning parent-child relations – in other cases a stay of execution can be ordered by the The Supreme Court of Greece (*Areios Pagos*) upon application of a party initiating the Cassation.

758. It is worth mentioning that in France filing a cassation generally does not prevent the judgment under appeal from being enforced. Moreover, its enforcement is even considered as one of the conditions for the appeal. This measure (Art. 1009-1 CPC) comes from the decree of 20 July 1989 and it is designed to ensure the authority of decisions and judgments given in the courts of last resort. Pursuant to Art 1009-1 CPC the first president may withdraw a case from the registry of cases if the appellant does not prove that the decision under appeal has been complied with[769].

2.8. The Cross-border Context

759. The impediments existing in most Member States with regard to the admissibility of third instance proceedings (a specific amount of value in dispute, the character and type of a dispute etc.), as well as various filters in the access to the highest judicial

[769] Loïc Cadiet, 'The system of French cassation', in Manuel Ortells Ramos (coord.), *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe* (Difusion Juridica 2008) 52.

instance (the need to produce precedent and unify case law etc.) prevent most cases from being reviewed by the Supreme Court. Consequently, the proceedings come to a close at the second instance, or even at the first instance court. The prevalent *ratione valoris* limitation adversely affects consumer cases as the value in dispute is usually relatively low in such cases.

760. However, it should be emphasized that once the criteria of admissibility are satisfied, the cross-border context of a given dispute may become an asset helping a party to successfully face different mechanisms of selection that are frequent at this stage. Namely, the cross-border context of such cases may trigger or reveal significant legal difficulties that are in need of clarification by the highest instance in the judicial hierarchy. It is worth emphasizing that judges who select cases for examination by the Supreme Court might be more willing to notice the potential of cross-border cases to satisfy the strict, public interest oriented criteria of various filter mechanisms.

761. The frequently occurring requirement of mandatory professional representation in the third instance proceedings is particularly noticeable. This requirement exerts a significant impact in the cross-border cases on such elements as the communication of the court with the parties (the service of a judgment, notification of a judgment, translation of the judgment), lodging a second appeal – which frequently entails specific requirements of this appeal as well as the examination of a second appeal. Depending on the model adopted in different Member States, obligatory professional representation may either constitute a follow-up to the obligatory legal participation in the proceedings before a second (or even first) instance court or commence as late as at the stage of second appeal proceedings. As regards the latter model, the participation of lawyers who are specialized in third instance proceedings may be imposed on the parties.

762. As far as the cross-border context is concerned, a requirement with regard to the obligatory legal representation might entail difficulty in appointing such a representative in due time – in other words, the starting point and the length of a deadline to perform this activity is decisive in this respect. Generally, a party will appoint an attorney who is based in the Member State where the proceedings take place. Against this background, the mechanism of applying for legal aid should play a significant role.

763. On the other hand, the fact that a party acts through an attorney from a Member State in which the proceedings are underway can facilitate the proceedings – especially given the cross-border dimension of the dispute. This will be true especially in cases when the attorney had already acted in the lower instance proceedings. Assuming that the court will communicate directly with an attorney – and not with the party herself – the problems connected with the service of a judgment or a notification about passing a judgment as well as the related difficulties with translation or preparation of a true copy of the judgment for the opposite party – are less burdensome or even become non-existent. In such cases, it is also easier to abide by the relevant time limits, including the time limit for filing a second appeal.

764. As a rule, the Supreme Court does not terminate the third instance proceedings with a judgment on the merits. On the contrary, if the second appeal turns out to be successful for the appellant, the Court will usually set the contested judgment aside and either terminate the proceedings on procedural grounds or transfer the case to the appellate court for further examination on the merits. However, as it was already mentioned, there are exceptions to this rule and – under specific circumstances – the third instance court may proceed with adjudicating on the merits. A judgment dismissing a second appeal as unfounded should also be classified as a judgment on the merits. Having said that, the judgment of the third instance – putting aside the decision on the costs of the proceedings – usually is not the one which will be enforced in another Member State. It should be assumed that the judgment of a lower instance court (i.e. either first or second instance court) will usually be subject to such enforcement. Therefore, the significance of the third instance decision can be construed as indirect. It manifests itself in an impact exerted on the existence of the judgment of second (exceptionally first) instance as well as its enforceability, and consequently – its enforcement in another Member State.

765. The impact of the third instance on the cross-border enforceability of a judgment in another Member State may be – in general terms – defined in a twofold way.

766. Firstly, the existence of the third instance creates a possibility to contest a judgment in the country of origin, also in the proceedings in which the defendant did not enter an appearance. Therefore, the possibility of having recourse to the third instance may be analyzed – in relation to the obstacle to recognition or declaration of

enforceability – through Art. 34(2) of Regulation 44/2001 or – with regard to the ground of refusal of recognition or enforcement – through Art. 45(1)(b) of Regulation 1215/2012, if the defendant did not enter an appearance in the Member State of origin, or – in other cases – within the possibility of raising a public policy exception (former Art. 34(1) of Regulation 44/2001; today Art. 45(1)(a) of Regulation 1215/2012). The latter scenario might be taken into consideration if the deprivation of the possibility of the third instance proceedings is qualified – under specific circumstances – as an infringement of a party's right to defence.

767. Secondly, the existence of the third instance in the Member State of origin may exert an impact on the enforceability of a judgement in the cross-border context, and in some cases it may even have an effect of the existence of the judgement in question. Consequently, it may also have an influence on the enforcement of the judgment in other Member States (former Art. 46 of Regulation 44/2001; Art. 44(2), Art. 51 in relation with Art. 44(1) of Regulation 1215/2012; Art. 21(3) of Regulation 4/2009; Art. 6(2) of Regulation 805/2004).

2.8.1. Documents provided to a party abroad who lost the second instance

768. In third instance proceedings, similarly as in second instance proceedings, it is of primary importance to inform the losing party coming from a different Member State about the fact that an unfavourable judgment has been passed. It is important considering the possibility of lodging an appeal at the third instance level. If this condition is not met, the possibility of initiating the proceedings will be either excluded or significantly hindered.

769. The solution according to which a judgment is communicated to a party (her representative) by the court *ex officio* – by means of service or notification – automatically after rendering a decision (e.g. Austria, Belgium, Spain, Lithuania) may be deemed relatively unproblematic. Such an approach seems to be indispensable when the judgment of the court of second instance was passed in camera, without the participation of the parties.

770. If a judgment was announced, for instance, following a hearing in the second instance and a party had been informed about the date of the hearing and/or the date of announcement of the ruling, the necessary standard of protection of the party's

rights should be deemed safeguarded (e.g. Poland, Finland). In practice, the described situation may be problematic in the cross-border context, though. Namely, assuming that there was no obligation to appoint a representative and a party acted on her own in the second instance proceedings, a trip to another Member State with a view to participate in the hearing or to be present (only) at the announcement of the ruling, may turn out to be excessively time-consuming and costly for a party.

771. Therefore, it seems that a good solution alleviating this dilemma consists in adopting a nuanced approach – namely, if a party was present at the hearing or at the announcement of the verdict, the judgment does not have to be served *ex officio*. On the other hand, if a party was absent, a judgment should be served on the party *ex officio* (the Netherlands, Croatia). A regulation which neither provides for a service of a judgment, nor notification of this fact, and leaves the initiative entirely to the party should be evaluated unfavourably against this background (Malta).

772. The lack of notification of the judgment by the court of second instance – in due time and in a way allowing to undertake defence – can exert an impact on the enforceability of a judgment in another Member State[770].

773. This influence can manifest itself, to a certain extent, within the condition for the declaration of enforceability indicated in Art. 34(2) of Regulation 44/2001 or the ground of refusal of enforcement indicated in Art. 45(1)(b) of Regulation 1215/2012 if a party did not enter appearance in the first and second instance proceedings and a judgment rendered in the first instance in favour of this party[771] was successfully appealed by the opposite party[772]. It may also happen that a party did not enter appearance in the first instance and the judgment passed in this instance can be directly appealed to the highest instance. In these scenarios, it seems that the possibility of having recourse to the third instance or the lack of such a possibility should be subject to evaluation within the scope of the abovementioned

[770] Cf. ECJ judgment of 14 December 2006, C-283/05, *ASML Netherlands BV v Semiconductor Industry Services GmbH*, ECLI:EU:C:2006:787.

[771] Theoretically, it is possible that a default judgement passed in the defendant's absence can be favorable to him, cf. Polish and Austrian civil procedure.

[772] The possible scenario might be as follows: the court of first instance dismisses a claim for 5 000 euros in the defendant's absence. As a result of the plaintiff's appeal – examined also in the defendant's absence – the court changes the ruling and adjudicates 5 000 euros.

regulations.[773] In these situations it is assumed that a lack of notification of the judgment constituted an infringement which in the light of the national law of the Member State of origin can be (still) successfully raised – as an appellate ground – in the third instance.[774]

774. In practice it may happen that a party who participated in the case from the beginning was not duly informed about the appeal proceedings which resulted in her absence from that stage of the proceedings. If the (unfavourable) judgment of the second instance was not notified to such a party, a question may arise whether such an infringement of her right to defence and her right to be heard by the court could be accepted as a justified ground for raising a public policy exception in the Member State of enforcement (cf. Art. 34(1) of Regulation 44/2001 as an obstacle to grant exequatur and Art. 45 (1)(a) of Regulation 1215/2012 as a ground to refuse recognition).[775] Moreover, a question also arises whether such a party, provided that she was aware about the judgment and could have lodged an appeal to the third instance court but failed to make such an effort, would be able to raise a public policy exception in the Member State of enforcement.

2.8.2. Information of the parties about the judgment; the question of translation

775. The possibility of lodging an appeal to the third instance court, similarly as in the case of the second instance, is conditioned upon not only a party's awareness of the judgment, but also the knowledge of the reasoning behind the judgment. It is important for a party to know the grounds on which the court based its verdict so that she can formulate relevant charges in the appeal.

776. As regards the third instance, this issue has even more far-reaching significance taking into consideration the specific, strict requirements of the appeal to the third instance which are usually provided for by the national laws of the Member States.

[773] Otherwise, it seems that these cases should be analyzed through the prism of public policy exception – see below in a different context.

[774] With regard to the interpretation of the possibility of contesting a judgment in the meaning of Art. 34 (2) Regulation 44/2001or Art. 45 (1) (b) Reg. 1215/2012 – cf. por. ECJ judgment of 7 July 2016, C-70/15, *Emmanuel Lebek v Janusz Domin*, ECLI:EU:C:2016:524.

[775] With regard to the possibility of applying public policy exception in cases of deprivation of the right of defence or the right to be heard in the course of the proceedings, as opposed to its beginning, cf. ECJ judgment of 2 April 2009, C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, ECLI:EU:C:2009:219.

The limitation of the scope of review performed by the third instance exclusively to legal issues – which is dominant in the national laws of the Member States – is also of major importance in this respect. It entails the necessity to construct charges concerning the application and interpretation of law, which in practice requires knowledge about the reasoning behind the judgment.

777. A good solution would consist in obtaining the reasons of the judgment by the party who intends to lodge an appeal at the third instance court. A national law according to which the court draws up the motivational part of a judgment and serves it on the party *ex officio* would be compatible with such a standard. Another approach would be that a party, having been made aware that the judgment was passed, could obtain the reasoning of the judgment upon request .

778. For obvious reasons it is necessary that the verdict as well as its motivational part are made available to the party – unless she is represented by a professional from the Member State whose court passed the judgment – in a language that she understands. As regards a party from another Member State, it should be the language of this State or a different language that the addressee understands, which entails translation of the judgment as well as its motivational part. It should be assumed that the proper standard is guaranteed by Art. 8 of Regulation 1393/2007, and it is important that the Member States abide by it in practice, especially in the context of the costs of the proceedings.[776]

779. It is worth emphasizing that the lingering difficulties with regard to translation have been identified in the case-law of the European Court of Justice[777]. In this respect, two approaches can be differentiated. On the one hand, in some national systems, the court issuing the judgment automatically serves the decision on the parties. What is more, in some Member States – in case of a foreign recipient – the court translates the judgment and serves the translation on the foreign party. On the other hand, some other national systems do not provide for translation in such instances.[778]

[776] Cf. ECJ judgment of 16 September 2015, C-519/13, *Alpha Bank Cyprus Ltd. v Dau Si Senh et al.*, ECLI:EU:C:2015:603.

[777] Ibid.

[778] Cf. the role of OFFI in Hungary. OFFI is the only agency licensed to prepare certified translation of foreign documents (website: http://www.offi.hu/en [30 November 2016]). For details see National Report, Hungary, question 2.2.1.

780. As regards enforcement in another Member State, the issue of a party's knowledge about the reasoning of a judgment appealable to the third instance and, consequently, also its translation into an adequate language, can be of significance[779].

781. This matter may play a role in the context of the condition of declaration of enforceability indicated in Art. 34(2) of Regulation 44/2001 or within the ground for refusal of enforcement indicated in Art. 45(1)(b) of Regulation 1215/2012 or with regard to the public policy exception in the light of Art. 34(1) of Regulation 44/2001 or Art. 45(1)(a) of Regulation 1215/2012.

782. Needless to say, the possibility of taking advantage of an appeal is (also) conditioned on the knowledge about the reasoning of a judgment. Similar importance should be attached to the issue of an adequate language in which it should be formulated. A situation could be evaluated differently if a party filed an appeal regardless of the lack of translation at her disposal, even though this procedural step would not cure the lack of proper translation in the service process, a fact which may have an impact at the stage of enforcement in another Member State.

2.8.3. Filing a second appeal and time limits

783. The knowledge of the method and the time limit to lodge an appeal at the third instance court constitutes – similarly as in the case of the first appeal – the condition enabling the party to take advantage of such a possibility. In the cross-border context, it is particularly significant for an appellant because the application of foreign procedural law – which frequently might be unknown to the appellant – comes into play.

784. A correct approach would require the court to duly inform a party whether she can appeal the judgment to the third instance, whether she would have to be represented by a lawyer and – provided that she may file an appeal on her own – it would be best to inform such a party what are the formal requirements of filing a second appeal and

[779] Cf. ECJ judgment of 14 December 2006, C-283/05, *ASML Netherlands BV v Semiconductor Industry Services GmbH*, ECLI:EU:C:2006:787.

in what time it is possible to do it (giving such instructions is provided for e.g. in Finland, Spain, Croatia, Germany, Poland[780]).

785. The case of countries which do not provide for instructing a party about the possibility, the time limit and the court to which a second appeal must be filed, should be subject to critical evaluation against this background (e.g. Luxembourg, the Netherlands, Greece, Malta, Romania, Italy).

786. In the cross-border context there exist examples of countries which provide for (longer) time limits for filing an appeal by a party from abroad, including a party from another Member State (e.g. France, Greece). It is particularly important when a party acted without a professional representative until that stage of the proceedings or if she must appoint a new representative specifically for the purpose of third instance proceedings.

787. However, this convenience is not imperatively necessary in cases when, objectively speaking, a time limit to lodge an appeal at the third instance court is – as it seems – long enough (60 days – Finland, Hungary, Italy; 2 months – Poland, Luxembourg, Czech Republic; 3 months – Belgium, Lithuania, the Netherlands).

788. The situation in which the national law would provide for a relatively short time limit to lodge a second appeal – applying not only to parties residing in a the country where the proceedings take place but also to parties from abroad – and at the same time, require a party to appoint a professional representative in that Member State – seems problematic. Against this background, it is worth underlining that a possibility of restoring or extending a time limit to lodge a second appeal would be salutary in this context. Such a possibility is to a wider or lesser extent provided by practically all Member States. It should be noted, however, that in countries where representation on the level of the first appeal is mandatory, finding and appointing a lawyer for the second appeal is less problematic.

789. The issue of a party's knowledge about the way of filing an appeal to the third instance as well as the time limit within which it should be done may exert an impact on the cross-border enforcement of judgments, just as it does when it comes to filing an appeal to the second instance court.

[780] In Poland such instructions will be given if a party is not represented by a professional.

790. It may play a role in the context of the condition of declaration of enforceability indicated in Art. 34(2) of Regulation 44/2001 or within the ground for refusal of enforcement indicated in Art. 45(1) (b) of Regulation 1215/2012 or with regard to the public policy exception in the light of Art. 34(1) of Regulation 44/2001 or Art. 45(1)(a) of Regulation 1215/2012. The possibility of filing an appeal is (also) conditioned on such factors as the knowledge about the existence of such a possibility as well as the knowledge on how to take advantage of it and having an adequate time limit to perform it.

791. If the requirement concerning the performance of service in time and in a way enabling a party to undertake defence applies also in relation to the judgment which is subject to appeal, then it can be assumed that the court of the Member State of enforcement must assess on its own – taking into account the circumstances of the case – whether a party had the adequate time to do it.[781]

2.8.4. Effects of the second appeal proceedings on the enforceability of the judgment

792. Similarly, as it happens at the stage of appellate proceedings, lodging a second appeal may exert an impact on the enforceability of a judgment in the state of origin. The legal solutions enacted in the procedural law of the respective Member States are varied and far from uniform. There is a parallel between the second and third instance proceedings in this respect. The fundamental problem – on the European scale – concerns precisely this non-uniformity, which necessitates the assessment of the impact of lodging an appeal to the third instance court on a case by case basis, taking into account the Member State in which the judgment was rendered.

793. The problems which arise at the enforcement stage are similar to the ones that appear at the time of lodging an appeal against a judgment passed by the first instance court.

794. The fundamental significance should be linked with the fact that the declaration of enforceability of a judgment within the regime of Regulation 44/2001 and the automatic enforceability of a judgment within the regime of Regulation 1215/2012 in another Member State is conditioned upon its enforceability in the Member State of

[781] Cf. mutatis mutandis ECJ judgment of 11 June 1985 r., 49/84, *Leon Emile Gaston Carols Debaecker and Berthe Plouvier v Cornelius Gerrit Boumwan*, ECLI:EU:C:1985:252.

origin (cf. Art. 37 of Regulation 44/2001 and Art. 39 of Regulation 1215/2012). This also applies to enforcing judgments within the regime of Regulation 4/2009 (Art. 17(2) and Art. 26) as well as Regulation 650/2012 (Art. 43). Consequently, if a judgment ceases to be enforceable – even temporarily – it cannot be either enforced or subject to the declaration of enforceability in another Member State.

795. If the execution proceedings are already underway in another Member State, suspending the enforceability of a judgment in another Member State should also entail suspending the execution proceedings (Art. 44(2) of the Regulation 1215/2012 and Art. 21(3) of the Regulation 4/2009) in the Member State of enforcement. Moreover, the mere possibility of lodging an appeal to the third instance court or the actual appealing of a judgment to the third instance in the Member State of origin – as qualifying under the category of ordinary appeal – justifies the possibility of staying the proceedings concerning the refusal of enforcement of judgment in the Member State of enforcement (Art. 51 of Regulation 1215/2012). In turn, instigating such proceedings makes it possible to limit the enforcement proceedings to protective measures, making enforcement conditional on the provision of a security or even staying the execution proceedings (Art. 44(1) of Regulation 1215/2012).

796. Within the system which requires granting exequatur, a mere possibility of lodging an appeal or the actual lodging of an appeal to the third instance constitutes a ground for staying the proceedings concerning the declaration of enforceability, even if it does not result in staying the enforceability of a judgment in the Member State of origin (Art. 46(1) and (2) of Regulation 44/2001). Moreover, staying enforceability in the Member State of origin may lead to staying the proceedings regarding the declaration of enforceability in the Member State of enforcement (Art. 35 of Regulation 4/2009 or Art. 53 of Regulation 650/2012).

797. It is also important to bear in mind the effects of the provision enacted in Art. 6(2) of Regulation 805/2004. It seems that the effects of this regulation might be, under specific circumstances, a result of appealing a judgment to the third instance in the Member State of origin.

3. Proposals and improvements

798. Insofar as cross-border cases are concerned, first and second appeals raise similar problems, although the problems do not have an identical weight. As regards the first appeal, one has to take into account that parties may not have been represented by a local lawyer. On the first and second appeals level, though, parties are in practice almost always represented by a local lawyer. Local lawyers are supposed to know how to obtain information about a judgment, are supposed to be familiar with the technicalities of appeals and are in a good position to evaluate the prospects of success of an appeal. Service of documents to local lawyers does not create any particular problems, as it can be effectuated according to the national rules on service.

799. Nevertheless, cross-border cases present difficulties which are present on the first and second appeals level. One of the most important difficulties lies in the necessity to communicate with a foreign party or a client who may lack background knowledge and experience and feel uncomfortable with the situation. This becomes even more acute if translations are necessary. For this reason, but also for the sake of uniformity and simplification, it is advisable to make proposals for improvement which cover both the first and second appeals level.

3.1. Information of the parties about the judgment; the question of translation

800. Any judgment should be communicated to a foreign party by the court ex officio. This communication should be effectuated pursuant to the rules of the Service Regulation if the party is not represented by a local lawyer, thus involving translation, and it may be carried out by any other means including registered mail or email with proof of receipt if the party is represented by a local lawyer on whom the judgment is served, in the latter case without the necessity of translation.

801. Such a solution would strike a compromise between the undeniable interest of the party to be perfectly informed of any judgment entered for or against him or her and the interest of the judiciary in keeping the burden and cost of communication low. Admittedly, direct communication of a judgment to a party who is represented by a lawyer would be a novelty to most, if not all, procedural systems. However, in cross-border cases, such a double communication would be very helpful. First, it would

reduce the risk that the party does not learn about the judgment at all for whatever reason, be it as unusual as the death or disbarment of her local lawyer. Second, such a direct communication would be more transparent and would enhance trust in the foreign judiciary. Third, the foreign party would be able to control her lawyer and, in case of delay or complete silence, would be able to take a new lawyer and seek remedy from her former lawyer in due time. As cases in which there are difficulties with the local lawyer seem to be rare, it is acceptable that the communication to a party represented by a local lawyer be conducted in the court's language without translation.

3.2. Information for the parties about legal remedies

802. In a cross-border case, the foreign party should be informed whether there is a legal remedy against a judgment at all, and if so, which court is the addressee of the remedy, which formalities must be respected, what are the necessary contents of the remedy and, last but not least, which time limits apply. This information should be given without too many details, using a standard form available in all official languages of the EU Member States, which could be downloaded from the internet at an URL highlighted on the form. This information should be provided together with information about the judgment as described before (see 3.1.).

803. Such information would be extremely valuable, taking into account that EU law tends to limit the available remedies at the stage of recognition and enforcement. Actually, as judges interviewed by the German national reporter highlighted, parties are often unaware that they could and should lodge an appeal in the country of origin. A judge at an appeals court dealing with remedies against the enforcement of foreign judgments under the Brussels regime reported that parties often seek a remedy only against recognition and enforcement of a foreign judgment in their home country[782]. These parties, as well as their lawyers if the latter are not familiar with cross-border cases, are badly surprised if, in the course of the proceedings in their home country, they learn that they should have lodged an appeal in the country of origin. The surprise is even worse if the parties and their lawyers discover that, at the moment when the recognition and enforcement court dismisses their remedy and tells them

[782] Interview conducted by the German National Reporter with a judge at the Court of Appeals of Stuttgart on 18 November 2016.

that they should attack the judgment in the country of origin, the time limit in the country of origin had already expired[783].

804. This account shows not only how important such information about legal remedies would be, but also that it is important even if the party retains a lawyer in her home country rather than a local lawyer in the country where the proceedings have taken place. Moreover, it identifies a source of mistrust, or even rejection, regarding further advances in European civil procedure. The present proposal would help to remedy a practical deficiency and to foster trust and acceptance in people.

3.3. Time limits

805. In cross-border cases, time limits constitute a very sensitive issue. On one hand, cross-border cases have a strong tendency to take longer than purely national cases. This tendency towards long duration should not be promoted further by providing for very long time limits, as lawyers tend to act towards the end of a deadline for strategic and organizational reasons. Thus, time limits of more than eight weeks seem to be excessive.

806. On the other hand, cross-border cases always involve more cumbersome communication, be it communication between the foreign party and the court or the foreign party and her local lawyer. This is particularly acute if a judgment – and maybe even the communication with a local lawyer – must be translated, but it is also a point if there are no linguistic problems. In addition, in cross-border cases, it is more difficult to take a decision on whether to appeal, as determining and discussing the prospects of success is harder for a party (and the party's counsel in her home country) if she is not familiar with the court's case-law, tradition and inclinations and, often, the applicable law. For this reason, time limits of less than three weeks appear to be too short.

807. One option would be to have all time limits prolonged, for example by two weeks, if a foreign party is involved. However, this option could result in very long time limits if the extra weeks are added to time limits which are very long even for domestic cases.

[783] Ibid.

808. The preferable solution would therefore be minimum standards leaving the determination of time limits to the national legislature as long as the time limit is not shorter than four and not longer than eight weeks, cf. also point 1.2.5.. Such a measure would improve the current situation without making it necessary to go into too much detail. As far as the beginning of the time limit is concerned, it should optimally coincide with service of the judgment on the party or her lawyer and not with the pronouncement of the judgment in an open hearing unless the foreign party is physically present in this hearing and a mere declaration is sufficient to lodge the appeal, cf. point 1.7. Especially the time limit for the particulars of the appeal should ideally only start when the party or her lawyer received a reasoned decision of the court in writing.

3.4. Provisional enforcement

809. As the preceding study of national laws revealed, provisional enforcement varies a lot among the Member States. One could therefore imagine to harmonize or even unify the respective rules. However, the differences are sometimes linked to local peculiarities like the duration of proceedings or to fundamental positions in legal doctrine. Moreover, singular cases like the provisional enforcement in the PIP case in France, which forced the harmed women who were awarded damages in the first instance to pay back important sums after the initial decision was overturned on appeal[784], do not lend themselves as indicators for fundamental problems. For this reason, it seems premature to suggest legal action in this field which goes beyond the existing rules.

[784] Cf. Laurent Bloch, 'Prothèses PIP : le long chemin de croix des victimes', Responsabilité civile et assurances no. 9, September 2015, note 24.

Chapter 5: Specific Instruments

XANDRA KRAMER

1. Introduction

810. This chapter focuses on four specific instruments in the area of judicial cooperation in civil matters. These are the European Enforcement Order (EEO),[785] the European Order for Payment Procedure (EOP),[786] the European Small Claims Procedure (ESCP),[787] and the European Maintenance Regulation.[788] While the EEO has introduced a certification procedure of national judgments relying on specific harmonized minimum rules to facilitate the cross-border enforcement of judgments, the EOP and ESCP are full fletched, self-standing European procedures. The Maintenance Regulation does not entail a self-standing procedure, but coordinates national civil procedures through its rules on international jurisdiction, recognition and enforcement, and contains other relevant provisions on cross-border cooperation.

811. All four regulations are limited to specific categories of cross-border claims, either uncontested debts,[789] small claims (currently up to € 2,000)[790] or maintenance claims[791]. The latter one is a sectorial instrument as it only applies to maintenance matters, while the others have a broad substantive scope but only apply to specific situations. These instruments to some extent rely on similar basic structures and are intended to support the efficient and effective cross-border enforcement of claims. A proper implementation into the national legal systems and a good interaction with national procedural law is pivotal for enhancing the free movement of judgments.

---

[785] Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] L143/15 (EEO Regulation).

[786] Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1 (EOP Regulation).

[787] Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1, Art 2 (ESCP Regulation).

[788] Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1 (Maintenance Regulation).

[789] EEO Regulation, Art 1, and EOP Regulation, Art 1.

[790] ESCP Regulation, Art 2. As of 17 July 2017, the threshold will be raised to € 5,000 pursuant to Regulation (EU) 2015/2421 of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure [2015] OJ L 341/1, Art 2.

[791] The Maintenance Regulation applies to 'maintenance obligations arising from a family relationship, parentage, marriage or affinity', Art 1.

These regulations apply in all the Member States, with the exception of Denmark. The Maintenance Regulation does not apply directly in Denmark, but Denmark has implemented the contents of the Regulation in its national law.[792]

812. This chapter will focus on the implementation and application of these instruments in the Member States and identify problems that may constitute an obstacle to mutual trust and the free movement of judgments. Per instrument the most important issues regarding the implementation and application in the Member States will be summarized (subsection 1), followed by a description and assessment of the problems in the application focusing on those created by the national procedural law (subsection 2) and identifying possible improvements (subsection 3). The final section (V.6) will give an overall recommendation as to whether legislative intervention is required and which improvements can be made to further a smooth implementation and interaction with national law.

2. The European Enforcement Order (EEO)

813. The EEO Regulation has been applicable since 25 October 2005 and is the first in the so-called second generation instruments of civil procedure that rely on harmonized rules of civil procedure and abolishes exequatur. It enables the court of origin to certify a judgment, an authentic act or a court settlement relating to uncontested debts within the meaning of Article 3 EEO Regulation as a European Enforcement Order upon the fulfilment of minimum standards of civil procedure. These relate to the information to be provided to the debtor, the methods of service as well as a review possibility.[793] These are minimum standards that need to be observed in a particular case and do not provide procedural rules as such. It has been commented that as exequatur proceedings have meanwhile been abolished under Regulation 1215/2012 (Brussels I-bis Regulation) the EEO Regulation has in part lost its importance,[794] but to date the instrument is still used in practice. It should

[792] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2009] OJ L149/80.

[793] Art 6 in conjunction with Art 12-19 EEO Regulation.

[794] This was for instance commented in by one of the interviewees in the Netherlands and in the French National report, question 4.3.1. The Commission Brussels I Recast proposal intended to replace this Regulation in part, but for different reasons (including the fact that the grounds of refusal have been maintained in Regulation 1215/2012) this provision was not adopted. See Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast).

be noted that the way in which the exequatur has been abolished in the EEO Regulation and the Brussels I-bis Regulation differ and thus the EEO Regulation may still have added value in practice.[795]

2.1 Implementation: Competence, Certification and Review

2.1.1 Competence for the certification

814. Ordinarily the application for an EEO is made to the court/judge that has competence on the merits of the claim or another dedicated judge or authority[796] either at the start or during proceedings or after the judgment has been rendered. This is in line with Article 6 EEO and the ruling of the CJEU in *Imtech Marine Belgium NV v Radio Hellenic SA*, from which it is clear that that 'the certification of a judgment as a European Enforcement Order, which may be applied for at any time, can be carried out only by a judge.'[797] The requirement that the certification *can only be carried out by a judge* follows from the consideration that the legal qualifications of a judge are essential to the correct assessment of the 'observance of the minimum requirements intended to safeguard the debtor's rights of defense and the right to a fair trial'.[798] The CJEU distinguishes the certification itself – a process where the minimum standards laid down in the EEO Regulation need to be reviewed – from the formal act of issuing the certificate.[799] The latter can be done, for instance, by the court registrar, as is the case in Belgium.[800] In line with the *Imtech* case the CJEU ruled in *Pebros Servizi Srl v Aston Martin Lagonda Ltd* that ''the procedure for the certification of a court decision as a European Enforcement Order appears, functionally, not as a

[795] Contrary to the Brussels I-bis Regulation, the EEO Regulation has abolished all grounds of refusal apart from irreconcilability of judgments (Art 21). The number of EEO applications may still drop in the next years since as a result of the temporal scope of the Brussels I-bis Regulation the exequatur procedure of Regulation 44/2001 (Brussels I) is still applicable to judgments given in legal proceedings instituted before 10 January 2015 pursuant to Art 66(2) Brussels I-bis Regulation.

[796] For instance in the Netherlands, the request for certification can be done in the document instituting proceedings or during the proceedings or (after judgment has given) at the *voorzieningenrechter* (president) of the District Court or where it concerned a judgment of the subdistrict court (*kantonrechter*) at the judge of that court or when it concerned a judgment of the Court of Appeal, at that court. See Art 2 Dutch Implementation Act (Uitvoeringswet verordening Europese executoriale titel).

[797] Case 300/14 *Imtech Marine Belgium NV v Radio Hellenic SA* [2015] ECLI:EU:C:2015:825.

[798] *Imtech*, para 47.

[799] *Imtech*, para 45.

[800] See also the *Imtech* case.

procedure which is distinct from the earlier judicial procedure, but as the final phase of that procedure, necessary in order to ensure that it is fully effective, by allowing the creditor to proceed with the recovery of his debt''.[801]

815. While in practice in most Member States the certification often seems to be requested in the document instituting proceedings or during the procedure, the certification can also be requested after the judgment is rendered. In this case, it is important that the certification along with the review of the requirements of the Regulation is done by a judge. This includes whether the debt was indeed uncontested (Article 3 EEO Regulation) – which has to be assessed autonomously and solely in accordance with the Regulation[802] – and whether the minimum procedural standards of Article 6[803] in conjunction with Articles 12-19 EEO Regulation are met. In a number of Member States this requirement is problematic as the public notary or another authority may also have jurisdiction, though this seems to be limited to the situation that an authentic instrument is certified.[804] However, in the French national report it is commented that the *greffier en chef* (chief clerk) has exclusive competence and this would be contrary to the *Imtech* judgment.[805]

2.1.2 Certification as EEO

816. As to the assessment that competent authorities make when certifying judicial and extrajudicial documents, courts in the Member States generally review whether the court has jurisdiction, whether the claim is within the scope of the EEO Regulation and in particular that it is uncontested within the meaning of Article 3, whether the judgment is enforceable and whether the minimum requirements of Articles 12-19 EEO are fulfilled. According to the national reports, the requirements of the EEO

---

[801] Case C-511/14 *Pebros Servizi Srl v Aston Martin Lagonda Ltd* [2016] ECLI:EU:C:2016:448, para 29.

[802] Case C-511/14 *Pebros Servizi Srl v Aston Martin Lagonda Ltd* [2016] ECLI:EU:C:2016:448.

[803] Also these are to be applied autonomously, see Case C-508/12 *Walter Vapenik v. Josef Thurner* [2013] ECLI:EU:C:2013:790, in which the CJEU ruled that Art 6(1)(d) of Regulation does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities.

[804] For instance in Hungary the public notary has competence in this regard, see National Report – Mutual Trust, Hungary, question 4.3.2.

[805] National Report, France, question 4.3.1.

Regulation are followed – either directly or as implemented in the national law[806] – and no additional requirements are imposed.[807]

2.1.3 Review under Article 19 EEO

817. The review mechanism under Article 19 of the EEO Regulation is implemented in different ways. In the earlier referenced *Imtech* ruling the CJEU clarified that Article 19 does not require to establish a particular review procedure. In this case, the question was whether the Belgian law relating to default judgments and opposition satisfied the requirements of Article 19. The CJEU ruled that when it concerns the certification of a judgment given in absentia, in order to constitute a review procedure within the meaning of this provision, it is required that the national law 'effectively and without exception allows for a full review, in law and in fact' in the two situations described in Article 19 EEO Regulation. These are (a) when the document instituting proceedings was served in accordance with Article 14 and service was not effected in sufficient time to enable the defendant to arrange for his defense without any fault on his part; or (b) the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part. In its *Imtech* ruling, the CJEU added that the national provision should allow to extend the periods for challenging a judgment not only in the event of force majeure, but also in case of extraordinary circumstances beyond the debtor's control. According to the CJEU, the national remedies must enable a debtor who invokes one of the situations laid down in Article 19 to request a review outside the periods laid down in national law and in such a way 'that they start to run again, at the earliest, as from the day on which the debtor was actually in a position to become aware of the content of the judgment or to challenge it'.

818. In virtually all Member States, as is clear from the national reports, the general review mechanisms under national law are applied and are considered as meeting the minimum standards of Article 19 EEO. For instance, in Austria *restitution in integrum* pursuant to § 146 ZPO, *Widerspruch* pursuant to §§ 397a and 442a ZPO (for default judgments) and *Einspruch* in accordance with § 248 para 1 ZPO (appeal against a

[806] For instance, in Poland the scope of the assessment is defined in Article 751 of the Polish Code of Civil Procedure (see National Report, Poland, question 4.3.2).

[807] See for instance National Report, Estonia, question 4.3.2.

conditional payment order).[808] In about half of the Member States, including Belgium, Bulgaria, Croatia, France, Estonia, Germany, Italy, Lithuania, Luxembourg, Poland, Romania, and Spain no particular rules are provided as to which review mechanism applies, but on the basis of this it is concluded that the general review procedures, and in particular those concerning default judgments, are applicable.[809] This will often imply that the grounds for review are broader than those provided in Article 19 EEO Regulation, but this is explicitly allowed pursuant to para 2 of this provision.

819. In only a few Member States a specific provision is implemented. For instance, in the Netherlands, Article 8 of the EEO Implementation Act (*Uitvoeringswet Europese Executoriale Titel*) provides that the review can be requested with the court that granted the EEO on the basis of the grounds provided in Article 19 EEO.[810]

820. It is not clear whether the great variety of national procedures that may be used in the context of the review of an EEO all fulfil the requirement imposed by the CJEU in *Imtech* case referenced above, in particular that they enable to extend the deadlines for challenging the judgment also in case of force majeure and extraordinary circumstances. The Dutch EEO Implementation Act provides for a period of four weeks to lodge a review after the grounds for review under Article 19, para 1 under (a) have ceased to exist. Though a similar deadline in relation to review under the EOP Regulation under Dutch law has been interpreted strictly in case law[811], from the present provision it is clear that the period only starts to run after the force majeure or other extraordinary circumstances have vanished.

821. From the responses to the online questionnaire (see chart below) it is clear that 75% of the respondents consider that either the adapted national rules or the general

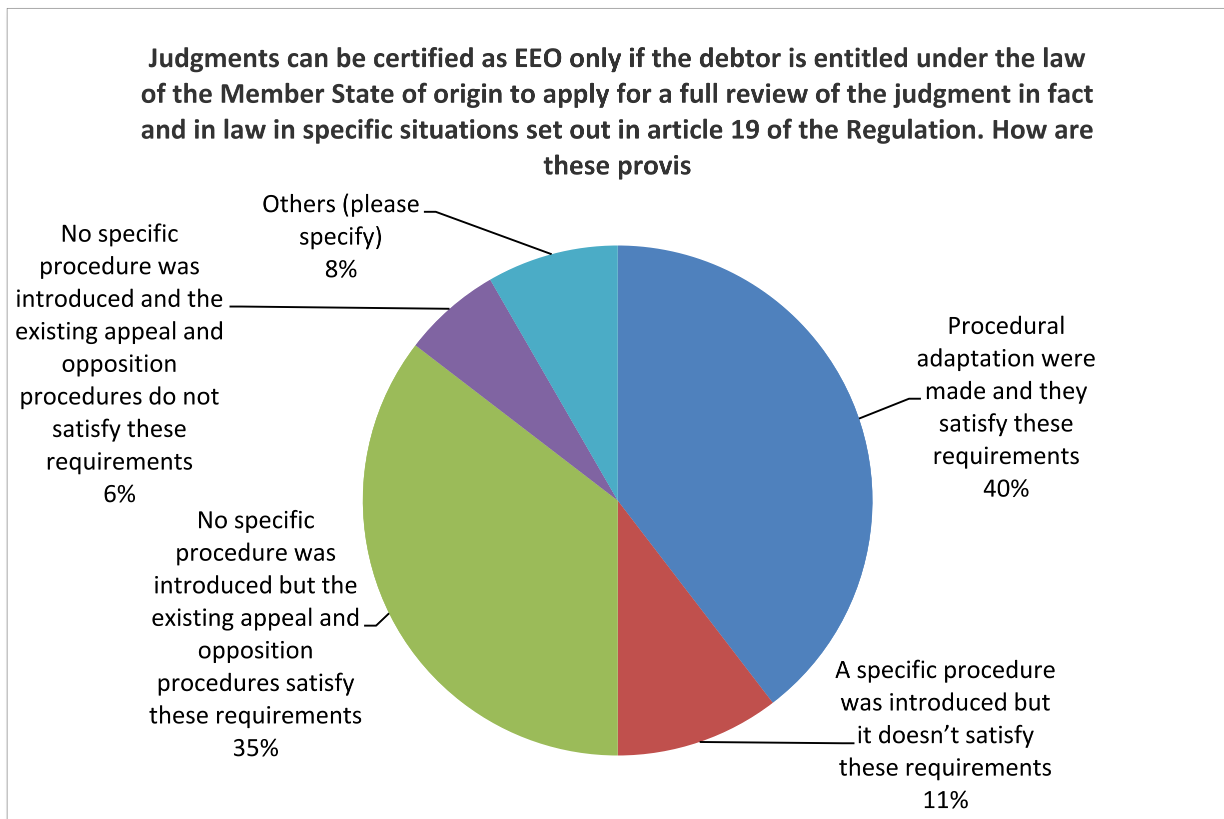
[808] National Report, Austria, question 4.3.3.

[809] In the Irish national report it is noted that the implementation rules are not explicit as to which ground are covered and that it may be concluded that review in Ireland it limited to the circumstances listed in Article 19 para 1. If this would be the case, then Irish law would not comply with the review mechanism. National Report, Ireland, question 4.3.3.

[810] See also National Report, the Netherlands, question 4.3.3.

[811] In these cases relating to the EOP the review was rejected because the four weeks deadline was not met: District Court The Hague, 30 September 2010, NL:RBSGR:2010:BN9635 (two months); District Court The Hague, 3 November 2010, NL:RBSGR:2010:BO3259 (one month and 4 days); District Court The Hague, 10 August 2012, NL:RBSGR:2012:BX6433 (one month and 5 days). See also Xandra Kramer, 'European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects' in Burkhard Hess, Maria Bergström, and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016) 97, 106.

review procedures satisfy the requirements of Article 19 EEO Regulation. 17% of the respondents consider the national procedures not sufficient. The reasons why these are not considered sufficient are not clearly specified. One respondent considered that Belgium law does not provide for a review in case of force majeure and that generally the national procedures do not cover what Article 19 covers. Another respondent remarked in relation to Italy that the dedicated national procedures differ from the grounds of review under the Regulation.[812] In any case, it is important that the review mechanism of the EEO – and that of the other instrument that contain a similar mechanism – are properly implemented in the Member States.



2.2 Problems and Assessment

2.2.1 General problems: rights of defense, review, and lack of familiarity and practice

822. In the online questionnaires the answers to the question what the main impediments are of the national procedural law in relation to the application of the EEO Regulation, approximately half of the respondents (15 out of 31) consider that there is no

[812] See also the comment in the Irish national report (n 809).

particular problem, that the Regulation is quite often used, and that it functions well in the national procedural law system (see chart below).

823. Another finding from the questionnaires is that 33% of the respondents (10 out of 30) consider that the right to review of the defendant is not sufficiently protected. It is not clear why the rights of the defendant are considered not to be well protected, though this may be due to a combination of factors, including problems in the service of documents, an insufficient or insufficiently clear review mechanism and the fact that the Regulation is not sufficiently well known or used. The issue of the service of documents is not specifically mentioned in this question, but is highlighted in different parts of the present study. The divergence of the service rules was mentioned specifically in relation to the EEO Regulation by the national reporters of Bulgaria[813], Italy[814], and Latvia[815]. This is opposed by some of the interviews in which the interviewees indicated that the requirements for service of documents are rather stringent and can be an impediment to the use of this instrument.[816] In answer to this particular question also half of the respondents considered Article 19 not to be well-implemented.[817] A minority of approximately 24% of the respondents to this question of the questionnaire answered that the Regulation is not sufficiently known. In the interviews carried out by the national reporters the lack of familiarity with this Regulation was only mentioned incidentally.[818]

[813] National Report, Bulgaria, question 4.3.1.

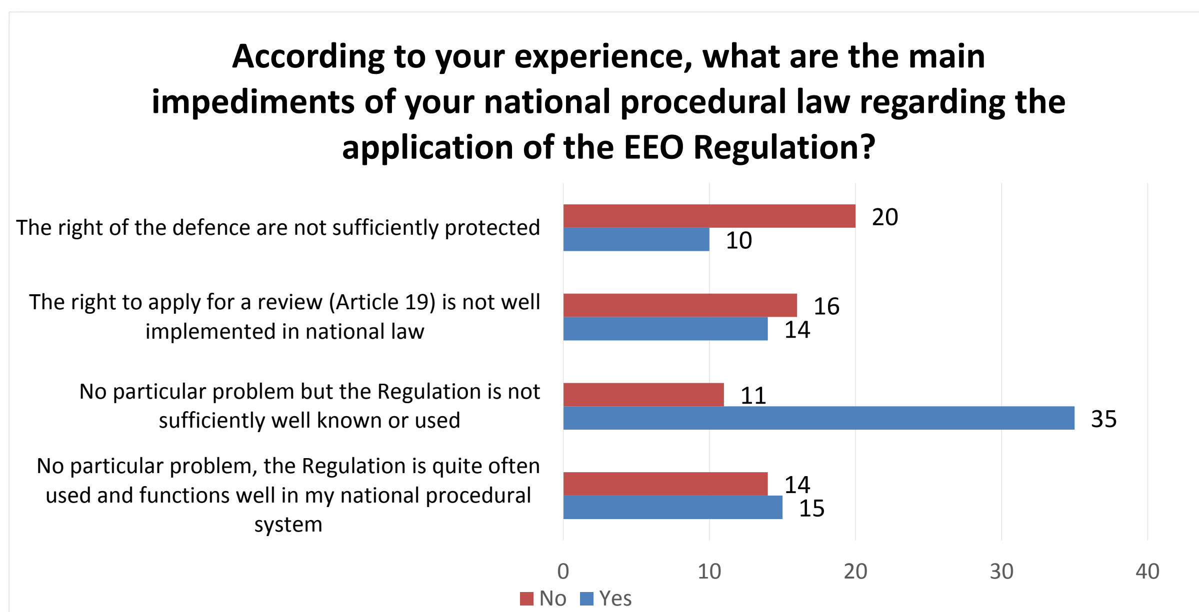
[814] National Report, Italy, question 4.3.1.

[815] National Report, Latvia, question 4.3.1.

[816] Interview conducted by the Greek National Reporter (answered by a judge); Interview conducted by the Dutch National Reporter (answered by a judicial officer).

[817] This seems to be at odds with the chart included in Section 2.1, however, the question is phrased differently and the population answering these questions is apparently not the same.

[818] In particular two interviews conducted by Greek National Reporter (answered by a lawyer/academic and a lawyer); Interview conducted by Spanish National Reporter (answered by a judge).



824. In nine National Reports it was specifically pointed out that the EEO Regulation is little used in that Member State, including Austria, Cyprus, France, Greece, Lithuania, Malta, Portugal, Slovenia, and Spain. The three main reasons given for the fact that it is little used are that the EOP in part fulfils the same function as the EEO and the EOP Regulation or a national equivalent is used more often, that the Brussels I Regulation functions well, and that the requirements of the EEO Regulation are rather complex.[819] It may be expected that the use of the Regulation will generally decrease over the next years as a result of the abolition of exequatur proceedings in the Brussels I-bis Regulation.

2.2.2 Specific problems

825. This section briefly addresses a number of specific problems or problems that only exist in one or few Member States and that have been identified in the National Reports and/or the interviews. In the Estonian report it is remarked that the relationship between the national rules of civil procedure and the EEO Regulation is not clear.[820] This has for instance resulted in limitations to the enforcement of foreign EEOs contained in national law that are not included in the Regulation. Likewise,

[819] The complexity of the provisions is specifically highlighted in an interview conducted by the Belgian National Reporter (answered by a judge) and the Czech reporter (answered by an academic).

[820] National Report, Belgium, question 4.3.1.

several interviewees from Belgium remarked that the interconnection between the EEO Regulation and national civil procedure is problematic.[821]

826. In a number of Member States the problem of interpreting 'uncontested claims' under Article 3 EEO Regulation is mentioned.[822] For instance in Croatia there are doubts whether a ruling on enforcement based on a trustworthy document under Croatian law can be certified as an EEO.[823] In its ruling in *Pebros* the CJEU confirmed that this term has to be interpreted autonomously and has provided further guidelines.[824] Another issue relating to the scope of the Regulation is the situation that the domicile of the defendant is not known, as it also mentioned by some of the interviewees. A Greek lawyer mentioned that the lack of cooperation between the agencies and services and the lack of electronic information on the domicile are problematic in this regard.[825] From the case law of the CJEU it is clear that when the domicile of the defendant is unknown, the Regulation does not apply.[826]

827. In Belgium, the question has arisen who is competent for the certification of the judgment as a result of lacking implementing legislation and a circular letter that was not clear.[827] The vast majority of case law decided that only the judge is competent to certify a judgment as EEO, whereas only the actual issuing of the certificate can be done by the court clerk. The correctness of this approach has meanwhile been confirmed by the CJEU in the *Imtech* ruling.[828] As noted above,[829] in France the *greffier en chef* (chief clerk) has exclusive competence to issue the order and, as the National Reporter acknowledges, this is problematic in view of the *Imtech* ruling.

828. In Finland and the Netherlands minor practical issues in relation to the translation of the certificate have been reported at the enforcement stage.[830] In the UK National

[821] Interviews conducted by the Belgian National Reporter (answered by two judges and an academic).

[822] See for instance National Report, Belgium, question 4.3.1.

[823] This is mentioned in the National Reports on Croatia, Latvia, and Portugal, question 4.3.1.

[824] Case C‑511/14, *Pebros Servizi Srl v Aston Martin Lagonda Ltd* [2016], ECLI:EU:C:2016:448.

[825] Interview conducted by the Greek National Reporter (answered by a Greek lawyer).

[826] Case C-292/10, *G v Cornelius de Visser* [2012], ECLI:EU:C:2012:142.

[827] National Report, Belgium, question 4.3.1.

[828] See Section 2.1.

[829] See Section 2.1.1 (no. 6).

[830] National Report, question 4.3.1: the Netherlands; Finland.

Report a case was mentioned where the EEO was withdrawn in Germany but the enforcement was already underway in England and Wales and the costs therefor could not be recovered in England and Wales.[831]

2.2.3 Refusal of the certification and enforcement

829. In part of the Member States no published case law or other information on the refusal to certify a judgment as an EEO is available. In most Member States where published case law is more widely available, the refusal of the certification is rather the exception. For instance, the Austrian National Reporter notes that in three reported cases only has the certification been refused.[832] In Belgium, the number of cases is higher, which is in part caused by the fact that proper implementing legislation is lacking.[833] In Spain statistics are available. Out of the 287 applications for certification made between 2013 and 2015, 32 were rejected.[834] In the Netherlands, the published case law includes some 45 cases where the certification was rejected.[835] However, the Regulation is applied regularly in the Netherlands and these would probably amount to a modest percentage (no statistics available). The main reasons provided in the published case law as reported are that (1) the claim is not uncontested within the meaning of Article 3; (2) the minimum procedural requirements are not fulfilled (in particular those pertaining to the service of the document); (3) there are jurisdictional issues; or (4) the case is outside the scope of the Regulation. There are no indications that the case law as described contains systematic errors and it does not evidence that the interplay between national civil procedure and the EEO Regulation is generally problematic in the Member States.

830. As regards the enforcement of EEOs rendered in another Member State, very few published cases are reported and in the vast majority of Member States none. In France a number of EEOs were refused; one because the authenticity of the EEO could not be established and two others where the minimum standards were not

[831] National Report, UK, question 4.3.1.

[832] National Report, Austria, question 4.3.4.

[833] National Report, Belgium, question 4.3.4.

[834] National Report, Spain, question 4.3.4.

[835] National Report, the Netherlands, question 4.3.1.

respected.[836] One published case in Estonia concerned the refusal of a foreign EEO where the form was not filled in properly and the information on the court that issued the order lacked.[837] In Germany, the enforcement of an EEO was refused in two instances[838]; in one the person against whom enforcement had to take place was not properly designated[839] and the other concerned a partial refusal of undefined interest[840]. In the Netherlands there are two published cases where an EEO judgment was not enforced or enforcement was suspended.[841] One was a Swedish EEO decision that could not be enforced, because the service of the Swedish judgement was not done in a language understandable for the defendant.[842] In the other case the enforcement of a Slovakian authentic act was suspended as the debtor had applied for rectification of the EEO certification in Slovakia.[843] In Romania, the enforcement of an Italian EEO was refused as it was time-barred under Romanian law (period of three years since the original judgment was rendered).[844] In Slovenia, the enforcement was refused due to the existence of two separate EEOs, which was considered contrary to Article 10 of the Regulation 805/04.[845]

831. As evidenced by the case law, the Member States' courts are supportive in enforcing EEOs rendered in other Member States. Only in a few cases the enforcement was refused and in other reported cases where refusal was sought, the refusal was denied.[846] For instance, the Slovenia court has emphasized that under no

---

[836] CA Bordeaux, 15 May 2013, no 12/02578; CA Nancy, 30 March 2015, no 14/00839; Civ. 2eme, 22 February 2012, no 10-28379. See National Report, France, question 4.3.5. It also reports an erroneous decision where an EEO was refused because there had not been an exequatur procedure (CA Aix-en-Provence, 20 November 2014, no 13/21240), but this was corrected in appeal.

[837] Estonian Supreme Court 1 December 2010 No 3-2-1-117-10. See National Report – Mutual Trust, Estonia, question 4.3.5.

[838] National Report, Germany, question 4.3.5.

[839] BGH, 26 November 2009, VII ZB 42/08, NJW 2010-2138.

[840] LG München, 19 January 2011, 6 T 6032/09, BeckRS 2010, 12370.

[841] National Report, the Netherlands, question 4.3.5.

[842] District Court The Hague, ECLI:NL:RBHAA:2009:BK6667.

[843] District Court Utrecht, ECLI:NL:RBUTR:2011:BU5866.

[844] Romania, Decision 7716/22 September 2015, Oradea General Court, Civil Section. See National Report, Romania, question 4.3.5.

[845] Appellate Court Koper, II Ip 312/2012, 18.10.2012, ECLI:SI:VSKP:2012:II.IP.312.2012.

[846] See for instance National Report, Austria and Belgium, question 4.3.5.

circumstances may the judgment or its certification as EEO be reviewed as to the substance in the Member State of enforcement.[847]

2.3 Possible Improvements

832. As regards the EEO Regulation it is proposed to maintain the status quo as far as this particular regulation is concerned. The analysis above did not reveal any issue that is particularly problematic under the EEO Regulation. One problem that was identified is that in a number of Member States the review mechanism is not properly implemented or generally proper implementing legislation is lacking. However, this is an issue that needs to be addressed at the national level in these Member States. A horizontal issue that can be picked up is the appropriateness of the review mechanism as it is implemented in the specific instruments. While under the EEO Regulation no particular problems are revealed by the data, under the EOP Regulation the review mechanism has proven to have shortcomings.

833. Another reason why targeted intervention relating to the EEO Regulation is not indicated is that in a growing number of Member States the EEO Regulation is losing relevance and is generally expected to become less important as a result of the abolition of exequatur proceedings in the Brussels I-bis Regulation. In addition, the EOP Regulation in part fulfils the functions of the EEO Regulation. The combination of these instruments might in the longer run make the application of the EEO Regulation obsolete.

3. The European Order for Payment Procedure (EOP)

834. The EOP Regulation has been applicable since 12 December 2009 and was the first genuine harmonized European civil procedure. The EOP is a one-sided procedure for the collection of uncontested monetary claims, applicable in cross-border cases.[848] It was introduced to overcome the hurdles that parties face when having to recover debts as a result of diverging national procedures and rules. It aims to simplify, speed up, and reduce the costs of litigation in relation to uncontested claims. The EOP Regulation was evaluated and the Commission report on the functioning

[847] Appellate Court in Koper, II Ip 429/2013, 17.10.2013, ECLI:SI:VSKP:2013:II.IP.429.2013.

[848] Arts 1-3 EOP Regulation.

was published in December 2015.[849] While some shortcomings were identified in the report, no initiatives have yet been taken to amend the Regulation. One amendment is introduced on 14 July 2017 as a result of Regulation (EU) 2015/2421 (new European small claims regulation). Article 17 EOP Regulation on the effect of lodging a statement of opposition will not only refer to the national procedures but also to the European small claims procedure as an option to continue the procedure after the opposition of the EOP.[850]

3.1 Implementation: Competence, Assessment, and Review

3.1.1 Competence to issue an EOP

835. In a growing number of Member States, the competence to issue an EOP is concentrated in a specific court. Currently this is the case in Austria, Croatia, Finland, Germany, Malta, Sweden, the Netherlands, and Portugal.[851] In Hungary, the unique situation exists that the public notary is competent to issue the EOP. One of the EOP cases in which the CJEU gave a ruling, the *Flight Refund* case[852], concerned the situation where a Hungarian notary issued an EOP against a German air carrier on the basis of an erroneous interpretation of the laws governing the allocation of international jurisdiction. While under the EEO Regulation the certification of a judgment may only be done by a judge according to the *Imtech* ruling, the EOP Regulation does explicitly not require that the examination of the application for an EOP under Article 8 is done by a judge.[853]

836. In the other Member States the ordinary courts have jurisdiction for these types of cases. In some Member States this is for instance the District Court of the seat of the debtor.[854] In other Member States the competence is dispersed over different courts

---

[849] 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, COM(2015) 495 final.

[850] Art 7, para 4 EOP Regulation will also be amended to facilitate the continuation of the procedure as a European small claims procedure.

[851] Information from the National Reports. The information on the allocation of jurisdiction is also available on the eJustice Portal.

[852] C-94/14, Flight Refund Ltd v Deutsche Lufthansa AG, ECLI:EU:C:2016:148.

[853] See Recital 16 to the EOP Regulation.

[854] See for instance for Bulgaria, Art 625 of the Code of Civil Procedure. National Report – Mutual Trust, Bulgaria, question 4.4.2.

having subject-matter jurisdiction. For instance, in Belgium competent courts are – depending upon the subject-matter and the amount claimed – the Justice of the Peace, the Court of First Instance, the Labour Court and the Commercial Court.[855]

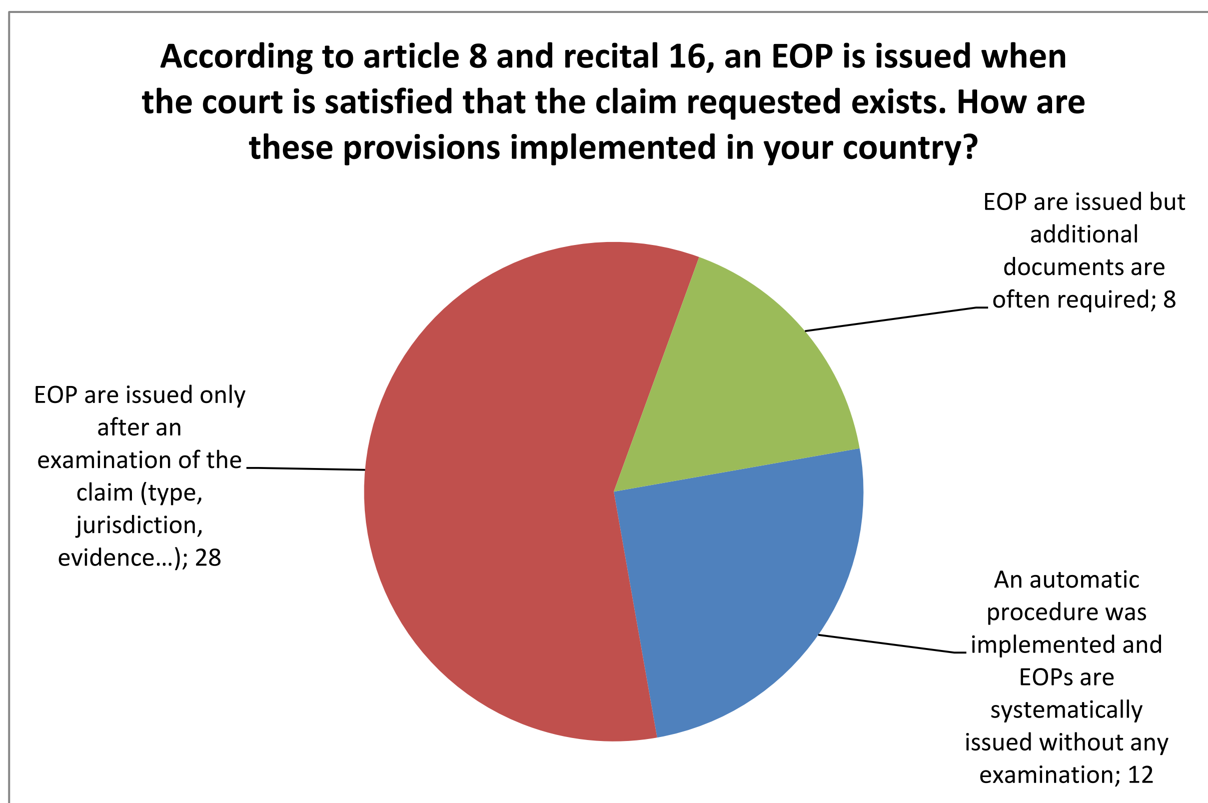
3.1.2 Assessment made by the competent (judicial) authority

837. The review of the application for an EOP is marginal in most Member States. In line with the Regulation, the courts generally assess whether the claim is within the scope of the EOP Regulation (type of claim, cross-border case), review the international jurisdiction in accordance with the Brussels I Regulation, and some review particularly whether the claims appears to be unfounded. The information included in the forms is leading for this assessment and in a number of Member States an automated procedure to review the application form is in place, including in Austria and Germany.[856] The conclusions in the National Reports are in line with the findings from the online questionnaires as shown in the graph below.[857] Respondents indicate that in 17% of the cases additional documents are required. These are primarily documents to evidence the existence of the claim as some national courts require (see below).

[855] National Report, Belgium, question 4.4.2.

[856] See in particular National Report, Germany, question 4.4.3. See also Commission evaluating report, COM(2015) 495 final, 7.

[857] These also largely coincide with the data from the interviews though the percentage of interviewees indicating that additional documents were needed was a bit higher.



838. In Belgium it is reported that – contrary to what the Regulation provides – in principle a full assessment of the merits of the claim takes place. In Belgium, and particularly in the French-speaking part, courts often require evidence and conduct a full examination of the claim.[858] Practice, however, varies a lot. In Finland an assessment of the facts and law is done, but this is only *prima facie* and solely based on the information provided in the application form.[859] In Romania sometimes the European and national procedure are mixed up and additional documents evidencing the claim are required.[860] The same is remarked in the Spanish National Report.[861]

3.1.3 Review under Article 20 EOP

839. Article 20 provides for similar grounds for review as discussed above in relation to the EEO.[862] It contains limited review grounds in case of certain deficits in the service, force majeure or extraordinary circumstance as a result of which the

[858] National Report, Belgium, question 4.4.3.

[859] National Report, Finland, question 4.4.3.

[860] National Report, Romania, question 4.4.1.

[861] National Report, Spain, question 4.4.1.

[862] See Section 2.1.3.

defendant does not have sufficient time to prepare for his defense or is prevented from objecting the claim within the 30 days' time limit of Article 16.

840. In a number of Member States no specific rules are in place implementing this provision, including in Belgium, Bulgaria, Luxembourg, Portugal, Romania, Slovakia, and Sweden. General procedures or the review procedure for the national order for payment procedure can be used. In most Member States provisions have been introduced stating how review can be lodged and at which court. The eJustice Portal also contains information on the courts having jurisdiction in this regard. For instance, in the Netherlands, as in many other Member States, review should be lodged at same court that issued the order. This should be done within four weeks after the defendant became aware of the order, or the grounds (force majeure or extraordinary circumstances) have ceased to exist or the defendant became aware of the ground for review.[863]

841. The CJEU has so far applied Article 20 strictly. A failure to observe the 30 days limit to lodge opposition by reason of the negligence of the defendant's representative does not justify a review under this provision.[864] In addition, in the *eco cosmetics* case the CJEU has ruled that the rules of Article 16 to 20 are not applicable when the minimum standards regarding service have not been observed.[865] When this irregularity is only revealed after the EOP has been declared enforceable it is for national procedural law to provide appropriate remedies in line with Article 26 EOP Regulation.

842. Though insufficient data are available, the information provided by the National Reports and the other data seem to indicate that little use is made of the review procedure.

[863] Article 9 Dutch Implementation Act EOP (*Uitvoeringswet Europese betalingsbevelprocedure*).

[864] Case C-324/12, *Novontech-Zala kft. v Logicdata Electronic & Software Entwicklungs GmbH* [2013] ECLI:EU:C:2013:205.

[865] Joined cases C-119/13 and 120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy* [2014] ECLI:EU:C:2014:2144.

3.2 Problems and Assessment

3.2.1 General problems: service and review, interaction with national law, lack of familiarity and practice

843. A general issue that is reported by a number of National Reporters and that is mentioned in some of the interviews, is the importance of a proper service and clear rules on the service of documents. That the service of documents is an essential issue in this procedure is also stressed by the *eco cosmetics* case referenced in the previous section.[866] In these joined cases, the service was not effected in line with the minimum standards of the EOP Regulation, but the EOP was nevertheless declared enforceable. Only when enforcement was sought, the defendants became aware of the issuing of the order. The CJEU concluded that the review grounds of Article 20 EOP did not cover this situation. It reasoned that the EOP should not have been issued on the basis of the Regulation and hence the rules on opposition and review included in Articles 16-20 EOP are not applicable. National procedural law instead should provide remedies in such a case. Correctly, it is concluded in the evaluation report of the Commission that a fundamental element of protection of the defendant, the right to have the case reviewed, is not regulated by the Regulation.[867] This is a highly undesirable situation.

844. In a number of Member States implementing legislation is lacking and this seems to complicate the interaction with national law. For instance, in Romania and Spain the requirements and rules regarding the national order for payment procedure and the European order for payment procedure are mixed.[868] This sometimes results in requiring more (evidential) documents than are required in the EOP. In relation to a former practice in Poland, the CJEU has made clear that the requirements of the Regulation are exhaustive and can thus not be complemented by those existing in national law.[869]

845. Though the Regulation is rather frequently used in many Member States, in almost half of the Member States the relative little use and/or lack of knowledge of

[866] Section 3.1.3.

[867] Commission evaluating report, COM(2015) 495 final, 9.

[868] National Report, question 4.4.1: Romania; Spain.

[869] C-215/11, *Iwona Szyrocka v SiGer Technologie GmbH* [2012], ECLI:EU:C:2012:794.

practitioners or potential users is reported. This includes Belgium, France, Germany, Greece, Ireland, Slovenia, the Netherlands, Finland, Latvia, Malta, and Romania. For instance, in France, statistics of 2015 evidence that only 400 EOPs were issued or enforced while 591,000 national order for payments were issued.[870] In Ireland, there are less than 200 applications per year; for instance, in 2014 there were 122.[871] In the Netherlands, the procedure has been used 300 times a year on average in the past five years, which is far behind the potential considering the high rate of uncontested monetary claims, even taking into account that the procedure is limited to cross-border cases.[872]

3.2.2 Specific problems: competence, assessment, forms and language

846. As noted in Section 3.1.1, in some Member States there are competence issues. In Hungary the public notary has jurisdiction and although this does not seem to pose significant problems as such, the *Flight Refund* case showed that at least in that case the public notary was not able to apply the jurisdiction rules correctly. In addition, this has resulted in the English High Court refusing enforcement as it considered the seal of the court an essential element.[873]

847. The Belgian National Reporter notes that there is a 'widely spread misconception' about the conditions for an EOP application. It is often thought that the claim is and should always have been uncontested.[874] Not including information on earlier out-of-court discussions with the debtor leads some courts to declare an EOP null and void during review procedures, according to the reporter. The lack of implementing legislation and (maybe as a result of this) knowledge on the Regulation may play a role in this.

848. In some National Reports and by a few interviewees the use of the forms is still mentioned as an issue, though the improvement of the forms and the eJustice Portal

[870] National Report, France, question 4.4.1.

[871] National Report, Ireland, question 4.4.1.

[872] National Report, The Netherlands, question 4.4.1. See more in detail Xandra Kramer, 'European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects' in Burkhard Hess, Maria Bergström, and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016) 97, 107.

[873] National Report, Hungary, question 4.4.1.

[874] National Report, Belgium, question 4.4.1.

as well as standing practice seem to have resolved the most pressing issues. It still happens, however, that forms are filled out wrongly or are incomplete and need to be corrected or complemented.[875]

3.2.3 Refusal of enforcement

849. On the basis of the available data, in particular published case law, it can be concluded that the refusal of an EOP is very exceptional. In Germany, a case is reported where the requirements for service were only partially met.[876] In Spain the enforcement of a Dutch EOP was refused on the – invalid – ground that the Spanish court lacked jurisdiction since the debtor's domicile was in the Netherlands.[877] In addition, the Hungarian National Report addresses the refusal of a Hungarian EOP in England because it was issued by the public notary and not a court, as mentioned in the previous subsection (3.2.2).

3.3 Possible Improvements

850. The analysis shows that though there are some obstacles in the use of the EOP Regulation, these are minor and are rather ad hoc or related to general issues in European civil procedure. For the proper functioning of this Regulation, the cross-border service of documents is of paramount importance. An EOP can and should only be declared enforceable when it is ensured that the EOP was served in accordance with the Regulation. Situations as they occurred in the *eco cosmetics* case are not acceptable and moreover, the EOP Regulation, in the light if the CJEU jurisprudence, does not provide a remedy.

851. The review rule of Article 20 should cover all types of situations where the defendant was not validly served with the document. The revised ESCP Regulation could serve as a model. While at present the uniformity of the protection of the debtor is undermined, information on national remedies for these types of cases should be made available to the broad public and brought to attention of legal practitioners..

[875] See *e.g.* National Reports, Hungary, the Netherlands, Slovakia, question 4.4.1.

[876] AG Berlin-Wedding, 22 October 2014, 70b C 17/14, BeckRS 2015, 15467

[877] Court of Appeal of Barcelona of 4 October 2012 [Audiencia Provincial de Barcelona (Sección 19ª), Auto núm. 122/2012, ECLI:ES:APB:2012:7160A. See also National Report, Spain, Question 4.6.

852. In addition, in order to ensure the proper functioning of this instrument in the national legal order, national implementation legislation should be in place. In a number of Member States implementation rules are lacking and the interaction between national law and the EOP Regulation is not clear. The information on the eJustice Portal should clearly present the relevant implementation rules to facilitate the good functioning of the Regulation.

4. The European Small Claim Procedure (ESCP)[878]

853. The ESCP has been applicable since 1 January 2009 and was the first genuine adversarial European civil procedure. As the EEO and EOP Regulation it abolishes the exequatur.[879] This optional adversarial procedure seeks to simplify, speed up, and reduce the costs of the collection of small claims in cross-border litigations. The current threshold of the procedure is € 2,000, but this will raised to € 5,000 following an amendment of the regulation, implemented by Regulation 2015/2421, from 14 July 2017.[880]. Regulation 2015/2421 seeks to tackle the shortcomings of the ESCP Regulation that were addressed in the Deloitte Report[881] and a number of other studies, as summarized in the European Commission Report (ESCP Report).

4.1 Implementation: Competence and Review Procedure

4.1.1 Competent courts

854. The competent authorities to issue an ESCP judgment differ among Member States. Most National Reports indicate that the courts competent to handle the ESCP applications are determined in accordance with general domestic procedural rules on courts' jurisdiction.[882] According to these, only six Member States have adopted

[878] This section was authored by Xandra Kramer and Elena Alina Ontanu (Erasmus School of Law).

[879] The ESCP Regulation abolished all grounds of refusal except for the reason of irreconcilability of judgments.

[880] Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1, Art 2 (ESCP Regulation). As of 17 July 2017, the threshold will be raised to € 5,000 pursuant to Regulation (EU) 2015/2421 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure [2015] OJ L 341/1, Art 2.

[881] Assessment of the socio-economic impacts of the policy options for the Future of the European Small Claims Regulation, Final Report, RDT-L05-2010, Deloitte, Brussels, 19.07.2013

[882] National Reports, question 4.5.2

specific provisions on jurisdiction. These are France, Ireland, The Netherlands, Poland, Sweden, and the United Kingdom (England and Wales).[883]

855. Two approaches are in place in the Member States. In most Member States all general or lower courts are competent to handle ESCP applications. Within this approach there are two additional possibilities. While in some Member States the competence is retained by a certain category of courts (such as regional courts in Bulgaria; district courts in Cyprus, Lithuania, the Netherlands, Romania, Slovakia and Sweden; local courts in Germany; justice of the peace in Greece and Luxembourg; first instance courts in Latvia and Portugal), in the others different types of courts share the competence with regard to ESCP claims. This shared national competence between various types of courts is generally related to domestic rules on subject-matter competence (e.g. a division between civil and commercial courts in Belgium, Croatia, France, Slovenia and Spain, or special competence for particular matters attributed to certain type of courts such as in Czech Republic, Hungary and Italy). At the national level some courts have centralized the handling of the ESCP claims within one of their departments. This is the case for some courts in Belgium, such as the Commercial Court in Antwerp (only the department of Turnhout) and Hasselt (for the district of Limbourg). Though the centralized handling ought to improve knowledge and speed up the handling, the National Reporter acknowledges a contrary effect.[884] This might be related also the fact the centralization is not made publicly known to potential users.

856. One particular court has jurisdiction to handle the claims in Finland and Malta. These Member States opted for a concentration of the ESCP cases at the level of the District Court in Helsinki in Finland and the Small Claims Tribunal in Malta.

857. Furthermore, the ESCP judgments appear to be in general based on an appreciation carried out by the judge, though only the National Reporter for Latvia clearly makes a reference in this regard.[885]

---

[883] National Reports, Poland, Sweden, the United Kingdom question 4.5.2. French Code of Civil Procedure, Art. 1382, Dutch Implementation Act (Uitvoeringswet verordening Europese procedure voor geringe vorderingen) Law of 29 May 2009, No. 31 596, Art. 2.

[884] National Report, Belgium, question 4.5.2.

[885] National Report, Latvia, question 4.5.2.

4.1.2 Review procedure

858. Article 18 of the ESCP Regulation is implemented differently across the Member States. Most Member States have adopted specific national provisions for the application of Article 18 of the ESCP. Ten Member States refer to available domestic mechanisms under which the review application should be handled by the court. This is the case in Austria, Croatia, France,[886] Germany, Hungary, Latvia, Lithuania, Poland, Sweden and United Kingdom (England and Wales).[887] In the Netherlands, the legislator opted for a direct application of the Article 18 mechanism by the national courts.[888] Similarly, in Poland Article 18 constitutes the basis on which the review is to be carried out following an application in accordance with national requirements for a pleading.[889] Other Member States have relied on the direct effect of the ESCP Regulation, making use of available national mechanisms that fit within the limited scope of Article 18. This is the case, for example, in Belgium, Bulgaria, Estonia, Finland, Italy,[890] Luxembourg, Romania, Slovakia, Slovenia, and Spain. Various national mechanisms can apply. For example: (1) in Belgium within the limited scope of Article 18(1) of the ESCP a writ of summons or a joint petition can be filed;[891] (2) in France an opposition can be filed if the judgment was issued in default, or otherwise ordinary challenging mechanism can be applied;[892] (3) in Finland the law provides for a reopening of the case in default judgments or an extraordinary

[886] Circulaire de la DACS C3 07-09 du 26 mai 2009 relative à l'application du règlement (CE) n° 861/2007 du Parlement européen et du Conseil du 11 juillet 2007 instituant une procédure européenne de règlement des petits litiges, NOR : JUS C 0911133C, Justice 2004/4, 30 août 2009, 17/51, point 3.7; Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017).

[887] National Reports, question 4.5.3.

[888] Dutch Implementation Act (Uitvoeringswet verordening Europese procedure voor geringe vorderingen) Law of 29 May 2009, Art. 6.

[889] PCCP, Art. 50527.

[890] Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017).

[891] National Report, Belgium, question 4.5.3.

[892] Circulaire de la DACS C3 07-09 du 26 mai 2009 relative à l'application du règlement (CE) n° 861/2007 du Parlement européen et du Conseil du 11 juillet 2007 instituant une procédure européenne de règlement des petits litiges, NOR : JUS C 0911133C, Justice 2004/4, 30 août 2009, 17/51, point 3.7; Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017).

appeal in the form of granting new deadline for other situations that fall under Article 18 ESCP;[893] (4) in Romania a range of mechanisms can be used, such as the request for annulment (*contestație în anulare*), the motion for revision (*revizuire*), or annulment procedure;[894] and (5) in Spain the national law provides for various remedies, such as appeal proceedings, *audiencia al rebelled*, or *nulidad de actuaciones*.

859. In some Member States the review request has to be filed by the defendant within a certain timeframe as established for the applicable national procedure. This is the case in Hungary, Latvia and Sweden.[895] The Dutch implementation act provides for a period of 4 weeks after the defendant is informed about the judgment (sub a) or after the grounds for review have ceased to exist (sub b).[896]

860. The way in which the review procedure is implemented in national systems seems to create some difficulties in practice. According to 11,11% of the interviewees this aspect is problematic in relation to national procedural law. This finding confirms earlier concerns on implementation and uncertainties with regard to the application of the review procedures, as mentioned in the European Commission ESCP Report. Article 18 as amended by Regulation 2015/2421 seeks to address some of the identified issues taking inspiration from the review provision in Regulation No. 4/2009 (Maintenance Regulation). According to the new Article 18(1) the review will concern only situations when the defendant did not enter into appearance due to the fact (1) the party was not served with the claim form or not summoned to the oral hearing in sufficient time and in a way it would have enabled the party to arrange for a defense, or (2) the defendant was prevented from contesting the claim by reasons of force majeure or due to extraordinary circumstances. Moreover, the defendant should not have failed to challenge the judgment when it was possible for him to do so. The amended text introduces also a limitation period within which the defendant is expected to act. Hence, the defendant has a period of 30 days to file a request for review from the moment he was aware of the contents of the ESCP judgment and

[893] National Report, Finland, question 4.5.3.

[894] National Report, Romania, question 4.5.3

[895] See National Reports, Hungary, Latvia and Sweden, question 4.5.3.

[896] Article 6 Dutch Implementation Act Small Claims. See also National Report, the Netherlands, question 4.5.3.

was able to react, or, at the latest, from the date of the first enforcement measure making his property non-disposable (Article 18(3)). This will facilitate the task of the national courts and bring certainty for defendants who under the present framework might not be immediately aware whether a limitation period is applicable within various domestic mechanisms implementing Article 18 of the ESCP Regulation. Additionally, the text sets objective criteria for the calculation of the 30 days period and partly clarifies the effects an ESCP judgment declared null and void will have for the claimant's rights.[897] However, the fact that the interruption of the prescription or limitation period will benefit only the claimants in the Member State ''where such interruption applies under national law'' (new Article 18(3) of the ESCP Regulation) can lead to different outcomes across the Member States based on the procedural law of the Member State of origin or the implementation measures the national legislators adopt for the implementation of Regulation 2015/2421.[898]

4.2 Problems and Assessment

4.2.1 General problems: lack of knowledge and limited use

861. A number of impediments in the application of the ESCP can be identified. Unfortunately, almost half of the National Reporters were not able to provide all the relevant information on the functioning and possible problems in applying the Regulation due to a lack of statistics and published case law. With regard to some of these Member States, interviewees were able to provide some insight on issues they encountered in practice or were aware of (e.g. Bulgaria, Cyprus, Greece, Malta).

862. One of the most often indicated problems related to the application of the ESCP is the lack of or limited awareness of the procedure by professionals involved in the procedure (judges, clerks, lawyers, bailiffs), as well as potential users. This is a

[897] Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017). The lack of express provision regarding the limitation was previously criticised by Crifò in relation to the EOP Regulation. See Carla Crifò, 'Civil Procedure in the European Order: An Overview of the Latest Developments, Déirde Dwyer (ed.), *The Civil Procedure Rules Ten Years On*, Oxford University Press, 2009; Carla Crifò, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment*, Kluwer Law International, 2009.

[898] Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017).

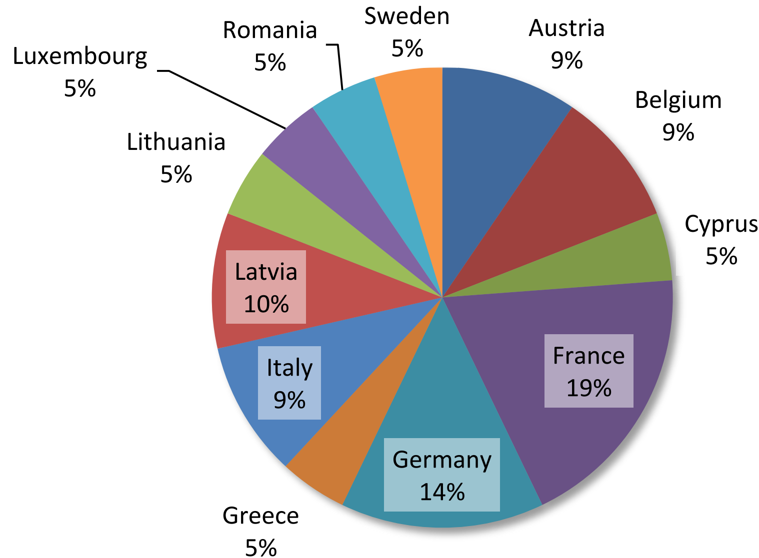
widespread impediment that has an impact on the use and manner in which the ESCP is applied and functions in practice. According to the survey results, the problem seems to be serious, as demonstrated by the circumstance that only a limited number of respondents answered the questions concerning the European Small Claims Regulation. The vast majority of respondents skipped this part of the questionnaire in its entirety due to lack of knowledge and experience. This is an important indicator of the limited knowledge and practical use of the instrument. Both the lack of practice and the limited knowledge have been confirmed by the interviews. Additionally, in a couple of Member States, interviewees indicate that the national procedure is considered to be a more appropriate option (for example simpler, faster, and better known).[899] The knowledge problem seems to be systemic, rather than regional[900], but in some Member States the problem is more serious than in others. The questionnaire asked the respondents to identify the main impediments of their national procedural law regarding the application of the small claims Regulation. While the overwhelming majority of respondents skipped the question, thus suggesting a general lack of knowledge and experience of the instrument, those who answered[901] predominantly reported that there is 'No particular problem, but the Regulation is not sufficiently well known or used'. The chart below shows the geographic distribution of the respondents who gave this answer. The same finding is mirrored in the interviews.[902]

[899] Bulgarian Private Enforcement Agent with 15 years of experience, a Romanian Judge and Academic with 19 years of experience, a Romanian Academic with 15 years of experience.

[900] Eurobarometer 395 showed that 86% of the citizens had never heard about the procedure.

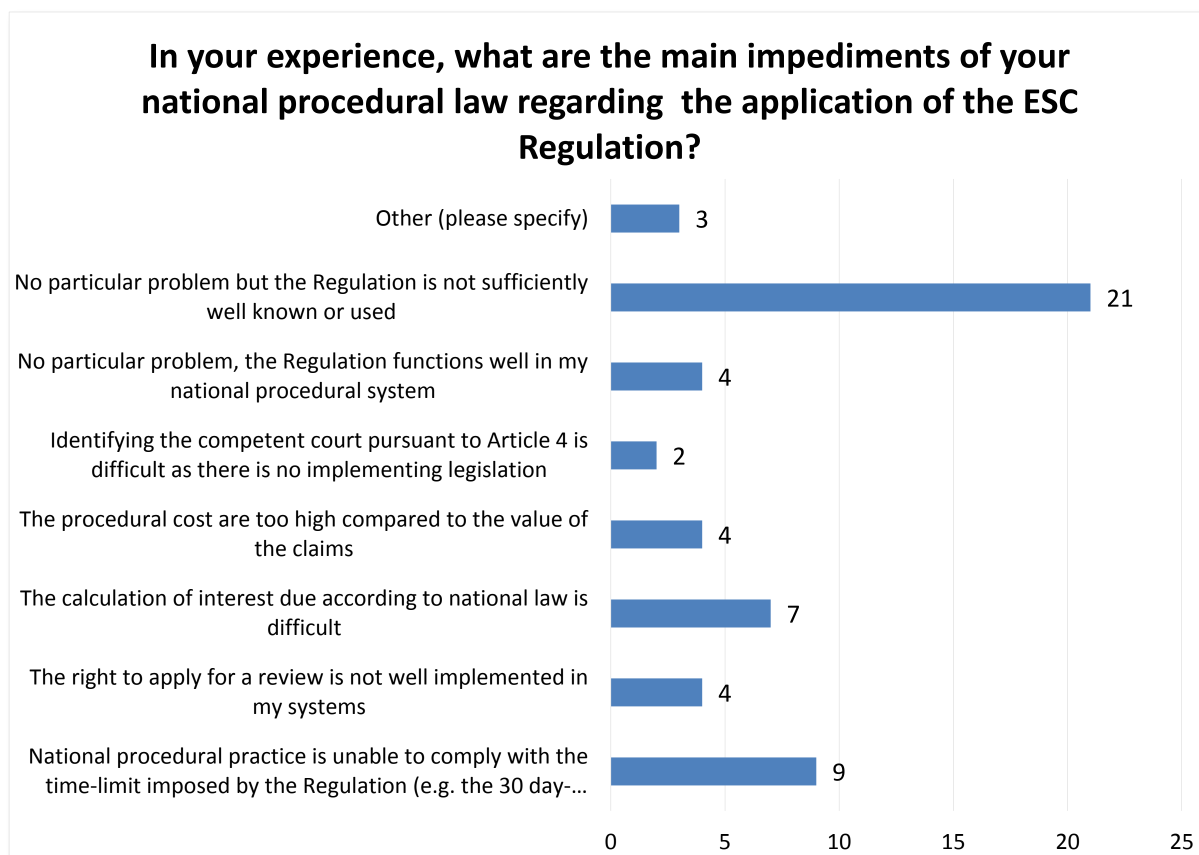
[901] Overall, the question was answered by 36 respondents and skipped by 552 respondents.

[902] The problem has been reported by interviewees from Austria, Cyprus, France, Finland, Germany, Malta, Latvia, Lithuania, the Netherlands, Slovakia and Spain.



4.2.2 Specific problems: competence, costs, assistance, time-limits, evidence, language, interest, service, and review

863. A number of procedural and forms related aspects are referred to as problematic by National Reports as well as survey respondents and interviewees. These difficulties mentioned are inherent to cross-border proceedings and are mainly related to the identification of the competent court to receive the claim, representation and assistance of the parties, evidence requirements, costs and payment of fees, calculation of legal interest and penalties, language requirements, procedural timeframe, service and review. Part of these issues are not necessarily the result of conflicting national provisions, but more a matter of availability of sufficiently detailed information for the potential users or for professionals applying this regulation, and possibly a lack of dedicated national provisions or clear guidelines as to which national rules and mechanism apply.



864. The information available on the European Judicial Atlas for the identification of the competent court is not particularly user-friendly or clear for a non-represented user.[903] Even if consumers manage to apply the provisions of Brussels I (now Brussels I-bis) correctly, then they will have to identify the national court territorially competent to receive their claim. The European Judicial Atlas may refer to more national courts can be competent for the same territory[904] (i.e. for Luxembourg there are three small district courts), or at times the information provided is erroneous or incomplete.[905]

---

[903] National Reports, question 4.5.1: Belgium; Luxembourg; the Netherlands.

[904] For Luxembourg there are three small district courts, remark made by two Luxembourgish judges at a seminar organized by the European Consumer Centre Luxembourg. National Report – Mutual Trust, Luxembourg, question 4.5.1.

[905] National Report, Belgium, question 4.5.1. Situation encountered also in relation to French Courts, Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017).

865. The costs of the proceedings are considered a problem in a significant number of Member States,[906] as earlier shown by the Commission ESCP Report.[907] The problem is raised by some of the National Reports and confirmed by the results of the surveys and interviews. The impediment is not only related to the court fees, but also to additional costs such as lawyer fees, translation costs and who should bear them, possible additional fees for the judge to determine the applicable law.[908] Further, the payment of court fees is problematic in some jurisdictions for foreign unrepresented parties, as information on the payment means is not available in other languages (Romania)[909] or requires physical presence or certain access to national information and credentials (Italy).[910] In some Member States, as revealed by the survey replies, and confirmed by interviewees, the costs of the proceedings can reach disproportionate levels. This is the case, for example, in Cyprus, Finland, Germany, Greece, Lithuania, the Netherlands and the United Kingdom (England and Wales). This issue related to the costs of the proceedings and the significant differences among court fees applicable across Member States was previously underlined in the Deloitte Report as well as by the Commission ESCP Report.[911] Regulation 2015/2421 amending the ESCP Regulation addresses part of this aspect in Article 15a(1) setting a duty on the Member States not to charge court fees that

[906] The problem has been reported in Austria, Cyprus, Finland, Germany, Greece (according to interviewees), Latvia, Lithuania, Romania, The Netherlands, Spain (according to interviewees) and Sweden.

[907] European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2013) 795 final, Brussels, 19.11.2013.

[908] National Report, Luxembourg, question 4.5.1

[909] National Report, Romania, question 4.5.1

[910] Elena Alina Ontanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures*, Thesis, Erasmus School of Law, Erasmus University Rotterdam (to be expected in 2017); Gar Yein Ng, 'European Payment Order and European Small Claim Online Simulation UK-Italy. Regulations (EC) No. 1896/2006 and 861/2007', *Building Interoperability for European Civil Proceedings Online*, Research Conference – Bologna, 15-16 June 2012, (available at http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EPO_Simulation_Gar_Yein.pdf).

[911] Assessment of the socio-economic impacts of the policy options for the Future of the European Small Claims Regulation, Final Report, RDT-L05-2010, Deloitte, Brussels, 19.07.2013; European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2013) 795 final, Brussels, 19.11.2013.

are disproportionate or higher than the ones charged for national simplified court proceedings.

866. According to the interviews only few Member States provide proper assistance to the parties using the ESCP procedure. According to a judge from Germany, the German Ministry of Justice supports the applicants in the filing process. In Finland, as most of the procedures concern claim for compensation for late/cancelled flights or internet purchases, consumers generally receive help from the Consumer Advisors. The same appears to be the case in Romania with the European Consumer Organization. In this context legal representation remains necessary as previously revealed in the Commission ESCP Report. Additionally, some National Reporters point to some existing uncertainties in relation to the mandatory nature of representation in an appeal proceedings in Austria, or the persons or entities who can represent the parties in ESCP proceedings in Belgium and Slovakia.[912]

867. A number of survey respondents indicate that the national practice is unable to comply with the time-limit imposed by the regulation. This is confirmed by interviewees in a number of Member States.[913] Nevertheless, as the Commission ESCP Report revealed, the duration of the proceedings diminished in a number of Member States to an average of approximately 5 months from up to 2 years and 5 months.[914]

868. Another issue relates to the evidence the parties have to submit to the court. This is in part due to the insufficient understanding of the ESCP provisions (Belgium) or the inability of the party to obtain and provide sufficient evidence (Luxembourg, The Netherlands, United Kingdom).[915] Additionally, national courts can be reluctant to make use of videoconference for this purpose, opting for personal evidence instead[916].

[912] National Reports, Austria, Belgium, Slovakia, question 4.5.1. At the same time the Portuguese National Reporter links the non-mandatory nature of representation and the lack of information and knowledge of the users to the limited use of the instrument. National Report, Portugal, question 4.5.1.

[913] Interviews carried out by National Reporters in Cyprus, Greece and the Netherlands on academics, lawyers and consumer protection association).

[914] The sample included 10 Member States: Bulgaria (6 months), Estonia (4 months), Finland (3 months), France (4.6 months), Malta (6 months), Poland (6.3 months), Slovakia (3 months), Slovenia (4.3 months), Spain (8.2 months), Germany (3.4-5.3 months).

[915] National Reports, question 4.5.1: Belgium, Luxembourg, The Netherlands, United Kingdom.

[916] Spanish Judge with 25 years of experience interviewed by the National Reporter.

869. Language requirements remain a barrier for practitioners and parties. They can also slow down the procedure and increase the costs due to the need for translations. Though the forms are available in all official languages, the object of the case, the explanation of the claim and the supporting documents need to be drafted or translated in the language of the proceedings. The same might be necessary for service purposes. Dutch interviewees refer to translation problems and sending of the forms in Dutch to parties in other Member States. However, , some Dutch courts are able to handle standard forms drafted in other languages than the language of the proceedings.[917]

870. A number of survey respondents indicate that the calculation of interest due according to national law is difficult.[918] This aspect was also mentioned by a Romanian interviewee.

871. Service issues are referred to by the Dutch and Polish National Reports.[919] These difficulties seem to be more often encountered when service carried out abroad to other Member States and related to the fact that no acknowledgement of receipt is received back by the courts (The Netherlands, Romania and Spain).

872. Another aspect that is indicated as problematic by the survey respondents is related to the lack of proper implementation of the review procedure in the national system. This issue is mentioned by the Belgian, Romanian and Slovakian National Reporter. This occasional reference by practitioners to the review mechanism might be related to the very limited use of the procedure; hence, problematic aspects might not be immediately noticed. However, in view of questions raised in relation to the EEO and EOP Regulations, Regulation 2015/2421 amends the review procedure for the ESCP.

[917] National Report, question 4.5.1: The Netherlands. See also Xandra Kramer, 'European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects', Burkhard Hess, Maria Bergström, Eva Storskrubb (Eds.), *EU Civil Justice. Current Issues and Future Outlook*, Hart Publishing, 2016; Xandra Kramer, Elena Alina Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections' [2013], *Nederlands Internationaal Privaatrecht* (NIPR), 319.

[918] 7 respondents of the overall 36 who answered the question (the same question was skipped by 552 respondents).

[919] National Reports, The Netherlands, Poland, question 4.5.1.

4.3 Refusal of Enforcement

873. Hardly any information is available on the enforcement of ESCP judgments including the refusal of enforcement. Only the Czech National Reporter was able to identify a case where an incoming judgment was refused enforcement because no translation of relevant documents (especially the claim) was provided in accordance with Article 6 ESCP, though the court informed the party of this duty.

4.4 Possible Improvements

874. Amendments of introduced by Regulation 2015/2421 that will become applicable on 14 July 2017 address most of the identified difficulties and issues. The amended text seeks to facilitate the application and use of the ESCP by setting an express duty on the availability of standard forms and the type the information and assistance that has to be provided to the parties. The procedure remains primarily a written procedure, but the use of appropriate distance communication technology is encouraged for oral hearings or the taking of evidence. The use of electronic means is also favoured in relation to the service of documents methods when available at national level. All these provision are expected to encourage and facilitate the use of the ESCP procedure and to diminish costs of proceedings that remain in many cases disproportionate to the value of the claim.

875. The increase of the ESCP threshold to € 5.000 will make the instrument available for a larger number of claims. The amendment of the costs provisions will balance the advantage retained in some Member States by national simplified procedures, as the court fees of the ESCP should not be disproportionate nor higher than that of domestic instruments. Furthermore, the Member States have to ensure that parties are able to benefit for distance payment methods; thus, personal presence in court for paying court fees should disappear. The provisions of the review procedure have been largely clarified and improved in relation to the present text. Language difficulties have also been addressed by the amended text, limiting the need of translation for enforcement purposes.

876. Lastly, the Regulation broadens up the duty Member States have to provide information on national rules relevant for the application of the ESCP within their

jurisdiction. Hopefully, the data to be made available by Member States will be more detailed and sufficient for any interested party to be able to carry out the procedure.

877. Aspects related to the implementation or coordination of rules between the ESCP Regulation and domestic provisions remain a duty of the Member States. Another aspect that should be considered at European as well as national level is more actions to raise awareness with regard to the existence of this procedure for potential users and professional. An appropriate training scheme should be available for all legal professions interested in and handling ESCP claims. Additionally, in view of the still limited use of the ESCP in many Member States, the national legislator should consider the possibility of concentrating this procedure in a smaller number of courts to allow them to gain familiarity with the instrument and expertise.

5. The European Maintenance Procedure[920]

878. The maintenance Regulation is the second Regulation, related to family matters, that has been adopted in the EU. It harmonizes the rules on jurisdiction, applicable law (through the Hague 2007 protocol[921]) as well as recognition and enforcement, related to ‘maintenance obligations arising from a family relationship, parentage, marriage or affinity’.[922] It became applicable on 18 June 2011. Consequently, maintenance claims now fall outside the scope of the Brussels I-bis and EEO Regulation.[923]

879. Regarding the circulation of judgments, the Regulation abolishes *exequatur* proceedings for the maintenance decisions issued in EU countries bound by the 2007 Hague Protocol,[924] the ultimate goal being to ensure an effective and swift recovery of cross-border maintenance payments.

---

[920] This Section was drafted by Amandine Faucon Alonso, Research Fellow at the Max Planck Institute Luxembourg.

[921] Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, available at https://www.hcch.net/en/instruments (accessed 10 January 2017).

[922] Article 1(1) Maintenance Regulation.

[923] Except for European enforcement orders concerning maintenance obligations issued by EU countries that are not bound by the 2007 Hague Protocol.

[924] The United Kingdom and Denmark are the only two Member States that are not. While the United Kingdom is now part of the Regulation (Commission Decision 2009/451/EC of 8 June 2009, OJ L 149/73), Denmark is not but has implemented most of the content of the Regulation (Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2009] L149/80.

5.1 *Implementation: Competence, Financial Support, Legal Standing, Provisional Measures, and Review*

5.1.1. Competence regarding maintenance claims

880. According to article 3 of the Regulation, a court has international jurisdiction if that Member State is either the habitual residence of the defendant; the habitual residence of the creditor; the court seized concerning the status of a person; or the court seized in relation to parental responsibility proceedings. The last two possibilities are of particular importance in practice as maintenance claims are almost always ancillary to divorce or parental responsibility proceedings.[925] In addition, Article 4 offers the possibility for parties to choose the court of the habitual residence or nationality[926] but this possibility does not seem to play a role in practice.

881. Once the Member State having international jurisdiction is identified,[927] national law will designate the particular authority competent to decide the case. For the majority of Member States, the courts of first instance are the main fora to hear family cases.[928] However, other systems have been developed in recent years. In Belgium, Cyprus, Czech Republic, and France, specialized jurisdictions have been created. These courts are granted exclusive jurisdiction to hear claims related to family matters, including maintenance claims.[929] Some other Member States, including Germany,[930] the Netherlands, Malta, and Spain (some districts only)[931] do not have separate family courts, but have specialized sections in the civil court that handle

---

[925] In that regard, the Court of Justice clarified that an application related to maintenance concerning a child must be considered as ancillary only to the parental responsibility proceedings, see Case C-184/14 *A v B* [2015] ECLI:EU:C:2015:479.

[926] For maintenance obligations concerning spouses or former spouses there are two additional possibilities: the court that has jurisdiction for the matrimonial matters' dispute or the court of their last habitual residence.

[927] Following article 10 of the Maintenance Regulation, the judge seized will verify its jurisdiction according to article 3 and 4.

[928] Austria (§ 104a of the Jurisdiktionsnorm), Bulgaria (art. 103, 104 No. 4 of the Code of Civil Procedure), Croatia (Art. 34(1) of the Civil Procedure Act), Estonia, Hungary, Ireland, Italy, Greece Articles 17.2 and 592.3, Code of Civil Procedure, Latvia, Lithuania, Luxembourg (Art. 4 Nouveau Code de Procédure Civile), the Netherlands (art. 3(1) Implementation Act), Poland (article 17 point 4 of the Polish Code of Civil Procedure), Portugal, Romania (Article 94 point 1 letter a) NCPC), , Slovenia (Article 32 of the Civil Procedure Act), Sweden (Parenting Code, the Marriage Code and CJP).

[929] In Spain there is also a very specific court (juzgados de Violencia sobre la Mujer), that will receive maintenance claim related to criminal proceedings arising from violence against woman.

[930] Courts Constitution Acts, Art 4.

[931] Organic Law on the Judiciary, Art. 87 and 98.

family matters, including maintenance. In Finland most family issues are resolved outside courts, through the Municipal Board of Social Welfare, while in Portugal administrative authorities can also be competent, but only when the beneficiary is an adult.[932]

882. In the United Kingdom, it is not the judiciary that is competent but the Child maintenance service. However, a resort to a Family court (or the Family division of the High Court) is available.[933] In Denmark, that has implemented the content of the Regulation,[934] the competent authority is not a court but the State administration. Appeals against its decisions are heard not by a judicial body, but by the Social appeal board.

5.1.2. Financial support

883. According to Article 44 of the Maintenance Regulation, parties to maintenance proceedings have a right to legal aid in order to ensure access to justice. The corresponding chapter lays down a minimal cover that ranges from assistance with the costs to interpretation. The rest, such as the conditions for the means or merits tests, is left to national law. However, free legal aid is mandatory for proceedings concerning children.

884. The legislation of the Member States generally provides that legal aid is not automatic and must be applied for, except for children.[935] Besides financial support, the national procedural rules on family proceedings usually entail that costs be shared between the parties, either equally or according to the judge’s discretion. In Bulgaria[936] and Romania, [937] no court fees are charged.

---

[932] See National Reports, question 4.6: Finland ; Portugal.

[933] See National Report, United Kingdom, question 4.6.

[934] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2009] OJ L 449/80.

[935] See National Reports, question 4.6: Austria; Belgium; France; Greece (Law 3226/2004); Ireland; Italy; Lithuania; Sweden.

[936] Code of civil procedure, Art. 83.

[937] See National Report, Romania, question 4.6.

5.1.3. Legal standing

885. Different systems exist among the Member States regarding the representation of parties to the proceedings. In some countries, personal appearance or legal representation can be mandatory whereas in others they are either not mandatory, or only mandatory under some conditions. In many Member States legal representation for spouses is not compulsory. In some Member States legal representation, including Germany and Greece[938], and in a number of Member States claims above a certain value require representation, including Austria, Italy, and the Netherlands.[939] In Poland, non-governmental organisations can also act as representatives[940]. In Belgium, personal appearance at the preliminary hearing is obligatory for maintenance proceedings.[941]

886. Regarding children, specific provisions usually exist. In Romania and Slovenia, the child is represented by his/her legal representative. In the Czech Republic[942] and Slovakia[943] a guardian is specially appointed by the court to represent the child. In Finland, children can be represented by the residential parent, the person having custody or social authorities in sensitive cases.[944]

887. As for the standing to bring a claim, in Hungary actions for maintenance can be brought by the guardian authority of a child or by a district office.[945] Similarly, In Lithuania the child protection service can apply to court and in Poland it can be a non-governmental organisation (also for claims between adults).[946] In Slovakia, the public prosecutor also has standing.[947] In Belgium[948] and Italy[949] the intervention of

[938] National Reports, question 4.6.2: Germany; Greece; Italy.

[939] E.g. in Austria above € 5,000, in Italy above € 2,582,28 and in the Netherlands above € 25,000.

[940] Polish Code of Civil Procedure, Art. 87§3.

[941] Belgian Judicial Code, Art. 1252ter/2(1).

[942] Act No 292/2013 Sb.

[943] See National Report, question 4.6: Slovakia.

[944] Child maintenance act, §§5, 9, 10 and13.

[945] National Report, Hungary, question 4.6.2.

[946] Polish Code of Civil Procedure, article 61§1

[947] National Report, question 4.6.2: Slovakia.

[948] Belgian Judicial code, Art. 138bis, § 1/1, 1° and 765/1.

[949] See National Reports, question 4.6.2: Italy.

the public prosecutor is required in proceedings related to maintenance, if children are involved.

5.1.4. Provisional measures

888. A great variety of provisional and protective measures relevant in maintenance exist in the Member States. Some provisional measures are not specific to family law, and include interim injunctions and pre-trial seizure of evidence that are also available in other types of cases.[950] Other Member States have interim injunctions designed specifically for family or marital disputes that are also applicable to maintenance proceedings, and some even have specific interim measures for maintenance disputes. These interim measures include interim maintenance,[951] provisional child and family support,[952] a contact order[953] and temporary domicile of children that are not of age.[954] The availability of measures differs widely per Member State and this can have consequences for the recognition and enforcement.

5.1.5. Review

889. According to Article 19 Maintenance Regulation, in case of default of appearance, the defendant can ask for a review of the maintenance decision. This review is limited to the absence of service of documents in due time or the inability of the defendant to contest the maintenance claim due to force majeure or extraordinary circumstances. According to the data available, the provision does not seem to be applied often in practice.

890. In the majority of Member States, no specific implementation measures have been adopted for this specific case and remedies, hence, are the same as for default judgments in general.[955] Spain, has however issued a communication detailing the application of the national review provisions in accordance with the Maintenance

[950] Bulgaria (Art. 389 para 2 of the Code of Civil Procedure), Finland, Austria (§ 382 para. 1 subpara. 8 lit a EO), Malta (Art. 876 COCP), the Netherlands, Greece (Articles 707-724; 728-730; 731-736 CCP).

[951] Austria, Spain (Art. 768.2 LEC), Romania, Slovenia (411 of the Civil Procedure Act).

[952] Portugal (Art. 377 to 379 CPC).

[953] National Report, question 4.6.4: United Kingdom.

[954] Romania (Article 920 NCPC), Slovenia (Article 411 of the Civil Procedure Act), National Report, United Kingdom, question 4.6.4.

[955] See National Report, question 4.6: Belgium; Croatia; Estonia; France; Luxembourg; Portugal; Romania; Slovakia; Sweden.

Regulation. In Finland, Germany, Malta and the Netherlands, specific implementation acts specifically detail the procedures for the review according to the conditions laid down in Article 19.[956]

891. Denmark and the United Kingdom are not affected by the provision at hand, since they are not part to the Hague 2007 Protocol, which is a prerequisite for the applicability of Chapter IV Section I of the Maintenance Regulation.

5.1.6. Central Authorities

892. Chapter VII of the Maintenance Regulation is dedicated to the Central Authorities. These play an important role in the cooperation at the recognition and enforcement stage in particular. In practice, Central Authorities inform on national enforcement procedures and help apply them (e.g. locate and contact the debtor). Additionally, in Austria, Belgium and Latvia Central Authorities facilitate the payment by advancing the sum and substitute the debtor in case of default, in order to ensure that the life needs of the creditor are immediately satisfied.[957] In Hungary, the Central Authority is even considered as the creditor itself. In Belgium, France, Hungary and Ireland the Central Authority is also responsible for enforcing provisional measures and collecting maintenance debt.[958]

893. Regarding the nature of Central Authorities, there is no uniformity. The institution can be either judicial (e.g. Austria, Bulgaria), a Ministry (e.g. Croatia, France, Greece, Lithuania, Malta, Spain) or a different administrative entity (e.g. Belgium, Germany, Portugal, Slovakia).[959]

5.2 Problems and Assessment

894. In the online questionnaire, 65.22% of respondents considered that there were no particular problems with the Maintenance Regulation but that it was not sufficiently known among practitioners.[960] Similarly, 81.25% of respondents said that they used

[956] See National Report, question 4.6: Finland; Germany; Malta; the Netherlands.

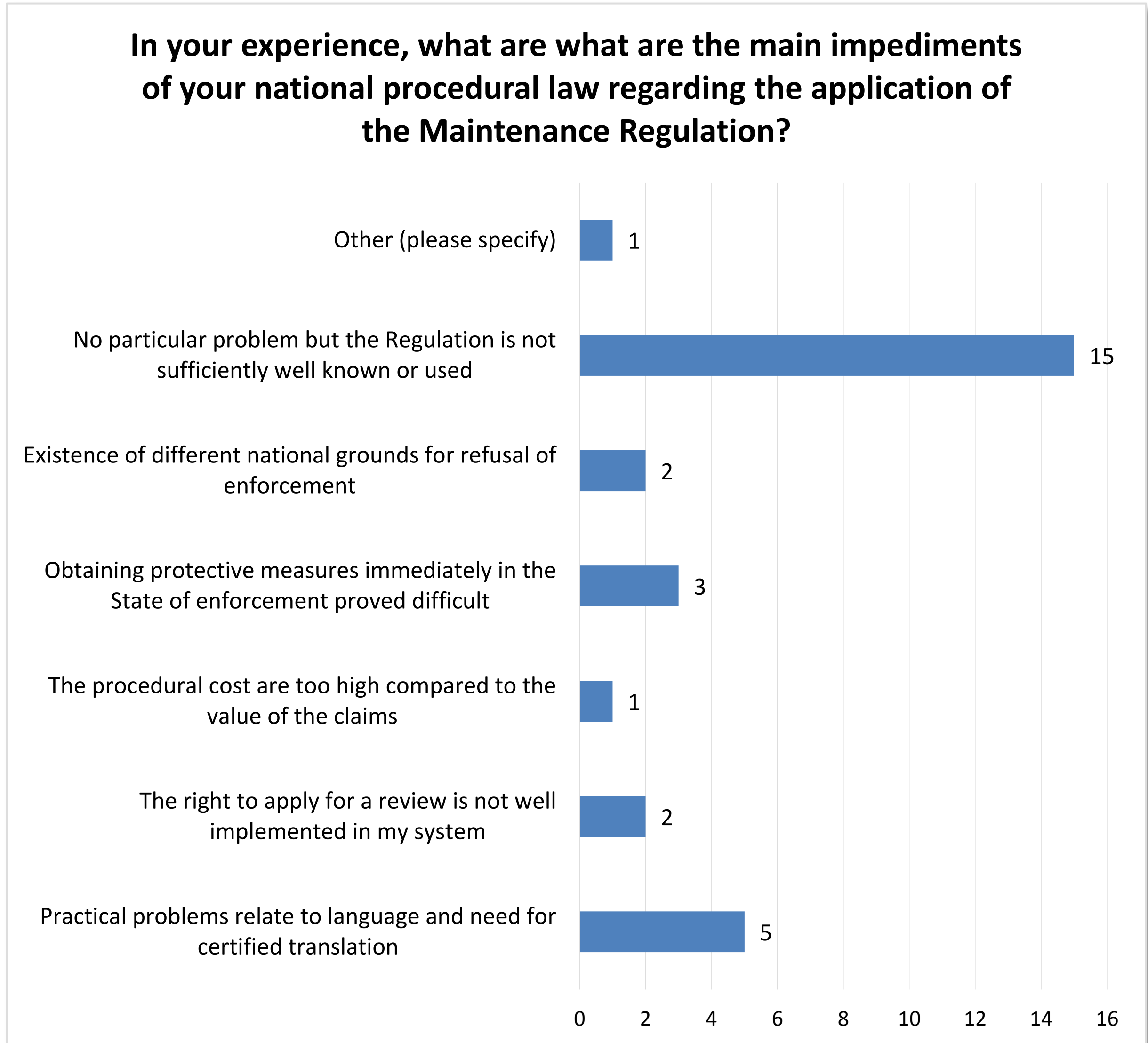
[957] See National Reports, question 4.6: Austria; Belgium (SEMAC Act); Latvia.

[958] See National Reports, Belgium (SEMAC Act), France, Hungary, Ireland (SI 274 of 2011).

[959] See National Reports, Question 4.6.

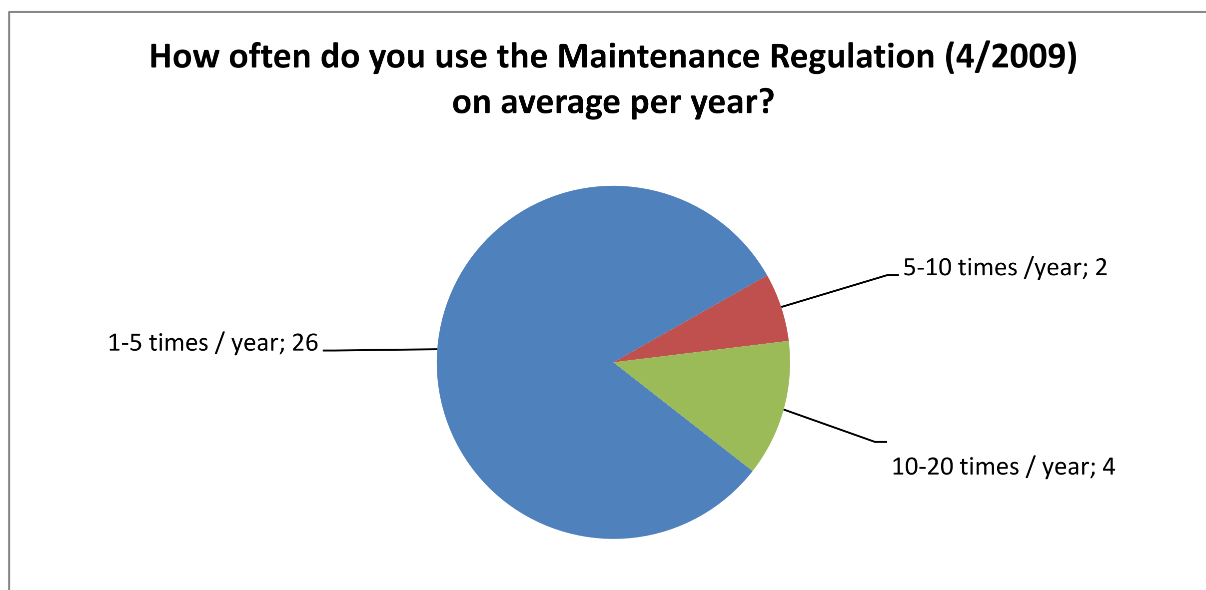
[960] The question was answered by 23 respondents.

the Regulation only 1-5 times per year.[961] Those findings were corroborated by interviews of experienced judges from Belgium, Sweden and France, lawyers from Slovakia and Lithuania as well as the Estonian Central Authorities and finally, academic experts from the Netherlands, Spain and Germany.[962]



[961] The question was answered by 32 respondents.

[962] Interviews conducted by the Belgian, Swedish, French, Slovakian, Lithuanian, Estonian, Dutch, Spanish and German National Reporters.



5.2.1. Procedural problems

895. Non-compliance with a judgment concerning maintenance claims can have very serious consequences for the parties involved in the case. Given the social and personal importance of maintenance claims, national procedural law generally implements a specialized enforcement regime, aimed at ensuring that creditors are adequately protected. By way of example, the procedural laws of many Member States provide that maintenance credits have priority over other credits.[963]

896. The circumstance that national procedural law sets forth provisions aimed at ensuring compliance with maintenance judgments is not, in itself, a problem, but rather a legitimate and desirable policy choice. However, the mechanisms through which enforcement is ensured vary significantly among the Member States. As a result, the same judgment could generate different effects, when circulating across national borders. The most visible aspect of the problem is that, in some Member States, non-compliance with a maintenance judgment may have criminal consequences and lead to imprisonment,[964] while in other Member States only civil consequences are possible. This divergence is potentially problematic, as the judgment may radically change its nature (from civil to criminal) once recognized in a

[963] National Report, question 4.6: Belgium; Croatia; Finland; Slovakia; Slovenia.

[964] Austria (§ 198 StGB (Strafgesetzbuch) (Austrian Criminal Code)); Bulgaria (Article 183 of the Criminal Code); Greece (Article 354 Criminal Code); Italy (art. 570 of the Criminal Code); Malta, Slovenia (Article 194 of the Criminal Code) and the UK, See National Reports, Question 4.6.

different Member State, with very different legal, social and personal consequences.[965]

5.2.2. Difficulties for practitioners

897. As was confirmed by lawyers from Italy and Greece as well as by judges from Sweden and Estonia with more 10 years of experience,[966] the biggest impediment for practitioners confronted with the Maintenance Regulation at the enforcement stage relates to languages and translation.[967] Even though there are standardized forms available, they are perceived as complex and difficult to fill in.[968] In particular, 68.75% of interviewees and 33.45% of online survey respondents reported that the forms are difficult to fill.[969] Furthermore, 59.06% of interviewees and 54.24% of the online survey respondents identified the forms as being too numerous.[970] This finding was confirmed by Slovak lawyers who believe the related language version is incorrect.[971] Besides, a translation of the judgment itself is sometimes necessary and it is not clear who should bear the costs, as reported by experienced judges from Sweden and Estonia.[972]

898. The localization of the debtor is another problematic aspect, as underlined by Judges from Finland and Greece with more than 20 years of experience, the Central authority of Latvia, a lawyer from Lithuania and a legal practitioner from the Netherlands.[973] In addition to complications due to the protection of the debtor's private life, the role of Central Authorities in this respect is not always clear to either lawyers or central authorities themselves. Still regarding Central Authorities, according to most respondents to the online questionnaire, some of them are easier

[965] In that sense, 170 out of 266 interviewees considered that most difficulties concern the technicalities of national procedural law (i.e. the absence of equivalent legal categories).

[966] Interviews conducted by the Italian, Greek, Swedish and Estonian National Reporters.

[967] See also the National Reports, Spain, question 4.6,.

[968] 147 out of 271 interviewees identified the forms as being too numerous. It was also confirmed by Slovak lawyers who believe the related language version is incorrect.

[969] The question was answered by 144 interviewees and 275 online survey respondents.

[970] The question was answered by 149 interviewees and 271 online survey respondents.

[971] Interview conducted by the Slovakian National Reporter.

[972] Interviews conducted by the Swedish and Estonian National Reporters.

[973] See National Report, question 4.6. Interviews conducted by the Finnish, Greek, Latvian, Lithuanian and Dutch National Reporters.

to collaborate with than others. This difference results in some judgments being enforced more efficiently/quickly than others.[974]

899. Finally, case law related to maintenance indicates that the Regulation is sometimes wrongly applied or not applied at all. This problem was reported by a French judge with more than 10 years of experience, lawyers from Greece and Slovakia as well as by a Professor from Germany with more than 20 years of experience.[975] This issue originates from the specificities of European family law: the proceedings often consist of various aspects (divorce, parental responsibility, maintenance) for which different instruments exist. This often results in an incorrect, or absent, application of the Regulation to maintenance proceedings that are ancillary to others. This circumstance, however, has never been reported by interviewees as an obstacle to recognition and enforcement as such. One possible explanation for this result is that, in the great majority of cases, different instruments lead to the same results as far as jurisdiction and applicable law are concerned.

900. In conclusion and as confirmed by a clear majority of respondents to the online questionnaire, the Maintenance Regulation does not seem to create many problems, in practice, regarding recognition and enforcement of European judgments in maintenance matters. The number of reported cases where the application for a maintenance decision was refused is extremely low and refusal is generally grounded in procedural defects (lack of jurisdiction, *ne bis in idem*).

901. In addition, during the interviews, some rather technical problems regarding jurisdiction and differences in provisional measures and the interaction with national law were mentioned.[976]

---

[974] Only 33.33% of respondents to the online questionnaire were satisfied with the collaboration with Central Authorities (the question was answered by 18 respondents). The same circumstances were also confirmed by an academic from Bulgaria (interview conducted by the Bulgarian National Reporter).

[975] Interviews conducted by the French, Greek, Slovak and German National Reporters.

[976] Two interviews conducted by the Dutch National Reporter with a lawyer and legal adviser (15 years of experience); interview conducted by the German National Reporter with an academic; interview conducted by the Slovak National Reporter with an academic (9 years of experience)

5.3 Possible Improvements

902. The data suggest that the Maintenance Regulation generally works well and constitutes a positive example of cross-border cooperation.

903. An area where targeted intervention could be desirable is to improve the cooperation between Central Authorities. The lack of consistency in that regard could be, for example, overcome through the European Judicial Network. The adoption of consistent and satisfactory practices of cooperation and exchange of information among Central Authorities could certainly constitute a positive step in the sense of an even and efficient application of the Maintenance Regulation. A better cooperation might also help to overcome problems in tracking the actual address of the maintenance debtor.

904. Concerning the lack of knowledge of the instruments, further training should be organized for legal practitioners. Training initiatives could help clarify the relations among the different instruments available in the family field. Alternatively, it could also be possible to consolidate the different sets of rules existing in the family field within a single instrument, which would serve as a 'one-stop shop' for all family-related private international law matters within the European Union. In this context, it should be taken into account that many of the online survey respondents expressed a very favourable opinion towards the idea of the consolidation of EU instruments. Namely, when asked whether they think that codification or consolidation of all the EU regulations would provide for a better understanding of and an easier management of applications for recognition and enforcement of foreign decisions, 87.97% of the online survey respondents answered 'Yes', while only 12.03% answered 'No'.[977]

905. In addition, the operation of the jurisdiction rules might need further research. From the present research it is not evident however that some uncertainties regarding the jurisdiction rules form an impediment for the free movement of judgments.

[977] The question was answered by 158 respondents.

6. Conclusion: General assessment of the application of these specific instruments

906. It can be concluded that the specific instruments generally function well within the national legal orders, despite the different modes of implementation. A few common remarks can be made. First, not all instruments are used often in practice and practitioners and potential users are not very familiar with the instruments. This in particular goes for the EOP and even more for the ESCP Regulation, though in some Member States also the EEO and/or the Maintenance Regulation is not used often. Legal training in these EU instruments for practitioners is of utmost importance.

907. Second, in a number of Member States these instruments are not well-implemented into national legislation, creating uncertainties in legal practice. This goes in particular for the EEO, EOP and ESCP. The latter two are self-standing European procedures, but they function within the national procedural context and all procedural issues that are not resolved in the Regulation are to be dealt with under national procedural law. To secure the effectiveness of the procedure, national laws should facilitate the proper functioning of these instruments. This includes the introduction of implementing legislation – for instance in the code of civil procedure or in separate acts – , making forms to be used in the procedure available on, for instance, the national website of the judiciary, and ensuring that aid is available to parties in filling in the forms (the latter in particular for the ESCP). Implementing legislation includes the competent court(s) and authorities (where concentration of the EOP and ESCP in particular should be considered), communication methods, language requirements, provisions on costs, and the applicability of general or specific provisions of the civil procedural code that 'embed' the procedure within the domestic system.[978] The eJustice portal and the keeping up to date of information included thereon in the official languages also play an important role in this regard and minimize language problems. Under the Maintenance Regulation specific questions on the interaction between the Regulation and the judicial cooperation have arisen.

908. Third, the review mechanism as it exists under the instruments require aligning as far as possible and maybe even a fundamental rethinking. As is evident from the *eco cosmetics* case it does not provide a safety net in all cases where the service of

[978] See also Art 26 EOP Regulation and Art 19 ESCP Regulation that provide that procedural issues not dealt with by these Regulations are governed by national law.

documents was not done correctly. Alternatively, introducing the well-established grounds of refusal to be invoked in a domestic (enforcement) procedure that have been taken over in the Brussels I-bis Regulation may be a solution as these have proven to function well.

909. Fourth, and related to this, a well-functioning, reliable system of cross-border service of documents is pivotal for the application of the sectorial instruments. This is best to be done through horizontal harmonization rather than through including minimum standards in the different instruments.

910. In regard of the European Enforcement Order (EEO) Regulation there are little specific problems. In a few Member States proper implementing legislation is lacking which creates challenges for practitioners and not all Member States national procedures seem to comply with the review rules as included in Article 19 EEO Regulation. In a number of Member States the EEO Regulation is little used because the EOP Regulation in part has the same functions and/or because enforcement under the Brussels I Regulation works well. The abolition of exequatur under the Brussels I-bis Regulation reduced the importance of this instrument.

911. The EOP Regulation poses a number of specific issues of implementation in and interaction with national law, but does not raise huge practical problems. Nevertheless non-application of the remedy provided for in Article 20 to the situation where enforceability of the order was granted despite of lack of service is subject of concern and should be addressed. At least the information on available national measures of redress in such situation should be easily available,

912. As to the ESCP Regulation, it is to be expected that the raising of the threshold along with a number of other amendments relating to costs, payment, language and practical assistance, implemented by the new Regulation, along with continuous efforts to increase awareness and improving the practical application, will suffice to tackle the most important problems.

913. The Maintenance Regulation raises little specific problems. In a number of Member States the use of the forms and language have raised issues and a general problem is tracking the current address of the maintenance debtor. Improving the cooperation between Central Authorities is recommended in this regard.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);

- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries
  (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
  or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

  (*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions:

- via one of the sales agents of the Publications Office of the European Union
  (http://publications.europa.eu/others/agents/index_en.htm).

DS-01-17-785-EN-N

doi:10.2838/38491