Selected problems related to provisional measures within Brussels I bis regulation and

European Convention on Human Rights

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1. Introduction

Concept of provisional, including protective, measures (hereinafter also as “provisional measures” or solely as a “measures”) represents traditional legal institute of (international/ supra/national) procedure law incorporated in all levels of legal systems and branches of law; nevertheless conditions for its applicability may differ as much as terms naming the institute itself.

Submitted paper reacts to legislative amendment adopted in acquis communautaire, which entered into force on 10 January 2015 with aspiration to rectify certain ambiguities arising from the European Court of Justice (“the ECJ”) case law; that’s why second chapter explains subject matter of provisional measure and also prospective application of existing ECJ case law. Third chapter analyses the relation between Brussels Ibis and another EU law statutes with intention to clarify material competence of recast (not only in the meaning of art. 1 (2) of Regulation). Inclusion of Convention, and ECHR case law, reacts to Bemir and Baykara principle perceiving Convention as living instrument which is interpreted in the light of current conditions, with reflection of evolving norms of national and international law; in other words the recast may influence current case law of ECHR which oftentimes looks into EU law during interpretation of article 6(1), also which concerns also interim measures. The last explanatory chapter explores constituent elements of cross-border enforcement of interim measure.

Questions faced by this paper might be summoned as follows: Is current ECJ case law still applicable for provisional measure? What procedural stage and which conditions enable issue of such a measure? How was, principally, changed free movement of judgments? And how ECHR affects application of Regulation? Keep reading, and find answers!

2. Elements of provisional measures related to jurisdiction in recast of Regulation

2.1. Subject matter of the case - Measures with provisional effect are included in all branches of EU law (e.g. freezing order, interim custody order in family law cases). Under

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3 Regulation no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), hereinafter also as “Brussels Ibis” or “Regulation”.
5 Terms Convention and ECHR correspond to “European Convention on Human rights” and “European Court of Human Rights” (or “Court”).
6 See Demir and Baykara v. Turkey, application no. 34503/97, of 12 November 2008, § 68.
7 Case of Vilho Eskelinen and others v. Finland, application no. 63235/00, of 19 April 2007, § 60.
8 Check per analogiam Micallef v. Malta (application no. 17056/09) of 15 October 2009, § 55.
encompassing, for enforcement procedure, provisional measures irrespective naming of decision and kind of tribunal having jurisdiction over the case.

Nature of proceeding on merits must fall, for the purpose of provisional measures regulation, under the principle of subsidiarity, within the scope of art. 1 Regulation. In other words, the provisional measure is usually governed by Regulation if the procedure on merits is governed by Brussels Ibis; nonetheless, falling of case within the scope ratione materiae of the Regulation serves as final criterion. Although the article, prima facie, refers to private law disputes, no definition of broad concept (civil/commercial law) is provided. The meaning of such a matter shall be understood within regime of EU law, rather than national one, as kind of relationship between equal parties, where none of them is placed in a position of subsidiarity to the other, irrespective which king of court deals with the case. Even if the main dispute shows attributes of ius privatum case, the substance-connecting link between subject matter of the principal case and reasons for imposition of provisional measure must not fall in art. 1 (2) of Regulation, as adjudicated in still applicable Jacques de Cavel case, which shall be applied very sensitively, reflecting actual circumstance of principal case and applicable legislation of Member State where this case is entertained.

The Regulation is also applicable in penal procedure in which injured party sues damages and desires to secure proper fulfilment of claim (of civil nature) by interim measure, unless the person against whom it is sued acted within acta iure imperi; the difference between freezing order and interim measure, retaining e.g. funds on bank account, lies in fact that

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9 It corresponds to conclusion of ECJ case law, notably case no. C-39/02, of Marøk Olie & Gas, of 14 October 2004, § 46.
10 This concept flows from current ECHR case law, notably from Immobiliare Saffi v. Italy, application no 227/93, of 28 July 1999, § 63, which includes enforcement procedure under the term “trial”.
11 Article 2 (a) of Regulation is not comprehensive and covers all courts’ decisions; on the other hand, it has exclusionary effect because only provisional measures served on defendant fall within the definition of “judgement”.
13 As adjudicated by ECJ in case no. 25/81, of C.H.W v. G.J.H., of 31 March 1982.
14 As it flows from ECJ case no. C-391/95, of Van Uden v. Deco-Line, of 17 November 1998, § 34.
15 ECJ case no. C-420/07, of Meletis Apostolides v. Orams, of 28 April 2009, § 41, or case no 29/76, of LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, of 15 October 1976, answer to first question, §3.
17 Connecting link, depending of content (substance) of the case, is used in different meaning from “real connection link” applied by ECJ in Van Uden case.
18 ECJ refused application of Brussels Convention 1968 (in case no. 143/78, of Jacques de Cavel v. Luisé de Cavel, of 27 March 1979), in ordering freezing of joint property of spouses, required within divorce procedure, following alteration of personal status (i.e. art. 1 (2-a) of Regulation) as a prevailing feature of the whole case (in proportion to protection of property rights).
19 For instance, application of conclusions in Jacques de Cavel case in the Czech Republic would impose on fact, whether spouses settle up joint property during divorce procedure (so called indisputable divorce) or whether they postpone separation on special procedure which is similar to division of co-ownership; the first requires joint property separation settlement as a precondition for divorce, the second one does not.
20 The decisive factor is whether the penalty is for the benefit of the private plaintiff or state (sovereign entity), see Report on the Convention, No C 59/71, §29 (available on http://www.unisnet.ca/other/art/schlosser.pdf).
21 Similar as in ECJ case no C-172/91, of Sonntag v. Waidmann c.s., of 21 April 1993, answer to first question.
22 Vide directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 (article 1 (1)).
first deals with successful execution of possibly imposed sanction (forfeiture of thing/property) while the second serves to protection of private-party interest established by private law. Similar mechanism might be applied in customs which are usually excluded from Regulation; nevertheless if the State’s claim flows from surety agreement guarantying payment of customs debt, and agreement between State and guarantor is not made through exercise of State powers, then, the interim measure imposed by court on guarantor in favour of creditor’s interest will be governed by Regulation too.

2.2. **Provisional character of measure** – Interim measure differs from “pure” judgment by its provisional purpose which flows from applicable substantive law and needs of measure-proposer. Interpretation of provisional purpose defined in *Reichert case* must be in Member State, where the measure is sued, applied sensitively with reflection of question whether the action imposed by plaintiff aims at definite solution of dispute (similar to *res iudicatae*) or whether the interim is desired.; same impact of *Reichert* occurs during application of article 1007 of Czech Civil Code enabling person, deprived from possession, to submit *action possessoire*, which aims merely at speedy remedy of actually changed state of affairs rather than adjudicate in right *in rem*. Then, provisional character must be connected with the substance of the principal procedure pending in the other state (dealing with right in issue) to secure subsequent successful enforcement of granted plaintiff’s right (e.g. freezing injunctions, interim payments etc.).

2.3. **Territorial requirement for measure’s imposition** – Application of Brussels Ibis on provisional measures require existence of usual institute of private international law (i.e. cross-border element of the case related to certain territory). The main principle (incorporated in article 35 of Regulation, which is *lex specialis* to previous rules governing jurisdiction) lies in fact that court (issuing interim measure) has no jurisdiction over substance of the case (i.e. right in issue). Thus, real connecting link between subject matter of the measure and territorial jurisdiction of the court (deciding on measure) must exist to establish jurisdiction (*Van Uden*, §40); the court may impose only measures which are available under its national law. Nonetheless, the court deciding on measure shall take into account circumstances of principal case and impact of measure on it; this requirement might be assessed as quite problematical for ordinary practice.

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24 As a measure “intending to preserve a factual or legal situation to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the *substance of the matter*”, see ECJ case no C-261/90, of Reichert v. Dresdner Bank AG, of 26 March 1992, § 34 and § 36.

25 *Van Uden*, § 38 and 46, or case no. 125/79, of Demilauder v. SNC Couchet Frères, of 21 May 1980, § 15, might be interpreted in such a way that court imposing measure shall evaluate the effect of measure on principal case. Nonetheless the court is placed to unusual position
Van Uden (§47) might be also interpreted in a way that provisional measure is supposed to be imposed by the Member State’s tribunal having jurisdiction under art. 35 of Regulation, if res (real object of measure) is located within the territory of the State. Mentioned principle does not cause troubles in cases where Member State’s court has jurisdiction to decide on provisional measure and merits collaterally, if decision on provisional measure was served to defendant prior to enforcement. In addition to it, real connecting link might be also applied with no inconvenience if applicant sues for measure dealing with several things or activities which are stable and do not exceed (by its impact) borders of State where court, deciding on measure, sits.

Any other variation (e.g. when area of probable enforcement of measure is not determinable or location, where object of measure is placed, leaves sovereign territory of Member State during pending procedure) causes grave troubles in determination of jurisdiction (e.g. in IP disputes). It seems from ECJ case law, that applicant has de lege lata no other chance than sue for provisional measures in the other Member State(s) which courts have also certain connecting link to the measure. However, some authors point out inconsistency in Member States courts’ practice where number of courts granted decisions imposed provisional measures with cross-border effect. This undesirable situation, challenging uniform interpretation, might be rectified by different approach to term real connecting link which shall be interpreted as a significant connection of court’s jurisdiction to movement (illegal infringement). If provisional measure has a relation to the behaviour, it might be enforceable wherever in EU where such behaviour takes place. Argument for cross-border effect of protective measure supports current legislative activity and ECJ case law which states, that enforceability of the judgement in the Member State of origin is main precondition for its enforcement in State in which enforcement is sought; therefore, if real connecting link was found in proceedings on provisional measure, then, the decision imposing such a measure is

because it is obliged to estimate impact of measure on principal case pending in other Member State and thus it is required to know this State’s legal order; there might be violation of one of the key maxims of any procedure law – iura novit curia, i.e. court knows (national) law.

Requirement for assessment of measure’s impact in legal order governing principal case is wholly contrary to well established ECHR case law (e.g. case of Connors v. the United Kingdom, application no. 66746/01, of 27 May 2004) concerning, for purpose of art. 6 (1) of Convention, principle of wide margin of appreciation, which leaves national courts, which are in contact with the force of local needs, in better position to choose relevant solution for purpose of certain case by application, and also knowledge, of national law.

Nowadays, this conclusion flows from last sentence of recital 33 of Regulation, which primarily regulates subsequent enforcement of provisional measure and restrains its territorial impact on sovereign area of Member State where the court deciding on measure seats.

See first sentence of recital 33 of Regulation.

E.g. he fights against distribution of fakes of goods protected by his trademark in several Member States or attempts to stop manufacture and distribution of certain products after termination/revocation of license contract.

In relation to it, principle of connecting link was subject to reasonable critique – see for instance page 23 of Green paper on the Brussels I Regulation submitted by EU Committee to House of Lords in year 2009 (in http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_parliaments/united_kingdom_house_of_lords_en.pdf)

See already mentioned Orams case, § 71, or art. 3 (1b) and art. 6 (1) of REGULATION (EU) No 655/2014 of 15 May 2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.
enforceable in any Member State and applicant will not be forced to submit separate actions for measure in other Member States anymore. This conclusion also reflects well established ECHR case law highlighting importance of mutual trust among Member States of European Community.

2.4. Recital 25 of Regulation and its relation to St. Paul Diary – Applicability of article 35 of Regulation, as said in Reichert or Van Uden, aims at jurisdiction of courts in imposition of measures related to preservation of party’s respective right (at risk of irreparable harm), or intends to protect factual status. Recital 25 subsequently extends application of the article on orders dealing with evidence where the protective aspect of order must be preserved. Impact of St. Paul Diary on recital’s (second sentence) interpretation remains problematic in case of witness-hearing, due to unusual state of facts from which the cited case flows.

The question posed by Dutch court in St. Paul Diary dealt de facto with possibility of witness-hearing to enable one of parties of possible dispute to evaluate submission of application (commence proceedings on merits); ECJ stressed element of “fishing expeditions” and absolutely omitted to evaluate protective aspect of measure. Thus, recital 25 could be interpreted in a way that court deciding on protective measure shall take into account all circumstances of the case (as in Jacques de Cavel) and shall evaluate whether obtaining of certain kind of evidence by protective measure is demanded by risk of irreparable harm on evidence (e.g. death of witness). If so, hearing of witness by provisional measure is possible, irrespective whether the case on merits is pending.

3. Court Jurisdiction – case law

In order to determine which court has jurisdiction in the matter substance, art. 2 – 26 of the Regulation (EU) No 1215/2012 must be applied. However protective measures are ruled by the art. 35 of the Regulation. Unlike the substance of the matter, protective measures jurisdiction is determined differently and follows 3 main questions: 1. Which court has jurisdiction to issue protective measure?; 2. What conditions must be met in order to issue protective measure?; 3. Which procedural stage allows issuing protective measure?

33 See presumption of equivalent protection developed in Bosphorus Hava Yollari v. Ireland, application no. 45036/98, of 30 June 2005, § 47, § 50, § 150, and then applied e.g. in AvotiŅš v. Latvia, application no. 17502/07, of 23 May 2016 (GC), § 101.
35 See § 25:“…measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence…”
36 The application for provisional measure will be submitted directly to the court which has no jurisdiction over the merits; thus, the applicability of Council Regulation (EC) No 1206/2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (art. 1 (1)), is out of question.
3.1 Question n. 1: Which court has jurisdiction to issue protective measure?

In order to determine which court has jurisdiction to issue protective measure, we use selected case law of the European Court of Justice (hereinafter as “ECJ”).

Case n.1 *C-391/95 Van Uden Maritime BV, trading as Van Uden Africa Line vs. Kommanditgesellschaft in Firma Deco-Line and Another*, contractual relationship dispute between two parties, where contract contained arbitration clause excluding court jurisdiction. One party did not carry out their duties and arbitration was initiated while court in Nederland was tasked to issue protective measure. Other party opposed the courts in Nederland have no jurisdiction since the contractual arbitration clause was agreed upon by both parties. ECJ established the distinction between the substance of the matter and issuance of protective measure. While jurisdiction of matter substance decision must be established by the Regulation articles, protective measure decision can also be guided by the jurisdiction of the national law. In this case no court has jurisdiction to decide the case while both parties agreed to exclude the court proceeding and entrusted dispute resolution via arbitration. According to Regulation no court would have jurisdiction to issue protective measure, however according to national legislation courts in Nederland have jurisdiction to issue protective measure while not assessing the matter substance.

Case n.2 *C-99/96 Hans-Hermann Mietz vs. Intership Yachting Sneek BV*, dispute between seller and buyer where seller is a company and buyer is natural person. Since buyer did not meet his obligation regarding payment, court in Nederland ruled about his payment obligation and asked court in Germany to execute the ruling. Objection was based on fact the buyer is a consumer and treaty was mostly arranged in Germany and only signed in Nederland, thus only German courts have jurisdiction. ECJ stated in its reasoning, protective measure can be issued by the court not having the jurisdiction over substance matter. Mutatis mutandis, art. 35 of the Regulation (EU) No 1215/2012 is applicable to consumer disputes.

Case n.3 *C-616/10 Solvay SA vs. Honeywell Fluorine Europe BV, Honeywell Belgium NV, Honeywell Europe NV*, European patent dispute where one party filed both lawsuit and protective measure proposal to Dutch court. Opposing party opposed the claim validity but not the court Jurisdiction. ECJ ruled, protective measure decision does not affect the substance matter decision. Art. 22 (4) of the Council Regulation (EC) No 44/2001 thus might have implication for other jurisdiction determining articles, like art. 31 but exclusive jurisdiction does not exclude the possibility to issue protective measure since it is not the decision in substance matter and does not affect the final outcome.
3.2 Question n.2: What conditions must be met in order to issue protective measure?

Protective measures are defined by certain elements and conditions characterised in following case law. Case n.4 143/78 Jacques de Cavel vs. Luise de Cavel, divorce proceeding where husband proposed execution of French court decision by German Court. Bank accounts and furniture manipulation should have been prohibited. Proposal was denied due to lack of proper documents and appeal was denied due to inapplicability of the Council Regulation (EC) No 44/2001. ECJ ruled it is impossible to issue protective measure based on the Council Regulation (EC) No 44/2001 on matter substance falling outside of this Regulation scope.

Case n. 5 25/81 C.H.W. vs. G.J.H, divorce proceeding where both husband and wife were of Dutch citizenship and lived in Belgium. Husband proposed issuance of protective measure in Nederland. ECJ ruled yet again, Council Regulation (EC) No 44/2001 cannot form the legal base for protective measure in cases with matter substance falling outside of the Regulation scope.

Case n.6 125/79 Bernard Denilauleur vs. S.N.C. Couchet Fréres, dispute between creditor and debtor. Court in France issued the protective measure authorising the creditor to freeze the debtor’s assets in Germany. In accordance with French Law such protective measure can be issued without the need of notification the sanctioned party. German court was unsure whether the art. 34(2) of the Council Regulation (EC) No 44/2001 apply. ECJ ruled out the protective measures are special instruments and thus different rules might apply for their issuance and execution. While those rules abide the national legal system they are not eligible to found a violation of a fair trial right. However the court tasked with protective measure execution is best suited to assess whether to execute the protective measure or deny the execution. Such assessment should be based on the nature of the protective measure, whether its purpose is to secure and character is truly provisional.

Case n. 7 C-261/90 Mario Reichert, Hans-Heinz Reichert, Ingeborg Kockler vs. Dresdner Bank AG, dispute between the parents and their son on one side and the bank on the other. Parents were German citizens and owned a real estate in France which ownership they decided to transfer to their son. Bank question this ownership transfer as its position as creditor deteriorated and demanded the court to issue protective measure stating the transfer was null and void. ECJ stressed the protective purpose of protective measures and their provisional nature. In case proposal does not follow these conditions it is not a protective measure and cannot be issued under the art. 35 of the Regulation (EU) No 1215/2012. It is also important to realise the protective measure cannot replace the decision on the matter substance and these two must be distinguished.
Case n. 8 C-391/95 Van Uden Maritime BV, trading as Van Uden Africa Line vs. Kommanditgesellschaft in Firma Deco-Line and Another, case details were also mentioned in case n. 1. However for purpose of this part we shall concentrate on the definition of protective measure. ECJ defined payment can be regarded as protective measure only under the condition guarantee is made to return the payment in case of unfavourable court decision on substance matter. Court also stated in order to apply art. 35 of the Regulation (EU) No 1215/2012 a bond between protective measure substance and local court jurisdiction must be present.

Case n. 9 C-104/03 St. Paul Dairy Industries NV vs. Unibel Exser BVBA, dispute between two Belgian parties. One party suggested witness interrogation by the Dutch court. ECJ defined art. 35 of the Regulation (EU) No 1215/2012 yet again and stressed the substance of the request must be measured whether it fulfils the requirements set for protective measures.

3.3 Question n. 3: Which procedural stage allows issuing protective measure?
Based on the above presented case law, it can be deduced the procedural stage of the case is of little importance and protective measures can be issued whenever the need arise and the request meet the conditions of the protective measures.

3.4 Summary
Question n.1: It is imperative to distinguish between protective measure issuance and the substance matter decision. Both might be decided by different courts while every court may assess the case differently regardless the previous decision. Jurisdiction to issue protective measure can be derived from national legal system; nonetheless the court with jurisdiction must have reasonable connection to the protective measure or the matter substance. Question n.2: Every request for protective measure must be assessed separately whether it contains essential characteristics of the protective measure, which are provisional nature with aim to secure certain condition for further court decision. Protective measure cannot replace the decision on matter substance and must be based on the Regulation (EU) No 1215/2012 scope. Question n.3: Protective measure might be issued whenever the need arise regardless of the proceedings stage.

4. Defendant’s rights
Protective measures proceedings are distinguished from main proceedings regarding appropriated time and rights, parties are endowed with. To ensure efficiency of the protective measure, court must decide upon the request quickly while having only limited time to gather and assess the evidence. Question may arise, where is the line between the protective measure efficiency and defendant’s rights protection?
Czech Constitutional Court ruled that it is imperative to uphold the principle of equality of parties to the extent where defendant is given opportunity to provide his statement regarding proposed protective measure and evidence stated within. Taking of evidence in protective measure proceedings is thus limited to mere opportunity to state opinion and provide basic evidence.

European Court of Human Right provided in case Avotiņš v. Latvia (application no. 17502/07) that: 1. defendant cannot be passive in protecting his rights and 2. court tasked with decision execution can examine only the conformity of the execution itself with the art. 6 ECHR but not the decision issued by another country court.

Similar conclusions were made by the Court in Case C-420/07 Meletis Apostolides v David Charles Orams, Linda Elizabeth Orams.

4.1 Summary

It is imperative to distinguish between protective measure hearing or proceeding and execution of issued protective measure. Court tasked with execution of protective measure issued by another country’s court cannot examine whether the “fair trial” conditions has been met, only whether the execution meet the criteria of the “fair trial” and consequently deny the execution if it would violate the national legal or public order.

Defendant must be given proper opportunity to be heard so the equality of arms is upheld, however whether the defendant would use such right is up to him. It is foremost defendant’s duty to guard his rights and if he does not use the available instruments like appeal, it is safe to concur right to a fair trial has been preserved.

5. Recognition and enforcement

Regulation (EU) 1215/2012 applies from 10 January 2015 and replaces Regulation 44/2001 from that date. Its main achievement is the abolition of exequatur although a party may invoke the same grounds that under the previous regime to oppose recognition or enforcement. Furthermore, the new Regulation includes amendments in other areas, such as lis pendens and extends the application of the jurisdiction provisions on consumer and employment contracts. Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation) introduces a

37 II. ÚS 1847/16 (http://www.usoud.cz/fileadmin/user_upload/II._US_1847_16_an.pdf)
40 The new regime introduced by the Regulation applies only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. Regulation 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015.
significant reform of the common European rules previously established in Regulation 44/2001, the so-called Brussels I Regulation. The importance of the reform is linked to the fact that the Regulation covers litigation relating all commercial matters, with the exclusion of insolvency proceedings that remain governed by Regulation 1346/2000 which is currently under review. It may be noted that after its adoption the Regulation has been amended by Regulation (EU) 542/2014 that refers to certain issues raised by the Unified Patent Court.

5.1 The abolition of exequatur
The recognition and enforcement of a foreign judgment has been traditionally subject to the compliance with typical requirements -such as compatibility with a judgment given between the same parties in the Member State addressed, or non-incompatibility with the forum’s public policy-, to be checked within the framework of a specific procedure – the so called “exequatur”. To the extent that exequatur procedure adds complexity, discomfort, and ultimately deters from entering into cross-border transactions in the same way that differences of language or currency do, the EU final goal is to abolish such intermediate step as among the Member States, in the name of mutual trust. One of the priorities set by the European Council of Tampere was the removal of all measures which impede the effectiveness of an intra-European judicial area, proclaiming the so-called "Principle of mutual recognition of judgments in civil and commercial matters”.

In the last 10 years exequatur has been removed to allow for the direct enforcement of access rights and of decisions ordering the return of a child, as well as of certain decisions on money claims. Several regulations have already suppressed (altogether or just partially) the exequatur.41 The revision of the Brussels I regulation was accompanied by an intense debate revolving around two main issues: on the one hand, the extension of the scope of the grounds of jurisdiction to non-EU defendants; on the other hand, the abolition of exequatur. The new regime has not endorsed the first objective. As for the second, it has been achieved only to some extent: the exequatur proceeding has disappeared, but some safeguards have been kept that may prevent (or at least, slow down) the achievement of a swift, unhindered free movement of judicial resolutions within the EU. Concerning the first of those two basic goals, the final result reflects the failure of the EU to fully unify the jurisdiction rules applicable to defendants not domiciled in a Member State. The new Regulation modifies the previous

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situation in this respect only with regard to the jurisdiction rules over consumer contracts and individual contracts of employment. In disputes concerning those matters— which are added to claims falling within the exclusive jurisdiction grounds and the provisions on prorogation of jurisdiction agreements— the new regime is also applicable to situations in which the defendant is not domiciled in a Member State.

Therefore, in the new system, all claims other than those covered by the exclusive jurisdiction rules, founded on a prorogation of jurisdiction agreement, or related to consumer contracts or individual contracts of employment, remain subject to the jurisdiction rules of each Member State when the defendant is not domiciled in a Member State.

With regard to the second main goal of the reform, the abolition of exequatur in the new Regulation makes it possible to proceed directly to the enforcement in other Member States of a judgment which is enforceable in the Member State of origin without any declaration of enforceability being required. Judgments issued by the courts of a Member State are to be treated as if they had been rendered in the Member State addressed. Moreover, in Annex I, the new Regulation establishes a model certificate that has to be served on the person against whom enforcement is sought in reasonable time before the first enforcement measure. Such model certificate, with all the relevant information about the judgment, will facilitate the cross-border enforcement of judgments within the EU. In light of the diversity of enforcement measures existing under national procedural laws, the Regulation allows for an adaptation based on a functional equivalence principle. Under this principle, where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims and interests.

The authors emphasised that the abolition of every possibility of verification in the state where enforcement is sought (hereinafter: the state of enforcement) of a judgment issued in another Member State could cause problems, above all from the point of view of the protection of human rights and the protection of so-called weaker parties, i.e. consumers, employees, and the insured.

The safeguards implemented in the new system restrict the transformation resulting from the abolition of exequatur in the final text of the Regulation. The Regulation gives to the person against whom enforcement is sought the possibility to apply for the refusal of the enforcement

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42 (rights in rem; the validity of the constitution, or the dissolution of companies or other legal persons, or the validity of the decisions of their organs; the validity of entries in public registers; and the registration or validity of industrial property rights)

43 (or in Switzerland, Iceland and Norway where the 2007 Lugano Convention applies, Denmark has own regime as well).
to the competent court of the Member State where enforcement is sought. Enforcement will be refused where one of the grounds for refusal of recognition or enforcement, as set out in Article 45, is found to exist. Those grounds apply in addition to the grounds for refusal or of suspension of enforcement under the law of the Member State addressed for judgments rendered by its own courts.

To assess the limited progress achieved by the new Regulation, it is noteworthy that the grounds to refuse enforcement under the Regulation are the same as those provided for by Regulation 44/2001 to deny exequatur: public policy, respect of the rights of defence of the defaulting defendant; incompatibility between judgments; and very limited verification of the jurisdiction of the rendering court. Therefore, the grounds to refuse enforcement remain unchanged and the main progress refers to a procedural development. Since the need for a special procedure (exequatur) is abolished, the control now takes place directly within the framework of the enforcement itself by enabling the party against whom enforcement is sought to bring an application for the refusal of the enforcement. Such an application may deeply affect enforcement, since the court in the Member State addressed may: limit the enforcement proceedings to protective measures; make enforcement conditional on the provision of security; or suspend the enforcement proceedings.

5.2 Lis pendens

New application of lis pendens in response to so-called Italian torpedoes. The Brussels I Regulation provided for a rule of lis pendens in Article 27 which provides that, where proceedings in the same case between the same parties are brought before the courts of different Member States, the court seised of the proceedings will be discontinued without any action until the jurisdiction has been determined. The court which initiated the proceedings first. This has been the subject of the greatest criticism of the regulation. The parties in which the proceedings were initiated had been widely misused and the practice became known in the professional circles as the so-called Italian torpedo. The Italian torpedo is a concept based on the judgment of the Court of Justice of the European Union (formerly the European Court of Justice). The Regulation establishes an exception to the general lis pendens rule based on granting priority to the court first seized. In order to prevent abusive tactics, when an exclusive choice-of-court agreement is involved, the new Regulation grants priority to the court designated in such an agreement. This exception allows the designated court to decide on the validity of the agreement and on the extent to which the agreement applies to the pending dispute. The new Regulation reinforces the effects of choice of forum agreements

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44 Gasser v. MISRAT (C-116/2002)
and intends to foster coordination with the Hague Choice of Court Convention. Furthermore, the new Regulation introduces a flexible mechanism enabling the coordination between proceedings in the courts of a Member State and proceedings pending in the courts of third States. Under this mechanism, a court of a Member State may stay its proceedings, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned and the proper administration of justice.

5.3 Recognition and Enforcement Procedure

The key concept of Chapter III on Recognition and Enforcement is the notion of decision. The definition of a decision for the purpose of the Brussels Ibis Regulation now includes Article 2 (a). Only a decision that complies with this definition can benefit from the adjustment of recognition and enforcement contained in Chapter III of the Brussels Ibis Regulation. In conjunction with Article 1, Article 2 a) defines the range of free movement decisions under the Brussels Ibis regulation. Text of Article 2 (a) using the text of Article 32 of the Brussels I Regulation earlier Article 25 of the Brussels Convention. The case-law to these provisions is thus continuing usable. However, it is necessary to keep in mind the new express modification contained in Article 2 (a) Brussels Ibis Regulation, second paragraph, which provisional or protective measures would be decision for purposes chapters III of the Brussels Ibis Regulation. In other words, which provisional or protective measures may be recognized and enforced under the Regulation in the territory of another Member State. According to the new explicit modifications, there is no provisional or protective measures issued pursuant to Article 35, thereby making the text of the Regulation Brussels has deviated from the previous case-law of the Court. The change in provision is because otherwise abolition of exequatur could cause conflicts within defendant rights to defend himself. So there is clear condition of contradictory proceedings before it goes to process of enforcement under Brussels Ibis.

The Court has expressed its views several times on the definition of "any judgement". It is clear that this must be a decision of the court of a Member State. Decisions for the purposes of the Brussels Ibis Regulation are not decisions of courts of non-member states, ecclesiastical courts, international tribunals or arbitration decisions. Now when we defined which for decisions Brussels Ibis applies we can advance to the procedure of recognition and

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enforcement specifically. The Brussels Ibis Regulation, in line with the Brussels I Regulation, is based on the principle of automatic recognition of judgments issued in one Member State in the territory of another Member State without the need for a special procedure. Compared to the Regulation Brussels I, however, was completely omitted for a declaration of enforceability, which was perceived as one of the obstacles to the free movement of judgments between Member States, as it increased the time and financial demands of cross-border litigation. Brussels Ibis Regulation only counts on recognition and execution of a judgment issued in another Member State. However, the recognition of a foreign judgment may be in accordance with the article 36 (2) on the proposal of the concerned party denied, because of the existence of any of the reasons outlined in Article 45 of the Brussels Ibis Regulation. As a condition for the recognition of a judgment of a court of another Member State is not the coming into force of issued decision, Article 38 of the Brussels Ibis Regulation provides with the possibility of suspending the proceedings on the grounds that the decision is challenged by an appeal in the country of origin. It is entirely at the discretion of the court whether the proceedings wholly or partly interrupts or not. A similar adjustment is found in Article 37 The Brussels I Regulation. As a consequence, according to the Brussels Ibis Regulation, the enforcement of a foreign decision, which is generally regulated in the Articles 39 to 44 of this Regulation. Articles 46 to 57 concern the refusal of the enforcement of the judgement, with the grounds again correspond to the grounds for refusal of recognition under Article 45 of the Regulation Brussels Ibis. However, the Brussels Ibis Regulation does not regulate the process of execution of the decision by itself. That remains within the competence of the national courts.

The direct enforcement in the Member State addressed of a judgment issued in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. Any party may oppose a decision on a refusal of enforcement to bring an appeal in accordance with Article 49 of the Brussels Ibis regulation. Against this decision is possible to bring another appeal. The court in which any of the two remedies is brought (accordance with the provisions of Article 51) are entitled to suspend proceedings if a lawful appeal has been admitted against the decision in the State of origin or if the deadline for its submission has not yet expired. From the above it is obvious that the system of remedies and the course of proceedings in the case of refusal to enforce a foreign decision is similar to the declaration of enforceability procedure under the original
Brussels I Regulation. The substantial difference remains that the special procedure will be initiated only in the case of a request for refusal of enforcement, not as an immanent part of enforcement procedure.

Regarding to Brussels Ibis Regulation completely abolishes the enforceability procedure. The Court's ruling on the interpretation of Article 36 and Article 37 (1) of the Brussels Convention, respectively, Article 43 of the Brussels I Regulation in a relation to the new Regulation are inapplicable. At this point, however, it is appropriate to point out that the Brussels Ibis Regulation provides for an appeal in Article 49 Against the decision to refuse enforcement. Although refusal of enforcement is completely a different institute from the institute of exequatur, is the adjustment of the corrective instruments in both very similar. For this reason, we consider the case law Court of Justice on Article 43 of the Brussels I Regulation as applicable at least as a guideline in interpreting the provisions of Article 49 of the Brussels Ibis Regulation.

5.4 The Refusal

The Brussels Ibis Regulation contains the grounds for refusal of recognition, respectively enforcement in Article 45. It was stated above that decisions issued in Member State and within the scope of the Brussels Ibis Regulation are in the other Member States are recognized automatically. However, decisions do have in other Member States no effect if they suffer from any of the defects listed in Article 45. 46

The Brussels Ibis Regulation contains the following reasons for refusing recognition, or enforcement: apparent disagreement with the public order of the state of recognition, serious procedural defects, incompatibility of the decision, violation of some of the jurisdiction rules contained in the Regulation Brussels I.

Because there is no significant change in between regulation related to public order we presumed that case law of the Court of Justice is applicable.47 The examined provision deals with procedural defects that occurred in the state of origin and which weaken the position of

46 The list of reasons is exhaustive. All the reasons must be interpreted restrictively because they constitute an exception to the principle of automatic recognition. The court in the executing State may not in any case review the case on the merits. When assessing the reasons, the court in the State Enforcement is bound by the factual and legal findings of the court which decision issued. Reasons are obligatory. If one of them exists, the court is obliged to Recognition, resp. refuse enforcement without any considerations. Subsidiary applications of national law is unacceptable. If the decision can not be accepted under the Regulation, can not subsequently be recognized under national law. If there are conditions of application of the Regulation than it must be applied, whether the decision will be or will not be recognized. The Regulation does not contain provisions, which would make it possible to apply national law even if it were in the given situation more favorable.

47 Concept of public order and analyze the position of the defendant in terms of personal participation to the proceedings (C-7/98 Dieter Krombachem vs. André Bamberski), (C-394/07 Marco Gambazzi vs. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company), the need to contain reasoning of original merit's decision (C-619/10 Trade Agency Ltd v Seramico Investments Ltd and C-302/13 flyLAL-Lithuanian Airlines AS vs. Starptautiski lidosta Riga VAS, Air Baltic Corporation AS), the issue of exequatur of the already executed decision (Case C-139/10 Prism Investments BV v Jaap Anne van der Meer, acting as Agents) As the insolvency administrator of Arilco Holland BV), the issue of impossibility of practical application of a recognized decision (C-420/07 Meletis Apostolides Vs David Charles Orams, Linda Elizabeth Orams) or substantive public order (C-38/98 Régie Nationale des Usines Renault SA v. Maxicar SpA, Orazio Formento).
the defendant so-called "irregularities in the proceedings". Specifically, it is a breach of the right to be heard. The provision thus constitutes one of the simplified exceptions of circulation of judicial decisions. The protection of the defendant's rights goes in two ways.

Firstly in the State of origin, the court has a duty to suspend proceedings when the defendant resides in another Member State until it is established that the defendant was able to receive an action in sufficient time or court has exhausted its legal ways to contact the defendant (Article 28 (2) of the Brussels Ibis Regulation).

The court of the State where the enforcement is sought based on the defendant's objections then examines whether conditions written in Article 45 (1) b) were abided. Because the provision can only be used when the decision was issued in the absence of the defendant, it was necessary to determine when the defendant should be considered as not involved.\(^{48}\) In the wording of the Brussels I and Brussels Ibis Regulations, a further question arose regarding to opportunities to appeal.\(^{49}\)

The extension of Article 34 (2) of the Brussels I Regulation and Article 45 (1) b) Brussels Ibis Regulation makes it impossible to deny recognition and enforcement because of a defect to delivery if the defendant has not made any appeal in the State of origin, even if he had "an opportunity" to do so. The aim of this change is to deal with procedural defects, if possible, in the State of origin. The result of stating of defendant's duty to make appeal in the country of origin is strengthing of the plaintiff's position and simplification of recognition conditions.

The purpose is to prevent defendant start defence whether intentionally or negligently, in state where recognition or enforcement is sought. If he has an "opportunity" to do so, he has to defend himself against the decision in the State of origin.\(^{50}\) To ensure this opportunity, it is according case law that the defendant was aware of the content of the judgment or at least that he had an opportunity.\(^{51}\)

In spite of a certain strengthening of the rights of the plaintiff, the purpose of Article 45 Paragraph 1, b) Brussels Ibis Regulation still remains protection of the defendant's right to be heard, although it is required on his part to take proper care to defend his rights according to principle vigilantibus iura. Points (c) and (d) of the first paragraph of Article 45 of the Brussels Ibis covers issue of the incompatibility of the decision as a reason for non-

\(^{48}\)(for example, if he was represented by a lawyer or guardian, but he did so without his consciousness)
\(^{49}\)Case law related to questions above: C-228/81 Pendy Plastic Products BV vs. Pluspunkt Handelsgesellschaft GmbH, C-619/10 Trade Agency Ltd vs. Ceramico Investments Ltd, C-172/91 Volker Sonntag vs. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann, C-78/95 Bernardus Hendrikman a Maria Feyen vs. Magenta Druck & Verlag GmbH, C-474/93 Hengst Import BV vs. Anna Maria Campese, C-166/80 Peter Klomps vs. Karl Michel, C-49/84 Leon Emile Gaston Carlos Debacker a Berthe Plouvier vs. Cornelis Gerrit Bouwman, C-283/05 ASML Netherlands BV vs. Semiconductor Industry Services GmbH (SEMIS).
\(^{50}\)(C-420/07 Meletis Apostolidis v. David Charles Orams and Linda Elizabeth Orams)
\(^{51}\)C-283/05 ASML Netherlands BV vs. Semiconductor Industry Services GmbH (SEMIS)
recognition of a foreign decision. The simultaneous existence of two incompatible decisions has the potential to cause serious violations of rule of law rules, and precisely that the provisions in question seek to avoid. It is necessary to distinguish between incompatibilities under Article 45 (1) c) and according d).\textsuperscript{52} Interpretation of Article 45 (1) e) Brussels Ibis Regulation\textsuperscript{53} (resp. Provisions in the Brussels Convention and the Brussels Ibis Regulation) do not seem to make any major difficulties to courts.\textsuperscript{54}

In summary, the modernisation brought about by the new Regulation does not hide that it only has partially achieved its intended goals. The extension of the rules on jurisdiction to defendants not domiciled in a Member State has been very limited and hence national jurisdiction rules remain applicable to many situations being a source of disharmony and distortions. Furthermore, the abolition of exequatur amounts in practice mainly to the disappearance of a procedural obstacle and facilitates enforcement by establishing a common model certificate, but does not alter the previous situation as to the possible grounds to refuse recognition and enforcement of judgments rendered in another Member State. The idea of draft of regulation was very ambitious, but the result of negotiation is more conservative. Only practise will show if new regime led to effectivenes and if protection of right to be heard preserved at the same level.

6. ECHR case law applicable within right to a fair trial – civil limb

*Bosphorus Hava* illustrates how ECHR manifests its relation to *acquis communautaire* and will to interpret it. In many cases the Court states that EU public bodies are in better position to interpret EU law and demonstrates equivalent protection of fundamental rights by EU law and Convention\textsuperscript{55}. Closer cross-border cooperation, partly realized by transmission of part of sovereignty from Member States to EU, also contributes to proper enjoyment of rights secured by Convention; nonetheless, EU Member States still bear responsibility for proper fulfilment of fundamental rights. Their legislation shall be, thus, comprehensible, foreseeable and precisely formulated, adopted within extend of so called margin of appreciation which for article 6 (1) wider\textsuperscript{56}; the article is also applicable for interim measures, where conditions for their applicability are generally formulated\textsuperscript{57}.

\textsuperscript{52}C-80/00 Italian Leather SpA vs. WECO Polstermöbel GmbH & Co, C-157/12 Salzgitter Mannesmann Handel GmbH proti SC Laminorul SA, 145/86 Horst Ludwig Martin Hoffman vs. Adelheid Krieg

\textsuperscript{53}According to Article 45 (1) E) The Brussels Ibis Regulation does not recognize a foreign decision in the event that the rules of jurisdiction in the following cases have not been complied with: Exclusive jurisdiction; insurance policies, if the policyholder or the insured or the injured party is the defendant; consumer contracts where the consumer is a defendant; individual employment contracts if the employee is a defendant. The latter three clearly show the protection of weaker contractual parties.

\textsuperscript{54}This is evidenced by the fact that, that the Court dealt with that provision only in one decision -C-420/07 Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams.

\textsuperscript{55}See e.g. *Bosphorus Hava* §§ 150,160, 163, 165.

\textsuperscript{56}S. and Marper v. the United Kingdom, application no. 30562/04, of 4 December 2008, §95, §106 or *Connors v. the UK*, § 82.

\textsuperscript{57}Per analogiam case of Forminster Enterprises Limited v. the Czech Republic, application no 38238/04, of 9 October 2008, § 64-65.
Although article 6 (1) was initially applied on proceedings on merits, the Court extended its applicability on interim measures if the measure effectively determines disputable right at stake. Civil nature of right affected by interim measure, and right at stake, is determined, as in EU law, within the context of supra-national law.

It might be reminded, at the end of introduction, as in Perez (§67), that principles incorporated into article 6 (1) are applicable, with some slight differences, in civil and criminal law cases. Moreover, if ECHR sets certain principles for proceedings on merits, these principles shall apply, via *argumentum a maiori ad minus*, with reflection of distinctive features of measures (e.g. temporal and provisional effect), in proceedings on interim measures. Article 6(1), civil limb, covers set of hereinafter explained rights covered under principle of fair trial; their violation may lastly result in violation of another article of Convention.

### 6.1. Equality of arms

is a fundamental principle of fair trial which entitles each party to present its case before tribunal under conditions which don’t place him/her to substantial disadvantage to the opponent. Nonetheless interim measures are often, at first instance, granted without any hearing and defendant might be placed in disadvantaged position then. Absence of oral hearing is permitted by Court if is justified by pursuit of justice, because it is applicant who, as first, proves necessity of measure’s imposition. Defendant has, subsequently, right of service of decision, have enough time to inspect court file, appeal against decision, submit evidence and take a part in hearing. Both parties thus enjoy these rights in civil cases before tribunal within *adversarial procedure*, ignoring the fact whether the case is disputable or non-disputable.

### 6.2. Proceedings on protective measure

As mentioned above, interim measures have temporal effect depending on entrance of judgment on merits into force. Proceedings on

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58 Indication of interim measure is similar to ECJ judicature, as demonstrated in Mamatkulov and Askarov v. Turkey, application no 46827/99, of 4 February 2005, § 108.
60 Perez v. France, §50, 57 or case of Juričič v. Croatia, application no 58222/09, of 26 July 2011, § 51, Kübler v. Germany, § 44. There might be some exemptions, obviously in criminal law only (case of Galstyan v. Armenia, application no. 26986/03, of 13 November 2007, § 58).
61 Per analogiam Markass Car Hire Ltd. v Cyprus, application no 51591/99, of 2 July 2002, § 39.
63 Per analogiam case of Romanova v. Russia, application no. 23215/02, of 11 October 2011, § 151-152.
64 There might be exemptions set by national law, e.g. legal fiction of service if defendant refuses or fails to take delivery to official or actual address; *vide Avotiņš* (§106) or *Orams*, § 75 – 76, 80.
65 BENet Praha v. the Czech Republic, application no 33908/04, of 24 February 2011, § 141, Krčmář and others v. the Czech Republic, application no. 35376/97, of 3 March 2000, § 42, Milatová and others v. the Czech Republic, application no 61811/00, of 21 June 2005, § 59. Failure of presence of submitted evidence to the other party does not constitute violation of article 6 (1) if such a evidence does not influence the decision itself (*BENet Praha*, § 124).
66 Appellate court shall arrange hearing to enable appellant to present its arguments (*Galstyan*, § 80-81, *Juričič*, § 92), unless the appeal is based solely on point of law and no evidence is submitted (*Milatová and others*, § 62, *a contrario* De Haes and Gusels v. Belgium, application no 19983/92, of 24 February 1997, § 58).
67 In the meaning described in *BENet Praha*, § 122, *Milatová*, § 59, or *Juričič*, § 73.
protective measures serve, if possible, for immediate and provisional regulation of certain relation, thus the emphasis on rapidity of procedure is justified and modifies certain principles usual for proceedings on merits.

Firstly, the procedure on measure shall be fast and effective. As adjudicated in *Komanický* 68, the length of whole procedure on measure must be assessed in the light of the *circumstances* of the case, its *complexity*, *conduct* of the applicant and state authorities, with assessment of applicant’s interest in dispute; it means that if the proceedings lasts over 2 years, many adjournments occur, and the case is not treated in expedite way, then article 6 (1) is violated 69. Member States shall thus adopt recent technical innovations such as videoconference of video-calls which make the procedure easier 70. Any party may then attend hearing in person from anywhere without necessary to be represented by proxy.

Secondly, the legality of provisional measure depends on length of its effect which must be proportional to aims which are preserved by it. This conclusion might be analogically derived from *Eli S.r.l.* 71, where Court stated that decision having provisional effect, which lasted for plenty of years, resulted in the same effect as decision on merits.

6.3. Substantiation of decision on interim measures is primarily affected by its atypical nature 72. The applicant shall firstly prove conditions required for its imposition such as necessity of interim regulation, relation of measure to merits, real possibility of occurrence of irreparable harm. Subsequently, the court must properly, without any prejudice, assess facts relevant for the measure 73 (these matters were explained above). National courts are thus in better position to evaluate imposition of interim measure and enjoy wide right of discretion in it 74. Nevertheless the right of discretion, alike as regulation of way of evidence-exercise and admissibility of certain evidence and its free evaluation 75, is not unlimited and must be in conformity with Convention; the Court revises such conformity if violation of national law affected right(s) guaranteed by Convention 76.

7. Final recommendation

Based on our research regarding the protective measures we managed to answer several questions and define the borderlines of protective measures application in justice. We also

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68 Komanický v Slovakia, application no 40437/07, of 12 June 2012, § 64, 89, 98, or
69 Also is *Markass Car Hire Ltd. v Cyprus*, § 38-40.
70 The Court allowed use of videoconference for attendance of party (in a dispute) in case of Marcello Viola v Italy, application no. 45106/04, of 5 October 2006.
71 *Elia S.r.l. v Italy*, application no 37710/97, of 2 August 2001, § 54, 79.
73 It does not mean to answer to every argument (*Perez*, § 80, *Van de Hurk v The Netherlands*, application no 16034/90, of 19 April 1994, § 61).
74 Higgins and others v France, of 19 February 1998, § 42.
75 In the meaning of *D.H. and Others v the Czech Republic*, application no 57325/00, of 13 November 2007, §178
concluded it would be useful to enhance further cooperation of justice systems among member states by adjusting the European Judicial Atlas to provide unified way of protective measure execution.

Index:
https://is.muni.cz/repo/1314599/Valdhans_Brusel_Ibis-_openaccess-_II.pdf
http://www.academia.edu/26896853/The_Abolition_of_Exequatur_in_the_Proposal_for_Revision_of_the_Brussels_I_Regulation_-_2011


