

Irreconcilable judgments in the EU Regulations: Reforming the ground(s) for refusal of enforcement*

Decisiones irreconciliables en los reglamentos UE: Reforma de los motivos de denegación de la ejecución

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Recibido: 15.12.2023 / Aceptado: 15.01.2024

DOI: 10.20318/cdt.2024.8438

Abstract: Despite the fact that the abolition of exequatur seems to have become the norm under the EU regulations dealing with monetary claims, all of the regulations that fall under this category still preserve some grounds for refusal of enforcement of judgments. One of the refusal grounds which remained, even in the regulations which otherwise abolished all possibility of refusal, is the ground of irreconcilability with another judgment. Despite its importance, this refusal ground can sometimes still be quite complex to interpret. This paper thus analyses the notion of ‘irreconcilable judgments’, clarifying the remaining difficulties in interpretation. Moreover, it compares the diverging solutions offered in different regulations, and ultimately proposes a potential reform.

Keywords: Irreconcilable judgments, refusal of enforcement, Brussels I Recast, second-generation instruments, private international law.

Resumen: A pesar de que la abolición del exequátur parece haberse convertido en la norma en los reglamentos de la UE que tratan de créditos monetarios, todos los reglamentos que entran en esta categoría aún conservan algunos motivos para denegar la ejecución de decisiones. Uno de los motivos de denegación que persiste, incluso en los reglamentos que de otro modo abolían toda posibilidad de denegación, es el motivo de incompatibilidad con otra decisión. A pesar de su importancia, este motivo de denegación a veces puede resultar bastante complejo de interpretar. Por lo tanto, este artículo analiza la noción de “decisiones irreconciliables”, aclarando las dificultades de interpretación restantes. Además, compara las soluciones divergentes ofrecidas en diferentes regulaciones y, en última instancia, propone una posible reforma.

Palabras clave: Decisiones irreconciliables; denegación de ejecución, Reglamento 1215/2012, instrumentos de ‘segunda generación’, derecho internacional privado.

Summary: I. Introduction; II. Historical overview; III. Irreconcilable judgments; A) The notion of ‘judgment’; a) ‘Judgment’ whose enforcement is sought; b) The conflicting ‘judgment’; B) The notion of ‘irreconcilability’; IV. Irreconcilability ground(s) of refusal; C) Irreconcilable judgment of the State Addressed; D) Irreconcilable judgment of another Member State or a Third State; V. Proposed reform.

* This work was supported by the Croatian Science Foundation through the Young Researchers’ Career Development Project (DOK-2020-01).

I. Introduction

1. As established initially in the Treaty of Rome,¹ the European Union (EU) is founded on the principle of a common internal market, based on the four freedoms of movement: free movement of goods, services, persons and capital.² Over the years, a ‘fifth freedom’³ emerged – the free movement of judgments. The core instrument which facilitated the flow of judgments in civil and commercial matters between the Member States was the Brussels Convention,⁴ followed by the Brussels I Regulation,⁵ and by the Brussels I Recast,⁶ which is currently in force. Other instruments have since been introduced as a way to expand the possibilities for judgments to be recognized and enforced freely throughout the EU. Not only did this facilitate the circulation of judgments, but it also allowed for judicial cooperation between the Member States.

2. The free movement of judgments, however, does not currently equal the recognition and enforcement of judgments without frontiers. Despite the mutual trust that is encouraged between the Member States, such trust is not blind.⁷ With remaining differences between Member States’ legal systems and cultures, safeguards are still necessary for the proper functioning of the EU’s legal system. This is also corroborated by the need to respect the fundamental rights which can be impaired in the procedure preceding the deliverance of the judgment which needs to be enforced in another Member State. Furthermore, Member States have an interest in preserving the essential coherence within their own legal system. As a result, all EU regulations provide for a ‘check point’ at the point of entry of judgments originating from other Member States. Thus, recognition and enforcement of a judgment can be refused because of certain irregularities that had occurred prior to the deliverance of a judgment or otherwise jeopardise the highest legal principles in the Member State of enforcement. Over the years, the aim of minimising the number of refusal grounds can be detected, primarily due to the idea of moving towards cross-border enforcement of judgments without frontiers⁸ on the basis of mutual trust, but also owing to further harmonisation of rules and previously mentioned stronger cross-border cooperation between the Member States. In that regard, different possibilities for refusal of enforcement can be found in different regulations.

3. As there have been contrary opinions over which grounds for refusal of enforcement should be kept and which abolished, and particularly due to the fact that the revision of Brussels I Recast as the instrument of main reference⁹ in terms of recognition and enforcement of judgments is currently underway, the time is proper to revisit the refusal grounds of the EU regulations. While some grounds of refusal, particularly the public policy ground, have previously received much scholarly attention,¹⁰ the

¹ Treaty establishing the European Economic Community, Rome (1957).

² Treaty on the Functioning of the European Union, OJ C 202/47 of 07 June 2016, Art. 26(2).

³ J. KRAMBERGER ŠKERL, “European Public Policy (with Emphasis on Exequatur Proceedings)”, *Journal of Private International Law*, n° 7(2), December 2011, p. 480; T. HOŠKO, “Public Policy as an Exception to Free Movement Within the Internal Market and the European Judicial Area: A Comparison”, *Croatian Yearbook of European Law and Policy*, n° 10(1), December 2014, p. 189.

⁴ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299/32 of 31 December 1972 (Brussels Convention).

⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1 of 16 January 2001 (Brussels I Regulation).

⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast), OJ L 351/1 of 20 December 2012 (Brussels I Recast).

⁷ K. LENAERTS, “The Principle of Mutual Recognition in the Area of Freedom, Security and Justice”, available at: https://www.law.ox.ac.uk/sites/default/files/migrated/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf.

⁸ As visible from certain attempts made in this direction, e.g. in the Maintenance Regulation (Regulation No 4/2009) or in the uniform procedures such as European Order for Payment Procedure (Regulation No 1896/2006) or European Small Claims Procedure (Regulation No 861/2007), etc.

⁹ B. HESS, “Towards a More Coherent EU Framework for the Cross-Border Enforcement of Civil Claims”, in J. VON HEIN, T. KRUGER (eds.), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives*, Cambridge, Intersentia, 2021, p. 390.

¹⁰ See e.g., O. MEYER (ed.), *Public Policy and Private International Law. A Comparative Guide*, Cheltenham, Edward Elgar Publishing Limited, 2022; T. KERESTEŠ, “Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow”, *Lexonom-*

irreconcilability of judgments received less such attention. This may be so because it is seldom visible through case law;¹¹ however, it remains one of the most important grounds, which is clear from the fact that it is the only ground kept in some of the newer regulations which otherwise abolished all possibility of refusal of enforcement.¹² Regardless of its omnipresence in the EU regulations, irreconcilability of decisions as a refusal ground is regulated differently in the regulations that this paper focuses on. Moreover, it suffers from certain interpretational difficulties, exacerbated by the recent case law of the Court of Justice of the EU (CJEU).¹³ Therefore, the aim of this paper is to identify reasons for different regulatory approaches in the regulations dealing with monetary claims, clear out the issues regarding their interpretation, and investigate whether a universal provision on irreconcilability could replace the existing ones.

4. The research focuses on the EU regulations dealing with cross-border collection of monetary claims, as they share common features, including similar refusal grounds, which allows for joint conclusions.¹⁴ The selected regulations include: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast)¹⁵ and its predecessors 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention)¹⁶ and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)¹⁷; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (EEOR)¹⁸; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (EOPR);¹⁹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (ESCPR);²⁰ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial

ica, n° 8(2), December 2016; T. HOŠKO, *cit.*; B. HESS, T. PFEIFFER, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law (Study)*, Brussels, European Parliament, 2011; J. KRAMBERGER ŠKERL, *cit.*; P. BEAUMONT, E. JOHNSTON, “Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy Defence?”, *Journal of Private International Law*, n° 6(2), August 2010; A. MILLS, “The Dimensions of Public Policy in Private International Law”, *Journal of Private International Law*, n° 4(2), August 2008; D. de Roover, “Public Policy as a Refusal Ground: Well Regulated?”, *Tilburg Foreign Law Review*, n° 8(1), January 1999; etc.

¹¹ Heidelberg report - Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States presented by B. Hess, T. Pfeiffer and P. Schlosser, Study JLS/C4/2005/03, Final version September 2007, Ruprecht-Karls-Universität Heidelberg, p. 563.

¹² See e.g., Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143/15 of 30 April 2004; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/1 of 30 December 2006; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/1 of 31 July 2007.

¹³ In particular, see CJEU, C-700/20, *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain*, 20 June 2022, ECLI:EU:C:2022:488.

¹⁴ In addition, monetary claims have a different enforcement mechanism from that of the enforcement for other types of judgments, e.g. where children are involved. The irreconcilability ground of refusal in such Regulations are often reversed, in the sense that the latter judgment takes precedence over the earlier one (e.g. Art. 39(1)(d) of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), L 178/1 of 02 July 2019).

¹⁵ Brussels I Recast, Arts. 45-51.

¹⁶ Brussels Convention, Arts. 27, 28, 34.

¹⁷ Brussels I Regulation, Arts. 34, 35, 45.

¹⁸ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Official Journal of the European Union, L 143/15 of 30 April 2004 (EEOR), Art. 21.

¹⁹ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/1 of 30 December 2006 (EOPR), Art. 22.

²⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/1 of 31 July 2007 (ESCPR), Art. 22.

matters (EAPOR)²¹; and Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation).²²

5. Following the Introduction, Chapter II. sets the scene with an overview of historical development of grounds of refusal under the EU regulations dealing with monetary claims. In Chapter III., the notion of ‘irreconcilable judgments’ is defined, while Chapter IV. focuses specifically on the features of the irreconcilability ground of refusal in the above listed regulations. Their provisions are analysed along with the CJEU and national case law, including that collected within the *EFFORTS Project*²³ and the *IC2BE Project*²⁴. This gives way for a proposal to improve the irreconcilability refusal ground. Finally, in Chapter V., conclusions are drawn on the general functioning of the ground in the current system, and summary of the *de lege ferenda* proposals is put forward.

II. Historical overview

6. The dates of 15 and 16 October 1999 mark an important turning point in the development of the rules on recognition and enforcement of judgments among the Member States. It was at this point that the European Council adopted conclusions in Tampere, with the aim of gradual abolishment of intermediate measures, *i.e.*, the exequatur procedure in cross-border recognition and enforcement of judgments in the EU.²⁵ While the process was in no way easy, it could be said that the goal of the Tampere Council was achieved in the regulations concerned with monetary claims, despite differences among the regulations, which result from a particular stage of development of free movement of judgments in the EU.²⁶ The greatest leap was made by abolishing the exequatur in Brussels I Recast, while the

²¹ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189/59 of 27 June 2014 (EAPOR), Art. 34.

²² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1 of 10 January 2009 (Maintenance Regulation), Art. 21. The Maintenance Regulation is thus the only instrument selected for this research that relates to family matters, as opposed to the rest of the regulations in civil and commercial matters. This was done as its scope relates directly to monetary claims, and was previously included under the Brussels I Regulation. Although some additional regulations could also be regarded as dealing with monetary claims, such as e.g. Insolvency Regulation [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141/19 of 05 June 2015], Succession Regulation [Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107 of 27 July 2012] or Twin Regulations [Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183/1 of 08 July 2016; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30 of 08 July 2016], these are not included in this research due to the fact that either their scope of application is specific to areas that are not primarily concerned with monetary claims as such and could thus be regarded only in part, or they concern specific areas that, due to their particular features, should be analysed separately from the rest.

²³ ‘Towards more Effective enforcement of claims in civil and commercial matters within the EU’; Project JUST-JCOO-AG-2019-881802; with financial support from the Civil Justice Program of the European Union. Reports available at: Collection of national case-law - Efforts (unimi.it).

²⁴ ‘Informed Choices in Cross-Border Enforcement’; financed by the European Union under the Civil Justice Programme 2014-2020. Database available at: IC2BE (uantwerpen.be).

²⁵ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, available at: https://www.europarl.europa.eu/summits/tam_en.htm. See also P. BEAUMONT, E. JOHNSTON, *cit.*, p. 249; P. BEAUMONT, L. WALKER, “Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project”, *Journal of Private International Law*, n° 11(1), June 2015, p. 32.

²⁶ S. HUBER, “Koordination europäischer Zivilprozessinstrumente”, in R. GEIMER, R. SCHÜTZE (eds.), *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag*, Berlin/Boston, Otto Schmidt/De Gruyter european law publishers, 2012, p. 428.

Maintenance Regulation was enacted without such requirement from the outset. In addition, a number of new, so-called ‘second-generation instruments’²⁷ (*i.e.*, EEOR, EOPR, ESCPR and EAPOR), which did not require a declaration of enforceability, were passed – most of them even before Brussels I Recast and the Maintenance Regulation.²⁸ This approach may be attributed to the distinguishing feature of the second-generation instruments – their regulatory scheme, which each integrates rules on a special civil procedure and rules on recognition and enforcement, and which, coupled with the set of predefined forms, contributes to the uniformity in the respective procedures in all Member States and thus reduces the need for recognition and enforcement ‘check points’. In this way, the free movement of judgments was established in (almost) full sense of the word. By improving efficiency of cross-border enforcement, this regulatory advancement should contribute to the general welfare in the EU.²⁹

7. Despite the significant progress, mutual trust between the Member States is still not as strong as it may seem.³⁰ It functions as a presumption, which is rebuttable based on the limited number of refusal grounds in a particular regulation.³¹ The purpose of retaining the respective ‘check point’ or a ‘judgment inspection’,³² is primarily to address certain procedural irregularities and to ensure that the defendant had a fair trial.³³ Regardless of which grounds remain available, it is seen as an exception to the general principle of free movement of judgments,³⁴ and should thus be interpreted restrictively.³⁵ The highest number of refusal grounds remains in the Brussels I Recast: public policy exception, irreconcilability with other judgments, guarantee of due process, and security of certain protective jurisdictional rules. As such, these grounds seem to be ‘time-proof’ as they have not changed much since the Brussels Convention was in place.³⁶ In the rest of the regulations, only some of these grounds remain – in majority of the regulations,³⁷ the ground of irreconcilability is the last one standing.

²⁷ P. MANKOWSKI, “The impact of the Brussels Ibis Regulation on the ‘second generation’ of European procedural law”, in P. MANKOWSKI (ed.), *Research Handbook on The Brussels Ibis Regulation*, Cheltenham, Edward Elgar Publishing Limited, 2020, pp. 230-249. See also J. VON HEIN, T. IMM, “Introduction: Practical Challenges and Research Aims”, in J. VON HEIN, T. KRUGER (eds.), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives*, Cambridge, Intersentia, 2021, p. 4; B. HESS, “The State of the Civil Justice Union”, in: B. HESS, M. BERGSTROM, E. STORSKRUBB (eds.), *EU Civil Justice. Current Issues and Future Outlook*, Bloomsbury Publishing, 2016, p. 4; E. STORSKRUBB, “EU Civil Justice at the Harmonisation Crossroads?”, in A. NYLUND, M. STRANDBERG (eds.), *Civil Procedure and Harmonisation of Law*, Cambridge, Intersentia, 2019, p. 18.

²⁸ J. VON HEIN, T. IMM, *cit.*, p. 7.

²⁹ G. CUNIBERTI, “The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency”, *International and Comparative Law Quarterly*, n° 57(1), January 2008, p. 47.

³⁰ M. WELLER, “Mutual Trust: In Search of the Future of European Union Private International Law”, *Journal of Private International Law*, n° 11(1), May 2015, pp. 66, 67.

³¹ I. KUNDA, “Međunarodnoprivatnopravni odnosi”, in E. MIŠČENIĆ (ed.), *Europsko privatno pravo. Posebni dio*, Zagreb, Školska knjiga, 2021, p. 497.

³² M. HAZELHORST, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, The Hague, T.M.C. Asser Press, 2017, pp. 51, 52.

³³ As provided in the European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>, Art. 6) and Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights of the European Union, OJ C 326/391 of 26 October 2012), Art. 47).

³⁴ T. KERESTEŠ, M. REPAS, “Grounds for Refusal of Recognition and Enforcement in the Brussels I Recast”, in V. RIJAVEC, W. KENNETT, T. KERESTEŠ, T. IVANČIĆ (eds.), *Remedies Concerning Enforcement of Foreign Judgements. Brussels I Recast*, Alphen aan den Rijn, Wolters Kluwer, 2018, p. 196.

³⁵ CJEU, C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch*, 2 June 1994, ECLI:EU:C:1994:221, para. 20; CJEU, C-7/89, *Dieter Krombach v André Bamberski*, 28 March 2000, ECLI:EU:C:2000:164, para. 21; CJEU, C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, 11 May 2000, ECLI:EU:C:2000:225, para. 26. See also H. ŠIKIRIĆ, “Razlozi za odbijanje priznanja i ovrhe sudskih odluka po Uredbi Vijeća (EZ) br. 44/2001 od 22. prosinca 2000. o sudskoj nadležnosti i priznanju i ovrši odluka u građanskim i trgovačkim predmetima”, *Zbornik Pravnog fakulteta u Zagrebu*, n° 60(1), February 2010, p. 62.

³⁶ X. KRAMER, “Cross-border enforcement and the Brussels I-bis regulation: Towards a new balance between mutual trust and national control over fundamental rights”, *Netherlands International Law Review*, n° 60(3), November 2013, p. 363. See also *European Commission*, Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) Final Report (Publications Office of the European Union, 2023), p. 246.

³⁷ With the exception of EAPOR.

8. The reason for omnipresence of the irreconcilability ground of refusal may be found in its purpose. It aims to avoid the disturbance in the legal order of the Member State of enforcement which would be created if conflicting judgments would be allowed to coexist.³⁸ In other words, it is justified by the aim of avoiding *bis in idem* in cross-border litigation,³⁹ whereby it assures the coherence among parties' rights and obligations within a legal system of individual Member States. Thus, it ensures the smooth functioning of the EU's area of freedom, security and justice.⁴⁰

9. The situation in which the irreconcilable judgments are given in two different EU Member States relates to the failure of the courts to respect the rule of *lis pendens*, provided in Articles 29-32 of the Brussels I Recast or Article 12 of the Maintenance Regulation. The *lis pendens* rule aims to resolve such situations pre-emptively, which explains why this refusal ground is seldom relied on.⁴¹ However, the rules of *lis pendens* in the Brussels I Recast do not cover the related proceedings pending before the courts of a Third State – in such cases, Brussels I Recast only provides a margin of discretion for the judges of a court in a Member State to stay the proceedings.⁴² Thus, the risk of irreconcilable judgments in EU rises. Additionally, if the proceedings in a Third State commence after those in a Member State, the risk of conflicting judgments rises again, as Third States are not bound by the EU rules on *lis pendens*. Here, the risk of conflicting judgments may still be mitigated in instances where international conventions which regulate *lis pendens*, e.g. Lugano Convention,⁴³ are applicable.

10. Regardless of the fact that irreconcilable judgments will oftentimes be avoided beforehand, the risk of parallel proceedings cannot be regarded as trivial,⁴⁴ as such situations still occur, and when they do, it is necessary to provide means to deal with them. Considering that the enforcement of conflicting and mutually exclusive judgments is practically impossible,⁴⁵ it does not come as a surprise that this ground of refusal still holds its place even in the regulations that otherwise abolished all refusal grounds.

III. Irreconcilable judgments

11. Before dealing with specific provisions in the regulations, this Chapter aims to offer analysis of the concept of 'irreconcilable judgments' by addressing in turn the notions of 'judgment' and 'irreconcilability'.

A) The notion of 'judgment'

12. In the course of recognition and enforcement, two judgments confront each other: the judgment whose enforcement is sought and the judgment with which the first one is irreconcilable.

³⁸ P. MANKOWSKI, "Article 45", in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law. Commentary. Brussels Ibis Regulation*, Köln, Verlag Dr. Otto Schmidt KG, 2nd edition, 2023, p. 887; T. KERESTEŠ, M. REPAS, *cit.*, p. 214.

³⁹ P. OREJUDO PRIETO DE LOS MOZOS, "La incompatibilidad de decisiones como motivo de denegación de la ejecución de los títulos ejecutivos Europeos", *Anuario Español de Derecho Internacional Privado*, n°9, 2009, p. 272.

⁴⁰ J. KUIPERS, "The Right to a Fair Trial and the Free Movement of Civil Judgments", *Croatian Yearbook of European Law and Policy*, n° 6, December 2010, p. 32.

⁴¹ A. GIUSSANI, "Grounds for refusal of recognition of foreign judgments: Developments and perspectives in EU Member States regarding public order and conflicting decisions", in V. RUJAVEC, K. DRNOVŠEK, C. H. VAN RHEE (eds.), *Cross-Border Enforcement in Europe: National and International Perspectives*, Cambridge, Intersentia, 2020, p. 60.

⁴² Brussels I Recast, Art. 33(1).

⁴³ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention), OJ L 339/3 of 21 December 2007.

⁴⁴ Y. FARAH, S. HOURANI, "Frustrated at the interface between court litigation and arbitration? Don't blame it on Brussels I! Finding reason in the decision of West Tankers, and the recast Brussels I", in P. STONE, Y. FARAH (eds.), *Research Handbook on EU Private International Law*, Cheltenham, Edward Elgar Publishing Limited, 2015, p. 120.

⁴⁵ M. HAZELHORST, *cit.*, pp. 46, 55.

a) ‘Judgment’ whose enforcement is sought

13. For the purpose of interpreting the notion of ‘judgment’ whose enforcement is sought, one should turn to the autonomous definition of ‘judgment’ provided in the regulation relevant in the case at hand.⁴⁶ Regardless of certain particularities, the definitions provided in the EU regulations on monetary claims only contain minimal differences; thus, it could be stated that a ‘judgment’ equals ‘any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.’⁴⁷ The Maintenance Regulation in its Art. 2(1)(1) uses the same definition, but employs the term ‘decision’ instead of ‘judgment’. This may be prescribed to the specific nature of the matters that fall under the scope of the Maintenance Regulation, as opposed to the rest. Regardless, the identical definition points to the fact that the concept of ‘decision’ in the Maintenance Regulation, and the concept of ‘judgment’ in the rest of the regulations, are essentially the same.

14. In Brussels I Recast, another element is added specifically in regard to its Chapter III on recognition and enforcement, stating that the notion of ‘judgment’ ‘includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this regulation has jurisdiction as the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement’.⁴⁸

15. While the concept of ‘judgment’ is certainly broad, there must be an actual judgment – a court settlement or an arbitral award do not qualify as ‘judgments’.⁴⁹ The notion of ‘judgment’, however, will include the ‘consent judgments’,⁵⁰ typically found in the legal systems of some Member States, such as Croatia⁵¹ and Slovenia.⁵² While such judgments are referred to as ‘court settlements’ in national laws of those Member States, this notion should not be confused with the notion of ‘court settlements’ under the EU private international law, in particular under Article 2(b) of Brussels I Recast, because they do not have the same meaning. Owing to their special features, including the *res iudicata* effect, the ‘consent judgments’ warrant the inclusion under the notion of ‘judgments’ within the meaning of both Article 2(a) and Article 45 of Brussels I Recast.⁵³

⁴⁶ For Brussels I Recast, Art. 2; for EEOR, Art. 4; for EAPOR, Art. 4(8). The Maintenance Regulation employs a different terminology and uses the term ‘decision’, but the definition provided in its Art. 2 shows that it is essentially the same concept as the term ‘judgment’, and can be used interchangeably. The EOPR and ESCPR do not provide the definition of ‘judgment’ as it was unnecessary due to the self-standing, written nature of these particular procedures.

⁴⁷ Brussels I Recast, Art. 2; EEOR, Art. 4(1); EAPOR, Art. 4(8), leaves out the word ‘tribunal’ and the offered examples (‘decree, order, decision or writ of execution’).

⁴⁸ Brussels I Recast, Art. 2. This addition represents the codification of the finding in the ruling in CJEU, C-125/79, *Bernard Denilauler v SNC Couchet Frères*, 21 May 1980, ECLI:EU:C:1980:130. Decisions within the EAPOR are of no relevance in this context because the CJEU provides an interpretation about the quality of a judgment which makes it apt for enforcement and not about the notion of judgment itself (CJEU, C-555/18, *K.H.K. v B.A.C., E.E.K.*, 7 November 2019, ECLI:EU:C:2019:937, para. 44; CJEU, C-291/21, *Starkinvest SRL*, 20 April 2023 ECLI:EU:C:2023:299, para. 56).

⁴⁹ See CJEU, C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch*, 2 June 1994, ECLI:EU:C:1994:221, para. 20.

⁵⁰ Heidelberg report - Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States presented by B. Hess, T. Pfeiffer and P. Schlosser, Study JLS/C4/2005/03, Final version September 2007, Ruprecht-Karls-Universität Heidelberg, p. 66, 277. See also A. LAYTON, H. MERCER (gen. eds.), *European Civil Practice (Vol 1)*, London, Sweet & Maxwell, 2nd edn, 2004, p. 869; I. KUNDA, M. TIČIĆ, “Authentic Instruments and Court Settlements Under the Twin Regulations”, in L. RUGGERI, A. LIMANTÉ, N. POGORELČNIK VOGRINC (eds.), *The EU Regulations on Matrimonial Property and Property of Registered Partnerships*, Cambridge, Intersentia, 2022, pp. 72-74.

⁵¹ Croatian Civil Procedure Act (*Zakon o parničnom postupku*), Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19 (2019) Arts. 321, 322.

⁵² Slovenian Civil Procedure Act (*Zakon o pravdnem postopku*) Uradni list Republike Slovenije, No. 73. (2007) Arts. 306, 307. See also A. GALIČ, “Vloga sodnika pri spodbujanju sodnih poravnav”, *Zbornik Znanstvenih Razprav*, n° 62, 2002.

⁵³ I. KUNDA, M. TIČIĆ, *cit.*, pp. 73-74: The court settlements in Croatia and Slovenia represent an agreement by the parties which is made before the court, entered in the minutes of the proceedings and signed by all parties. The court ensures that there are no ongoing proceedings on the same matter. Only then does the court settlement becomes final and enforceable, and also acquires the *res iudicata* effect.

16. What remains unnoticed by the relevant regulations is the definition of a Third State ‘judgment’. As visible from the above, the definition of ‘judgment’ is only given in relation to those originating from another Member State.⁵⁴ For the purpose of the notion of a ‘judgment’ from a Third State, no guidance is given in any of the EU regulations dealt with in this paper nor in the CJEU case law. While turning to international conventions may be possible at some instances,⁵⁵ in others, there is no clear answer. Therefore, by analogy, the definition of ‘judgment’ from a Third State should be the same as of a Member State ‘judgment’.

b) The conflicting ‘judgment’

17. To trigger the irreconcilability refusal ground there needs to be an actual judgment standing in conflict with the one whose enforcement is sought. Conversely, a pending proceeding that could potentially lead to an irreconcilable judgment does not warrant refusal of enforcement of an already existing judgment. This holds true even if proceedings are pending in the Member State of enforcement, as correctly held by the decisions of the French⁵⁶ and Spanish⁵⁷ courts. This requirement has been expressed in both provisions in Article 45(1)(c) and (d) of Brussels I Recast using the phrase ‘judgment given’. A clear prerequisite of a ‘given’ judgment is that such judgment must be already rendered by the court at the stage where enforcement is sought, whether that be by the Member State of enforcement, other Member States or in a Third State.⁵⁸ A judgment can be considered as ‘given’ when it produces legal effects according to the law of the Member State or Third State of origin.⁵⁹

18. A question that inevitably follows is whether a ‘judgment given’ must have become *res iudicata* at the point where the enforcement of an irreconcilable judgment is being sought. Some commentators point out that, in a view of the lack of any provision to that effect in the regulations, the judgment does not have to acquire the status of *res iudicata*. They state that the judgment only has to be ‘given’ and that the request for *res iudicata* would thus qualify as an additional requirement and would expand the conditions provided by applicable legal provision.⁶⁰ Such conclusion is drawn on the bases of the CJEU’s ruling in *Italian Leather*, which dealt with irreconcilable decisions on interim measures. The CJEU stated that ‘it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance’ and that ‘as Article 27(3) of the Brussels Convention [now, Article 45(1)(c) of the Brussels I Recast] (...) refers to ‘judgments’ without further precision, it has general application’.⁶¹ This ruling cannot, however, provide basis for the above conclusion on *res iudicata* as it only confirms that decisions on interim measures are included under the notion of ‘judgments’ in the provisions providing for irreconcilability as a refusal ground – this is clear given that the case dealt with two decisions on interim measures.⁶²

19. Further arguments to the contrary may also be made. It appears counterintuitive that a judgment which acquired the status of *res iudicata* may be denied enforcement on the basis of its irreconcilability with an ‘earlier’ judgment which is still subject to an appeal, and may soon be overturned.⁶³ In

⁵⁴ See Brussels I Recast, Art. 2(a); EEO, Art. 4(1); EAPOR, Art. 4(8); Maintenance Regulation, Art. 2(1)(1).

⁵⁵ See e.g. Lugano Convention, Art. 32.

⁵⁶ EFFORTS Project, Report on French Case Law, available at: D2.11-Report-on-French-case-lawCONFIRMED.pdf (unimi.it), p. 36.

⁵⁷ INDUKERN S.A. Roj: AAP B 4357/2008 - ES:APB:2008:4357A, IC2BE National Case Database, available at: IC2BE INDUKERN S.A. Roj: AAP B 4357/2008 - ES:APB:2008:4357A (uantwerpen.be).

⁵⁸ P. MANKOWSKI, ‘Article 45’, *cit.*, p. 888.

⁵⁹ P. MANKOWSKI, ‘Article 45’, *cit.*, p. 894.

⁶⁰ P. MANKOWSKI, ‘Article 45’, *cit.*, p. 888.

⁶¹ CJEU, C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, 6 June 2002, ECLI:EU:C:2002:342, para. 41.

⁶² The question of whether there is a possibility of a different outcome were the decisions not of an equal status will be dealt in the following Chapter.

⁶³ In such situations, however, it may be advisable for the enforcing court to stay its proceedings. See e.g. A. LAYTON, H. MERCER, *cit.*, p. 921; P. MANKOWSKI, ‘Article 45’, *cit.*, p. 893.

addition, according to the Jenard Report, discretion in regards to taking into account the differing status of irreconcilable judgments is left to the court before which the enforcement is sought.⁶⁴ Therefore, the resolution of this question could vary among the Member States. This interpretation is certainly not without problems – not only for the reason of potentially differing interpretations between the Member States, but also because it does not resolve the above-described scenario. Based on the current understanding, however, such scenario may not be fully excluded.

20. Lastly, it has been noted by some authors that the scope of ‘judgment given’ which may prevent enforcement of another judgment based on irreconcilability is broader than the scope of ‘judgment’ whose enforcement is sought – it expands also to some decisions that would not otherwise fall under the general notion, *i.e.*, to decisions outside of the material scope of the regulation in question.⁶⁵ An example of irreconcilable judgments is: a judgment awarding maintenance on the ground of paternity and a judgment which does not recognise the paternity.⁶⁶ This is justified by reason of unacceptability of simultaneous legal effects of conflicting judgments in the same legal system, regardless of the fact that these judgments do not fall under the scope of the same regulation.⁶⁷ Recognising that this extension should be accepted as justified means of resolving the conflict between the judgments, it is submitted that it does not alter the notion of ‘judgment’ as such, but only enables the court to take account of the earlier judgment which is outside the material scope of the regulations applicable to enforcement in a particular case.

21. As a rule, arbitral awards do not qualify as ‘judgments’ relevant for the purpose of irreconcilability because arbitration is outside the scope *ratione materiae* of Brussels I Recast⁶⁸ and arbitral awards are recognised and/or enforced among the Member States under the applicable convention.⁶⁹ However, under certain conditions established in *London Steam-Ship Owners*,⁷⁰ arbitral awards can still stand on the way of recognition or enforcement of judgment from another Member State. In this case, the CJEU interpreted the notion of ‘judgment’ under Article 34(3) of the Brussels I Regulation (now, Article 45(1)(c) of Brussels I Recast). The case dealt with the procedural aftermath of the sinking of the oil tanker *Prestige*. While criminal proceeding with the attached civil claims were pending before Spanish courts, arbitration proceedings were commenced in London, at the initiation of the London P&I Club, *i.e.*, liability insurer of the *Prestige*. Two judgments were delivered: 1) the London arbitral award was delivered first, and concluded that the London P&I Club is not liable before the damages are paid by the owners of the *Prestige*;⁷¹ importantly, the judgment in terms of this award was handed down by the English court, and 2) the Spanish judgment ordering the Club payment of damages. After the Spanish judgment was submitted for recognition in England, a question of whether the English judgment entered in terms of the London arbitral award falls under the notion of ‘earlier judgment’ in Article 34(3) of the Brussels I Regulation.

22. The CJEU stated that an English judgment entered in terms of the arbitral award could be regarded as an ‘earlier judgment’ within the meaning of Article 34(3) of the Regulation if a judicial

⁶⁴ *European Council*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59/1 of 05 March 1979, p. 45.

⁶⁵ B. HESS, “Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners’ Mutual Insurance Association. Case C-700/20, *London Steam-Ship Owners’ Mutual Insurance Association v. Kingdom of Spain*, Judgment of the Court of Justice (Grand Chamber) of 20 June 2022, EU:C:2022:488”, *Common Market Law Review*, n° 60, April 2023, p. 538; A. MOURRE, “Is Commercial Arbitration Entering in Dangerous Waters in the European Union”, *Asian International Arbitration Journal*, n° 19(1), May 2023, p. 3.

⁶⁶ P. MANKOWSKI, “Article 45”, *cit.*, p. 892.

⁶⁷ T. HARTLEY, “Arbitration and the Brussels I Regulation – Before and After Brexit”, *Journal of Private International Law*, n° 17, May 2021, p. 72.

⁶⁸ Brussels I Recast, Art. 1(2)(d).

⁶⁹ The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

⁷⁰ CJEU, C-700/20, *London Steam-Ship Owners’ Mutual Insurance Association Limited v Kingdom of Spain*, 20 June 2022, ECLI:EU:C:2022:488.

⁷¹ In accordance with the ‘pay to be paid’ clause which can be found in all of the insurance contracts concluded with the P&I Clubs.

decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of the Regulation. Because in the case at hand the arbitral award in terms of which that English judgment was entered violated the relative effect of an arbitration clause included in an insurance contract and the rules of *lis pendens* in the Brussels I Regulation, this English judgment did not constitute an ‘earlier judgment’ within the meaning of Article 34(3) of the Regulation, and could not act as an obstacle to the recognition and/or enforcement of the Spanish judgment.⁷² This was hardly the end of the *Prestige* legal saga since the second arbitral proceedings were still pending at the time the CJEU judgment was made, and the High English Court ruled in October 2023 not to be bound by the CJEU judgment, finding it to be *ultra vires*.⁷³

23. Regardless of these developments and criticism directed against the CJEU judgment, as well as the fact that UK is no longer a Member State, *London Steam-Ship Owners* still requires analysis because it casts a different light on the interpretation of irreconcilability ground of refusal. On the one hand, the ruling confirms that the notion of ‘judgment’ irreconcilable with the one whose enforcement is sought is broader than the notion of ‘judgment’ whose enforcement is sought, and includes judgments entered in terms of arbitral awards. On the other hand, this is limited by additional requirement – that the arbitral award in terms of which the judgment is entered must not have been made ‘in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation’.⁷⁴ This means that, in case of alleged irreconcilability of judgments, the court of the Member State of enforcement will have to determine whether the arbitral award in question was delivered in accordance with the principles underlying EU judicial cooperation in civil matters which would have been applicable if, instead of the arbitral tribunal, the matter was decided by a court.

24. It is worth assessing whether this CJEU ruling should be codified in by the future amendments of Brussels I Recast, given such practice in the past. Codifications of this sort serve either as corrections⁷⁵ or reminders⁷⁶ to assure proper interpretation by the national courts. However, it is submitted that the ruling in *London Steam-Ship Owners* need not be so codified in future for the following reasons. Rather than serving the above-mentioned purposes, the additional clarification of legal situation of judgments entered in terms of arbitral awards would unnecessarily burden the legislative text which otherwise does not enumerate individual situations dealt with in the CJEU case law on grounds for refusal. In addition, these situations seem to be not only extremely rare, but also unknown in many Member States. Hence, any corresponding amendment might potentially confuse the national courts rather than clarify the situation. Having said that, if it is established that there is a need to make the courts particularly aware of this CJEU ruling, an option of including such clarification in the recitals remains as a viable alternative to codification.

B) The notion of ‘irreconcilability’

25. Another concept whose understanding is indispensable in the context of the analysed ground of refusal is the notion of ‘irreconcilability’. This notion is to be interpreted autonomously and means

⁷² CJEU, C-700/20, *London Steam-Ship Owners’ Mutual Insurance Association Limited v Kingdom of Spain*, 20 June 2022, ECLI:EU:C:2022:488, paras. 43, 53, 54, 59.

⁷³ English High Court, *The London Steam-Ship Owners’ Mutual Insurance Association Limited v The Kingdom of Spain (M/T ‘Prestige’)* [2023] EWHC 2473 (Comm), paras. 214-233.

⁷⁴ CJEU, C-700/20, *London Steam-Ship Owners’ Mutual Insurance Association Limited v Kingdom of Spain*, 20 June 2022, ECLI:EU:C:2022:488, para. 54.

⁷⁵ For instance, Art. 31(2) of Brussels I Recast changed the previous interpretation of CJEU in case C-116/02, *Erich Gasser GmbH v MISAT Srl.*, 9 December 2003, ECLI:EU:C:2003:657.

⁷⁶ For instance, the second part of Art. 2(a) on provisional measures was added to Brussels I Recast as a result of the CJEU ruling in case C-125/79, *Bernard Denilauler v SNC Couchet Frères*, 21 May 1980, ECLI:EU:C:1980:130.

that judgments are irreconcilable if they ‘entail legal consequences that are mutually exclusive’.⁷⁷ Actually, the conditions of irreconcilability are to be interpreted by analogy with those for *lis pendens* in Article 29 of the Brussels I Recast.⁷⁸ The ‘same cause of action’ requirement is to be interpreted liberally,⁷⁹ and comprises of ‘the facts and rule of law relied on as a basis of the action.’⁸⁰ At the same time, it must be assessed what question ‘lies at the heart of the two actions’ which are in conflict.⁸¹ This concept is therefore not restricted to cases where applicable substantive laws are the same.⁸² What matters is that subject-matter is equal, while claims can differ.⁸³ Additionally, for the assessment of whether two claims have the ‘same cause of action’, account should be taken only of the respective claims, and not on the defence submitted by the defendant.⁸⁴

26. *Hoffmann* provides an illustration of the above point.⁸⁵ The case dealt with one decision concerning maintenance (which at the time was under the scope of the Brussels Convention), and other concerning divorce. The decisions were still deemed irreconcilable, as the maintenance was one party’s conjugal obligation and dependent on the existence of marriage, which was dissolved by the decision on the divorce.⁸⁶ Other examples of irreconcilable judgments in the national case law include the decision of the French Court of Appeal in which it held that an Italian order for payment was irreconcilable with a French judgment ordering the debtor to comply with a settlement agreement which was signed between the parties beforehand, as both were dealing with the same claim.⁸⁷ Further such cases include judgment awarding damages for failure to perform a contract and a judgment between the same parties which declares that the contract in question is invalid;⁸⁸ a judgment concluding that a person is liable for damage to someone’s cargo and a judgment denying such liability;⁸⁹ an interim order urging the defendant to stop using a certain trade name could be irreconcilable with a judgment that dismisses application for equal relief.⁹⁰

27. The irreconcilability between the judgments must therefore arise in terms of their effects, not differences among provisions of substantive or procedural law, as they may not necessarily be irreconcilable solely based on that.⁹¹ The requirement of irreconcilability was deemed as not met in the case before the Court of Appeal of Versailles,⁹² which clarified that certificate issued under the Brussels I Regulation is not irreconcilable with the withdrawal of the certificate issued under EEOR, although both certificates were given in relation to the same claim.⁹³ Further examples of judgments that are not deemed irreconcilable include judgments between the same parties, but concerning different

⁷⁷ CJEU, C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61, para. 22.

⁷⁸ P. MANKOWSKI, ‘Article 45’, *cit.*, p. 894.

⁷⁹ A. LAYTON, H. MERCER, *cit.*, p. 776.

⁸⁰ CJEU, C-406/92, *The owners of the cargo lately laden on bord the ship ‘Tatry’ v The owners of the ship ‘Maciej Rataj’*, 6 December 1994, ECLI:EU:C:1994:400, para. 39.

⁸¹ CJEU, C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, 8 December 1987, ECLI:EU:C:1987:528, para. 16.

⁸² A. LAYTON, H. MERCER, *cit.*, p. 776.

⁸³ CJEU, C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, 8 December 1987, ECLI:EU:C:1987:528, para. 17.

⁸⁴ CJEU, C-111/01, *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV*, 8 May 2003, ECLI:EU:C:2003:257, para. 32.

⁸⁵ CJEU, C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61, paras. 3, 4.

⁸⁶ CJEU, C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61, para. 24.

⁸⁷ EFFORTS Project, Report on French Case Law, available at: D2.11-Report-on-French-case-lawCONFIRMED.pdf (unimi.it), pp. 18, 36.

⁸⁸ See by analogy to the *lis pendens* situation, CJEU, C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, 8 December 1987, ECLI:EU:C:1987:528, paras 16, 17; *European Council*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59/1 of 05 March 1979, p. 45; A. LAYTON, H. MERCER, *cit.*, p. 919.

⁸⁹ A. BRIGGS, *The Conflict of Laws*, New York, Oxford University Press, 2002, p. 126.

⁹⁰ A. BRIGGS, *Civil Jurisdiction and Judgments*, Abingdon, Informa law from Routledge, 7th edn, 2021, p. 743.

⁹¹ A. LAYTON, H. MERCER, *cit.*, p. 919.

⁹² EFFORTS Project, Report on French Case Law, available at: D2.11-Report-on-French-case-lawCONFIRMED.pdf (unimi.it), p. 48, 49.

⁹³ This is due to the fact that, according to Art. 27 of the EEOR, the EEOR does not affect the possibility of seeking recognition and enforcement in accordance with the Brussels I Regulation. Therefore, some inconsistent decisions delivered on the basis of the EEOR and Brussels I Regulation (or Brussels I Recast) may exist, but do not necessarily qualify as irreconcilable judgments.

contracts;⁹⁴ judgments accepting jurisdiction of the court of the forum and a different judgment on the merits;⁹⁵ judgments which are based upon different findings of facts;⁹⁶ a judgment ordering the seller to compensate for damage due to the lack of goods and a judgment ordering the buyer to pay the price of the purchase (as both can be executed simultaneously via set-off);⁹⁷ a judgment that a party is liable for damage to cargo and a judgment ordering payment of damages for short delivery.⁹⁸

28. The notion of ‘irreconcilability’ also raises an issue of the assessment of the status of the judgments which are in conflict. As previously established, judgments which are in conflict need not be of equal status, e.g. one may be a *res iudicata*, while another may still be under appeal. According to the current rules, there seems to be no ‘hierarchy’ of decisions when assessing their irreconcilability. In a situation of conflict between a judgment on the merits and a provisional decision, commentators have concluded that these do not necessarily have to be irreconcilable, as their consequences may be different.⁹⁹ This may generally be true, as a judgment on the merits and an interim judgment do not produce the same effect; on the contrary, interim measure will usually cease to have effect after a judgment on the merits is issued.¹⁰⁰ This is certainly the case where interim measure is issued by the court of a Member State which has jurisdiction as to the substance of the matter. However, interim measures can also be issued by other courts, which do not have jurisdiction as to the substance.¹⁰¹ Although such measures do not benefit from the EU rules on mutual recognition and enforcement,¹⁰² it does not mean that they cannot be enforceable under the national rules. As confirmed in *TOTO*, there is no hierarchy between different grounds of jurisdiction for issuing such measures, which in turn allows for variance of interim measures to be issued by different courts, from different Member States.¹⁰³ Thus, irreconcilability can arise between an interim judgment and a judgment on the merits.¹⁰⁴ On such occasion, could the enforcement of judgment on the merits be refused based on the ground of irreconcilability with the provisional measure? As provisional measures do fall under the notion of ‘judgment’, the answer seems to be affirmative. In cases where the conflicting interim judgment is a domestic one, *i.e.*, rendered by a court in the Member State of enforcement, the possibility of refusal on the basis of Article 45(1)(c) of the Brussels I Recast is even greater. This solution is unfortunate; however, as stated above, it will depend on the court of the Member State of enforcement, which will have discretion over this issue.¹⁰⁵

IV. Irreconcilability ground(s) of refusal

29. After analysing the notion of ‘irreconcilable judgments’, the following analysis will focus in more detail on the provisions of the selected regulations, with the aim of detecting whether variations in

⁹⁴ P. MANKOWSKI, “Article 45”, *cit.*, p. 892.

⁹⁵ P. MANKOWSKI, “Article 45”, *cit.*, p. 892.

⁹⁶ A. LAYTON, H. MERCER, *cit.*, p. 919.

⁹⁷ H. SIKIRIĆ, *cit.*, p. 87.

⁹⁸ A. BRIGGS, *The Conflict...*, *cit.*, p. 126.

⁹⁹ A. LAYTON, H. MERCER, *cit.*, p. 920; P. MANKOWSKI, “Article 45”, *cit.*, p. 892.

¹⁰⁰ X. KRAMER, “Case C-80/00, Italian Leather SpA v. WEICO Polstermöbel GmbH & Co., European Court of Justice, 6 June 2002”, *Common Market Law Review*, n° 40, August 2003, p. 961.

¹⁰¹ Brussels I Recast, Art. 35. See also V. RIJAVEC, “Cross-border Effects of Provisional Measures in Civil and Commercial Matters”, in V. RIJAVEC, T. IVANC, *Cross-border Civil Proceedings in the EU (Conference Papers)*, Maribor, Univerza v Mariboru, Pravna fakulteta, 2011, p. 85.

¹⁰² Brussels I Recast, Art. 2(a); recital 33 of the Preamble.

¹⁰³ CJEU, C-581/20, *Skarb Państwa Rzeczypospolitej Polskiej reprezentowany przez Generalnego Dyrektora Dróg Krajowych i Autostrad v TOTO SpA - Costruzioni Generali and Vianini Lavori SpA*, 6 October 2021, ECLI:EU:C:2021:808. See also G. CUNIBERTI, “CJEU Rules on Parallel Interim Litigation”, available at: CJEU Rules on Parallel Interim Litigation – EAPIL.

¹⁰⁴ P. VLAS, M. ZILINSKY, F. IBILI, “Civil Jurisdiction and Enforcement of Judgments in Europe”, *Netherlands International Law Review*, n° 49(1), May 2002, p. 128.

¹⁰⁵ *European Council*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59/1 of 05 March 1979, p. 45.

this ground of refusal are justified and whether there is a possibility of a single solution which would be in line with the regulations' common objectives.

30. While majority of the regulations on the cross-border collection of monetary claims provide only one ground for refusal of enforcement on the basis of irreconcilability, regardless of the origin of the irreconcilable judgment in question, Brussels I Recast offers two grounds for refusal of recognition and enforcement related to irreconcilability of judgments. The first one, contained in Article 45(1)(c), provides for refusal of recognition or enforcement in case of a judgment of the Member State Addressed, while the second provision can be found in Article 45(1)(d), and relates to judgments from other Member States and Third States. The two are discussed in turn, with simultaneous comparison to the singular provision offered in the rest of the regulations.

C) Irreconcilable judgment of the State Addressed

31. Article 45(1)(c) of Brussels I Recast provides that the recognition or enforcement shall be refused 'if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed'. Thus, this provision only refers to irreconcilability with domestic judgments. The only requirement here is that judgments must be given between the same parties. This requirement would also be fulfilled in case of a different party in the first and second proceedings, if that party succeeded to the rights of one of the initial parties.¹⁰⁶ This, however, differs from situation where the subrogation already took place and the first creditor, which is not entitled to pursue the claim anymore, attempts to enforce the relevant judgment. Such situation is visible on the example from the Higher Regional Court Koblenz, which decided on the question of irreconcilable judgments dealing with maintenance claims which were subrogated from the first creditor to the public maintenance fund.¹⁰⁷ In a situation where the public maintenance fund attempted to enforce the judgment which was previously denied enforcement to the first creditor (who was not entitled to pursue the claim due to subrogation), the court ruled that such judgment is not irreconcilable with the previous judgment refusing enforcement, as the judgments were not 'between the same parties'.

32. This provision of Article 45(1)(c) automatically prioritises the domestic judgment with which the judgment whose recognition or enforcement is sought is irreconcilable. It does not matter whether the domestic judgment was given before or after the one whose recognition or enforcement is sought – what matters is that it exists at the time this is being sought.¹⁰⁸ This is certainly a delicate issue, as the irrefutable priority given to a domestic decision may be contradicting the idea of free movement of judgments and their automatic recognition. It is thus questionable whether this can be reconciled with the idea of mutual trust between the Member States, considering that a provision biased in favour of domestic judgments clearly discriminates against other Member States' judgments. This is especially the case when the domestic judgment was issued later than the one from another Member State whose recognition and/or enforcement is sought. Some initially believed that this situation is not even addressed by Brussels I Recast (as it only states that the judgment must be 'given') and, furthermore, since foreign judgments receive automatic recognition, that a domestic judgment is not able to affect their status.¹⁰⁹ However, on the basis of the ruling in *Hoffmann*, where the CJEU considered that a domestic judgment, although given later in time, prevails over the foreign one,¹¹⁰ authors maintain that Article 45(1)(c) produces *ex nunc* effect from the date the domestic judgment is adopted.¹¹¹ This points to the fact that domestic judgment would

¹⁰⁶ P. MANKOWSKI, "Article 45", *cit.*, p. 893; T. KERESTEŠ, M. REPAS, *cit.*, p. 215.

¹⁰⁷ EFFORTS Project, Report on German Case Law, available at: D2.10-Report-on-German-case-law.pdf (unimi.it), p. 4.

¹⁰⁸ A. BRIGGS, *Civil...*, *cit.*, p. 742; T. KERESTEŠ, M. REPAS, *cit.*, p. 215. For an example from national courts, see also e.g. EFFORTS Project, Report on French Case Law, available at: D2.11-Report-on-French-case-lawCONFIRMED.pdf (unimi.it), p. 36.

¹⁰⁹ P. MANKOWSKI, "Article 45", *cit.*, p. 893.

¹¹⁰ CJEU, C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61, para. 23.

¹¹¹ P. MANKOWSKI, "Article 45", *cit.*, p. 893.

be given priority even if it is rendered after the foreign one. Such conclusion should perhaps be reconsidered after the abolition of exequatur in the Brussels I Recast and the immediate enforceability that is awarded to judgments. However, the wording of the provision did not change and still results in refusal of enforcement if a domestic judgment between the same parties is irreconcilable with the judgment whose enforcement is being sought. Thus, at the moment the domestic judgment is given, the judgment from another Member State ceases to be entitled to automatic recognition and enforceability.¹¹²

33. Another issue related to Article 45(1)(c) is the fact that domestic judgments are automatically given priority even when they are not *res iudicata*, and that, even if the domestic judgment is only provisional, it can be given priority over the foreign one.¹¹³ From the national court's point of view, it is perhaps understandable to give preference to the judgment given in its own Member State, regardless of the fact that it may still undergo appeals. However, from an EU perspective, preference of domestic judgments in cases where the judgments in question are not of equal status, *i.e.*, if a foreign judgment is *res iudicata* and the domestic one is still appealable and thus may be overturned, is opposing the core idea behind the EU's area of freedom, security and justice. This issue, however, is not limited to Article 45(1)(c), as the question of irreconcilability of judgments which are not of equal status is not resolved in any of the regulations relevant for the purpose of this paper. Regardless, this provision of Brussels I Recast and its explicit favouritism towards domestic judgments has been met with much criticism, and was even referred to as an 'expression of obsolete nationalism and chauvinism'.¹¹⁴

34. In light of the above, a change of Article 45(1)(c) would be welcome. A better solution can be found in the second-generation instruments. Although these regulations opted for a more restrictive approach to refusal of enforcement, almost all of them still kept the refusal ground for irreconcilable judgments. This is understandable considering the previously mentioned practical impossibility of enforcing conflicting and mutually exclusive judgments. As opposed to Brussels I Recast, only one ground for irreconcilability is offered in each of these regulations, with the same standard for any 'judgment given', regardless of where it was issued but with clear priority to earlier one. This represents a modernisation reflecting higher level of mutual trust.

35. Before analysing the refusal ground for irreconcilability in the second-generation instruments, however, it is necessary to assess whether a similar solution may be applicable to Brussels I Recast, or the reasoning for different solution lies in the specific features of these procedures. In that vein, EOPR and ESCPR form uniform, self-standing EU procedures which result in an EU order/title. Although these specific regulations may only be applied in cross-border cases, parties still have the possibility to opt for their national counterparts, which exist alongside them.¹¹⁵ Thus, the possibility of irreconcilability of such EU title with a domestic judgment remains possible. The same is true for EEOR, which was envisioned as a way to certify an existing judgment as an EEO, subsequently allowing such judgments to circulate freely, without intermediate measures, among the Member States.¹¹⁶ This was particularly important as this regulation came to existence at the time when the exequatur was still not abolished within the Brussels regime. After this has changed in the Brussels I Recast, the relevance of EEOR itself is questioned by some authors.¹¹⁷ In any case, EEOR can be viewed as a potential substitute for enforcement of judgments under the Brussels I Recast. Against the backdrop of the ambitious changes in Brussels I Recast in regards to the abolition of exequatur, the reason why the refusal grounds for irreconcilability remained the same is not quite clear. The uniformness of specific EU rules or the procedures itself may have prompted the initial departure from the specific position of domestic judgments in terms of irreconcilability under the second-

¹¹² A. LAYTON, H. MERCER, *cit.*, p. 925.

¹¹³ P. MANKOWSKI, "Article 45", *cit.*, p. 892.

¹¹⁴ P. MANKOWSKI, "Article 45", *cit.*, p. 893.

¹¹⁵ EOPR, Art. 1(2); ESCPR, Art. 1.

¹¹⁶ EEOR, Art. 1.

¹¹⁷ See e.g. B. HESS, D. ALTHOFF, T. BENS, N. ELSNER, I. JÄRVEKÜLG, "The Reform of the Brussels Ibis Regulation", *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, n° 6, November 2022, pp. 30, 31.

generation instruments – at the same time, this does not explain why the same was not done in regards to Brussels I Recast. The unjustifiableness of different treatment of irreconcilable judgments has already been noted by some authors,¹¹⁸ especially in terms of unconditional priority of domestic judgments, which ‘serves neither comity nor judicial economy’.¹¹⁹ As mentioned above, such provision should find no place in the system which is founded on the principle of mutual recognition of judgments and aims to further facilitate the free movement of judgments, without frontiers.

36. In that vein, it should be noted here that a change of Article 45(1)(c) would not in any way affect the general system of recognition and enforcement that is employed in Brussels I Recast. For example, if one party tries to enforce a judgment from a Member State A in the Member State B, the enforcement would be refused if there is a conflicting domestic judgment from the Member State B. This refusal, however, would not be dependant solely on the fact that both judgments were given between the same parties, but would also have to involve the same cause of action. This should not be viewed as an issue, given that this additional requirement should not be hard to fulfil on the rare occasion that the judgments in question are actually irreconcilable. It would, however, remove the special status of domestic judgments and bring them to the same footing as the judgment emanating from different Member States. Once again, this should not be viewed as an issue, given that there is no particular need to protect national interest in these types of situations which are, after all, not common in practice. Moreover, the free movement of judgments in the EU places judgments of all Member States on an equal footing; therefore, any provision of the EU regulations which places domestic decisions above decisions of another Member State, without a particularly important reason, should be viewed as ‘outdated’.¹²⁰

37. For the purpose of comparison, EEOR, EOPR and ESCPR, with minor variances,¹²¹ provide that enforcement shall be refused if the judgment whose enforcement is sought ‘is irreconcilable with an earlier judgment given in any Member State or in a third country’ if it fulfils three additional requirements: a) the earlier judgment must have involved the same cause of action and was between the same parties; b) it was either given in the Member State of enforcement or it fulfils the conditions for its recognition in the Member State of enforcement; and c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.¹²²

38. Apparently, the conditions in the second-generation instruments are somewhat stricter than in Brussels I Recast, particularly compared to Article 45(1)(c). Here, no priority is given to domestic judgments; instead, a chronological priority of judgments is instituted.¹²³ This removes problems linked to favouring domestic judgments. Such ‘chronological requirement’ at an enforcement stage may also be praised simply as a matter of principle, as it discourages the bad-faith litigation tactics of delaying the procedure, *i.e.*, the ‘Italian torpedo’ strategy.¹²⁴ In terms of EEOR, it is important to differentiate the moment of issuance of the judgment in question and the moment in which the certification as an EEO

¹¹⁸ S. HUBER, “The Reform of the European Small Claims Procedure. Foreign Body or Puzzle Piece within the System of European Civil Procedure?”, in J. VON HEIN, T. KRUGER (eds.), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives*, Cambridge, Intersentia, 2021, p. 100; B. HESS, D. ALTHOFF, T. BENS, N. ELSNER, I. JÄRVEKÜLG, *cit.*, p. 27; S. LEIBLE, „Art. 45 Brüssel Ia-VO”, in T. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR Kommentar*, Köln, Verlag Dr. Otto Schmidt KG, 2021, p. 1077.

¹¹⁹ F. JUENGER, “The Recognition of Money Judgments in Civil and Commercial Matters”, *The American Journal of Comparative Law*, n° 36(1), 1988, p. 26.

¹²⁰ As pointed in e.g. B. HESS, D. ALTHOFF, T. BENS, N. ELSNER, I. JÄRVEKÜLG, *cit.*, p. 27.

¹²¹ The differences lie in the fact that EOPR differs in a way that it also provides for irreconcilability with an earlier decision ‘or order previously given...’. Additionally, the same regulation differs as it provides that it is necessary only that ‘irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin’.

¹²² EEOR, Art. 21; EOPR, Art. 22; ESCPR, Art. 22.

¹²³ S. HUBER, “The Reform...”, *cit.*, p. 100.

¹²⁴ C. CRIFÒ, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment*, Alphen aan den Rijn, Kluwer Law International, 2009, p. 98. For more on the ‘Italian torpedo’ strategy, see e.g., D. KENNY, R. HENNIGAN, “Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation”, *International and Comparative Law Quarterly*, n° 64, January 2015.

was issued. For the sake of determining which of the conflicting judgments came earlier, the moment of issuance of the judgment itself is relevant.¹²⁵

39. In terms of the last requirement under c), EOPR differs slightly, as it provides only that irreconcilability could not have been raised as an objection in the Member State of origin. This is so as the EOP is structured in a way that its issuance is dependent on there being no objections.¹²⁶ Nonetheless, this condition can sometimes be hard to fulfil, as it can be difficult for the Member State of enforcement to certify whether the objection could have been raised in the Member State of origin.¹²⁷

40. The only regulation from the selected ones which does not allow for a refusal of enforcement based on the irreconcilability ground is EAPOR. Generally, it establishes a system in which any violation of the conditions for issuance of the order may be challenged solely in the Member State of origin.¹²⁸ Its Article 16 explicitly states that ‘the creditor may not submit to several courts at the same time parallel applications for a Preservation Order against the same debtor aimed at securing the same claim’,¹²⁹ and that the creditor, when applying for EAPO, must declare whether he has lodged any additional applications for equivalent national order against the same debtor.¹³⁰ Depending on the information provided, the court will then consider whether the issuance of EAPO is still appropriate.¹³¹ Because of this requirement, conflicting decisions are unlikely. There are, however, still possibilities for such situations, *e.g.*, if there is an order which rejects an application for EAPO as unfounded and a subsequent order which allows the same application.¹³² In these circumstances, it seems that the issue could not be raised in the Member State of enforcement, which leaves space for future challenges. The question arises as to whether one could rely on the public policy exception, which has been preserved in EAPOR in cases of irreconcilability. Although this seems possible in some international conventions,¹³³ this should not be so under EAPOR. Firstly, the legislator’s intention seems not to allow such interpretation, given that EU regulations generally separate the question of irreconcilability from the public policy exception. Secondly, the CJEU, when interpreting the provisions of the Brussels Convention and the Brussels I Regulation, held that the use of the ‘public policy’ concept is precluded when the issue in question is whether a foreign judgment is compatible with a national judgment.¹³⁴ In any case, with EAPOR’s limited practical application so far,¹³⁵ this issue appears to have merely theoretical relevance.

41. Finally, the Maintenance Regulation provides that the enforcement of the decision may be refused ‘if it is irreconcilable with a decision given in the Member State of enforcement or with a decision given in another Member State or in a third State which fulfils the conditions necessary for its recognition in the Member State of enforcement’.¹³⁶ This is applicable to decisions given in the Member States that are bound to the 2007 Hague Protocol, *i.e.*, every Member State except Denmark. For deci-

¹²⁵ P. OREJUDO PRIETO DE LOS MOZOS, *cit.*, p. 276.

¹²⁶ C. CRIFÒ, *cit.*, p. 143.

¹²⁷ C. CRIFÒ, *cit.*, p. 143.

¹²⁸ G. CUNIBERTI, S. MIGLIORINI, *The European Account Preservation Order Regulation: A Commentary*, Cambridge, Cambridge University Press, 2018, p. 229.

¹²⁹ EAPOR, Art. 16(1).

¹³⁰ EAPOR, Art. 16(2).

¹³¹ EAPOR, Art. 16(4).

¹³² G. CUNIBERTI, S. MIGLIORINI, *cit.*, p. 232.

¹³³ *European Council*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59/1 of 05 March 1979, p. 45.

¹³⁴ CJEU, C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61, para. 21; CJEU, C-700/20, *London Steam-Ship Owners’ Mutual Insurance Association Limited v Kingdom of Spain*, 20 June 2022, ECLI:EU:C:2022:488, para. 78.

¹³⁵ See *e.g.*, EFFORTS Project, Report on Croatian Case Law, available at: D2.13-Report-on-Croatian-case-law.pdf (unimi.it), p. 6; EFFORTS Project, Report on Italian Case Law, available at: D2.9-Report-on-Italian-Case-law.pdf (unimi.it), p. 70; EFFORTS Project, Report on German Case Law, available at: D2.10-Report-on-German-case-law.pdf (unimi.it), p. 1.

¹³⁶ Maintenance Regulation, Art. 21(2). In the same provision, it is added that ‘a decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision’.

sions given in Denmark, exequatur is not abolished, and in terms of irreconcilability as a refusal ground, it is the same as in Brussels I Recast.¹³⁷ In practice, this refusal ground seems to be only of limited importance as it is rarely used.¹³⁸ When comparing with the provisions in other above analysed regulations, the provision in Maintenance Regulation is surprisingly minimalistic. No additional requirements, such as the ones in EOPR, ESCPR and EEOR, are laid down. This difference, however, may be warranted by the special ways the decisions in the sphere of family law are rendered and then changed depending on the subsequent changes of the relevant facts.

D) Irreconcilable judgment of another Member State or a Third State

42. The second provision dealing with irreconcilable judgments in Brussels I Recast in Article 45(1)(d) provides that the recognition or enforcement shall be refused ‘if the judgment is irreconcilable with an earlier judgment given in another Member State or in a Third State¹³⁹ involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed’. Clearly, it contains stricter conditions than in cases of conflicts with domestic judgments. Several additional requirements must be fulfilled: the conflicting judgment is given ‘earlier’, in a different Member State or a Third State; it involves the same cause of action; it is given between the same parties; and it fulfils the conditions required for its recognition in the Member State addressed. Due to the additional requirements, this provision bears more similarities with the respective provisions in EOR, EOPR and ESCPR.

43. The first condition refers to temporal priority – whichever judgment is given first will have priority. While the chronological hierarchy of judgments is welcome, the moment relevant for this assessment is not certain in all situations.¹⁴⁰ Situation is simple where both judgments are given in two different Member States, because effects of both judgments are automatically recognised and the date when recognition or enforcement is sought holds no importance. Taking into consideration the date of the commencement of the proceedings would be wrong, as Article 45(1)(d) is ‘not a sanction of the violation of Article 29’ on *lis pendens* (which obliges any court other than the one first seized to stay the proceedings of its own motion), and the issue of the relevant moment for assessment ‘should be solved with respect to the logic followed in Article 36’ (which established the automatic recognition of any judgment given in a Member State).¹⁴¹ Since judgment cannot be automatically recognised before it starts producing relevant legal effects in the Member State of origin, this date (the date on which the judgment starts producing such legal effects) would be the most appropriate one for the assessment in question.¹⁴² This date can be the same as the date on which the judgment was rendered, but need not be,¹⁴³ which of course depends on the national law of the Member State of origin.

44. For situations in which there is a Third State judgment, the question of the relevant date for the assessment of priority seems more complicated, as Third State judgments do not benefit from automatic recognition.¹⁴⁴ However, careful reading of Article 45(1)(d) provides a solution. Since this provision

¹³⁷ Maintenance Regulation, Art. 24(c) and 24(d).

¹³⁸ *European Commission*, Study on the application of Regulation (EU) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Final Report, JUST/2019/JCOO/FW/CIVIL/176 (2020/05), p. 56.

¹³⁹ The opposite situation of a recognition and enforcement of a Third State judgment and possible refusal for the reason of irreconcilability is outside the scope of Brussels I Recast, and subject to national (or international) law in force in the State Addressed.

¹⁴⁰ P. MANKOWSKI, “Article 45”, *cit.*, p. 894.

¹⁴¹ P. MANKOWSKI, “Article 45”, *cit.*, p. 894.

¹⁴² P. MANKOWSKI, “Article 45”, *cit.*, p. 894.

¹⁴³ P. MANKOWSKI, “Article 45”, *cit.*, p. 894.

¹⁴⁴ With an exception in cases where the Member State of enforcement offers automatic recognition to all foreign judgments, e.g. in the case of Belgium. See P. MANKOWSKI, “Article 45”, *cit.*, p. 895.

states that a judgment must fulfil the conditions necessary for its recognition, and not actually be recognised in the Member State of enforcement, the date relevant for assessment is the date when the judgment starts producing relevant legal effects which again will depend on the national law of the State of origin.

45. Once the priority is established, further conditions to be met for recognition depend on whether the judgment originates from a Member State or a Third State. If it originates from a Member State, the Brussels I Recast applies to all issues; if it originates from a Third State, conditions for recognition will be found either in national law or in an international convention applicable in the Member State addressed.¹⁴⁵ Once it is established that the earlier judgment is recognised, the issues of irreconcilability will of course depend only on Brussels I Recast (or another EU instrument) hence the reference is made to the above discussion.

46. Another important condition in Article 45(1)(d) is that irreconcilable judgments must be given in different Member States or a Member State and a Third State. If two irreconcilable judgments are given in the same Member State, their conflict falls outside the scope of the Brussels I Regulation and should be resolved in that Member State, in line with the available national legal remedies.¹⁴⁶ This was confirmed by the CJEU in *Salzgitter*.¹⁴⁷ This solution has been criticized by some scholars,¹⁴⁸ as it does nothing to prevent possible problems, such as the one in *Salzgitter*, where the defendant did try to raise his objections before the national courts, but was still blocked every time, which led to the existence of two conflicting judgments in the same Member State. It appears that such situations are still occurring in practice, as in a case before the Luxembourgish court which rejected the argument of irreconcilability based on the fact that the two judgments in question were both rendered in Belgium.¹⁴⁹ However, rather than being the problem of EU cross-border civil cooperation, it is one that needs to be resolved within the national legal and judicial system of the State of origin.

47. The twofold approach which differentiates between the judgments rendered in the Member State addressed and judgments rendered in any other State, was not deemed necessary in the second-generation instruments. The same provision that was mentioned above in relation to the domestic judgments applies also to judgments from other Member States or Third States. However, it departs from Article 45(1)(d) in two ways. Firstly, the conflicting judgments can also originate from the same Member State as evident from the wording itself, since the earlier judgment can be given in ‘any’ Member State. Secondly, the requirement is that the irreconcilability was not and could not have been raised in the Member State of origin. The objective here is clearly to avoid opportunistic behaviour of debtors who can raise the same ground in the proceedings in different Member States.¹⁵⁰ While useful, the second requirement can also result in some difficulties for the Member State of enforcement in certifying whether there was an opportunity to raise objections in the Member State of origin. Then again, this is the issue to be resolved by the national law of the respective Member State of origin.

48. It is visible from the analysis above that Article 45(1)(d) is mostly in line with the singular refusal ground in the second-generation instruments. Even so, the second-generation instruments still opted for a modernised approach in view of the inclusion of irreconcilable judgments originating from the same Member State, and in view of the added requirement that irreconcilability was not and could not have been raised in the Member State of origin. As already noted above, the specific features of

¹⁴⁵ P. MANKOWSKI, “Article 45”, *cit.*, p. 895.

¹⁴⁶ P. MANKOWSKI, “Article 45”, *cit.*, p. 891.

¹⁴⁷ CJEU, C-157/12, *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*, 26 September 2013, ECLI :EU:C:2013:597, para. 40.

¹⁴⁸ See A. BRIGGS, *Civil...*, *cit.*, p. 744; S. LEIBLE, *cit.*, p. 1079; G. MÄSCH, “EuGVVO: Keine Anwendbarkeit von Art. 34 Nr. 4 auf unvereinbare Entscheidungen aus demselben Mitgliedstaat”, *Europäische Zeitschrift für Wirtschaftsrecht*, 2013, p. 905.

¹⁴⁹ EFFORTS Project, Report on Luxembourg Case Law, available at: Microsoft Word - 24NovDefReportLuxembourgischCase Law.docx (unimi.it), p. 5.

¹⁵⁰ P. OREJUDO PRIETO DE LOS MOZOS, *cit.*, p. 277.

EEOR, EOPR and ESCPR do not warrant such different solution as opposed to Brussels I Recast. Actually, both Brussels I Recast and the second-generation instruments overlap in the scope of application *ratione materiae* and, thus, the second-generation instruments refer to Brussels I Recast in terms of jurisdiction.¹⁵¹ Moreover, they all share the same goal of facilitating the free movement of judgments. In particular, the refusal grounds also serve the same purpose and thus warrant the aligned interpretation. Finally, the provision on irreconcilability refusal ground in the second-generation instruments does not in any way simplify the necessary conditions for irreconcilable judgments; actually, the conditions may even be stricter in some instances, as especially visible when comparing requirements of Article 45(1) (c) with the refusal ground in EEOR, EOPR and ESCPR. While it is true that these regulations represent different stages of the development of EU rules on free movement of judgments,¹⁵² at this point it would be appropriate to consider all of the rules and incorporate the best approaches into Brussels I Recast as the main instrument of reference.

V. Proposed reform

49. Irreconcilability as a refusal ground could be seen as the last one standing in some of the more ‘ambitious’ regulations in terms of the rules on enforcement. From the example of EAPOR, however, it can also be seen that it is not irreplaceable. Since the case law shows that irreconcilability is rarely used as a ground of refusal in practice, the possibility for its abolishment is even greater. However, irreconcilable judgments can still occur, regardless of the rules on the coordination of the proceedings in substance through the rules of *lis pendens*. Thus, it is appropriate that ‘checks’ remain at the enforcement stage as well. Since the case law analysis does not indicate that this refusal ground is being used as a means to prolong the procedure in any way, it can also be concluded that it does not have a particular negative effect in terms of cost-effectiveness and lengthiness of the cross-border enforcement procedure.

50. Instead of aiming for its abolition, attention should therefore be paid to the ways in which it may be improved. Important differences can be detected among the provisions of the selected regulations, particularly between Brussels I Recast and the rest of the regulations. This can, in turn, create interpretational issues. As there is no reason as to why such differential treatment would be necessary, a possibility of alignment of all of these provisions should therefore be taken into account.

51. The above comparison between the provisions of Brussels I Recast, *i.e.*, Articles 45(1)(c) and 45(1)(d), and the provisions of the ‘second-generation’ instruments, shows that the most prominent issue is the outdated refusal ground of irreconcilability in the Brussels I Recast. This regulation differentiates two situations dealing with irreconcilable judgments, based on whether the judgment seeking enforcement is in conflict with a domestic judgment or a judgment emanating from different Member State or a Third State. In that sense, Article 45(1)(c) gives priority to domestic decisions, even when they were not actually given prior to the judgment whose enforcement is sought. The regulation also intentionally leaves out the situations when both conflicting judgments were rendered in the same Member State, which once again only shifts the problem to the national sphere.

52. There seems to be no justification for retaining priority status for domestic judgment, regardless of whether such judgment was given before or after the judgment whose enforcement is sought. Likewise, there is no justification for stricter requirements in Article 45(1)(d) for irreconcilability for judgments other than domestic. However, the latter provision still does not deal with conflicting judgments originating from the same Member State, nor does it provide for the condition that the irreconcilability was not (and could not have been) raised in the Member State of origin, which helps to prevent the opportunistic behaviour of debtors and minimises the possibility of raising the same ground over again.

¹⁵¹ E.g. in terms of the rules on jurisdiction. See EOPR, Art 6 and ESCPR, Annex I.

¹⁵² S. HUBER, “Koordinierung...”, *cit.*, p. 428.

53. Therefore, merging Articles 45(1)(c) and 45(1)(d) in a single irreconcilability refusal ground would be opportune. Such ground could reflect the provisions of EEOR EOPR and ESCPR, which seem to be more in line with the current EU principles, especially in view of the principle of automatic recognition of judgments within the EU. These instruments were on the right track when introducing new, modernised version of the provision on the irreconcilability as a refusal ground. It would be a missed opportunity not to include similar type of provision into Brussels I Recast as well, considering that it is still the main instrument for recognition and enforcement of judgments in civil and commercial matters in the EU, while EEOR, EOPR and ESCPR have only had limited success. Additionally, having the same (or nearly the same) provisions on irreconcilability refusal ground in all analysed regulations would facilitate uniform application before the Member State courts, and avoid the unnecessary differential treatment of irreconcilable judgments among the selected regulations. Such ‘egalitarian’ approach¹⁵³, *i.e.* consolidation of irreconcilability as ground of refusal, could contribute to legal certainty and effective enforcement of judgments in the EU.¹⁵⁴ After all, these regulations deal with similar questions in different ways, sometimes for no apparent reason. Thus, a modernisation in view of the proposal suggested above is welcome.

¹⁵³ K. KERAMEUS, *Enforcement in the International Context*, Collected Courses of the Hague Academy of International Law, vol. 264, 1997, p. 107.

¹⁵⁴ S. HUBER, “Koordinierung...”, *cit.*, p. 428.