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### Reforming the Brussels I<sup>bis</sup> Regulation: Perspectives and Prospects

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# Reforming the Brussels I<sup>bis</sup> Regulation: Perspectives and Prospects<sup>1</sup>

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## Abstract

According to article 79 of Regulation (EU) 1215/2012, the EU Commission shall present a report on the application of the Brussels I<sup>bis</sup> Regulation by 11 January 2022. This paper intends to open the discussion about the present state of affairs and the necessary adjustments of the Regulation. Although there is no need to change its basic structure, the relationship of the Brussels I<sup>bis</sup> Regulation with other EU instruments (as the General Data Protection Regulation) should be reviewed. There is also a need to address third-State relationships and cross-border collective redress. In addition, the paper addresses several inconsistencies within the present Regulation evidenced by the case law of the CJEU: such as the concept of contract (article 7 no 1), the place of damage (article 7 no 2), the protection of privacy and the concept of consumers (articles 17 – 19). Finally, some implementing procedural rules of the EU Member States should be harmonised, i.e. on the assessment of jurisdiction by national courts, on judicial communication and on procedural time limits. Overall, the upcoming review of the Brussels I<sup>bis</sup> Regulation opens up an opportunity to improve further a central and widely accepted instrument of the European law of civil procedure.

## Keywords

Regulation 1215/2012 (Brussels I<sup>bis</sup> Regulation); Hague Conference of Private International Law; Judicial Cooperation Post-Brexit, Cross-border Collective Redress; Specific Jurisdiction Based on Contract and on Tort, Protection of Privacy, Implementing Legislation

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## Table of Contents

Title page.....	1
1. Fundamental Issues – A Need to Change the Basic Structure of the Regulation? .....	3
1.2 The Relationship with Other EU Instruments.....	4
2. Third-State Relationships .....	5
2.1 The Increased Role of Third-State Relationships (Especially the Relationship with the UK after Brexit).....	5
2.2 Assessing the Role of the Hague Conference .....	6
2.3 Providing for Residual Heads of Jurisdiction.....	6
3. Cross-Border Collective Redress within the Framework of the Regulation .....	7
4. Specific Inconsistencies within the Current Regulation .....	8
4.1 Article 7 no 1 – Revisiting the Concept of Contracts in the Case-Law of the CJEU .....	8
4.2 Article 7 no 2 – Growing Fragmentation of the CJEU's Case-Law .....	9
4.3 The Concept of Consumers in Articles 17–19 .....	11
4.4 Defining and Delineating Judgments and Settlements .....	11
4.5 Provisional Measures.....	12
4.6 Aligning Article 45 (1) (c) with Article 29 of the Regulation Brussels I <sup>bis</sup> .....	13
5. Improving Procedural Implementing Rules .....	13
5.1 Assessment of Jurisdiction, Articles 27 and 28: Providing for Comprehensive Uniform Standards.....	14
5.2 Enhancing Direct Cooperation between Courts by Mutual Communication and Assistance .....	14
5.3 Harmonising Procedural Time Limits.....	15
6. Final Remarks: The Future of the Brussels System .....	16

According to article 79 of the Brussels I<sup>bis</sup> Regulation, the EU Commission shall present a report on the application of the Regulation by 11 January 2022. So far, to the best of my knowledge, the Commission has not launched a call for tender. This may be due to the other developments undertaken in the area of EU procedural law, especially in the field of digitization (e-Codex) and the protection of the rule of law, in which the Commission is currently involved. However, the time has come to reflect about necessary reforms and to assess the state of affairs of the Brussels system.<sup>2</sup> The scope of this review also needs to encompass the different roles of, respectively, the CJEU and the lawmaker in EU law: As a matter of principle, the CJEU cannot change the fundamental structures of the Union law. It is up to the EU-lawmaker to implement major changes.<sup>3</sup>

The following paper is intended to open up a discussion about potential changes of the Brussels I<sup>bis</sup> Regulation. It starts from two basic premises: on the one hand, it looks at the proposals already made in 2010 when the EU Commission presented its view on the reform of the Brussels Regulation. On the other hand, it also looks at recent case-law of the CJEU in order to see whether more fundamental adaptations of the Regulation are needed. The intention of this article is not to come up with many detailed proposals for changes but rather to open up the discussion about necessary improvements of the Regulation.

## 1. Fundamental Issues – A Need to Change the Basic Structure of the Regulation?

### 1.1 The Function of the Regulation as the Basic and Reference Instrument of Civil Judicial Cooperation

Since the 1970s, by providing rules on jurisdiction, pendency and recognition and enforcement, the Brussels I<sup>bis</sup> Regulation has laid the fundamental structure and has served as the basic instrument in the area of judicial cooperation. During the last twenty years, its function has been changed and expanded, as it has become the instrument of main reference in the enlarged system of European instruments of private international and procedural law.<sup>4</sup> In this regard, the Regulation has performed well.<sup>5</sup> Therefore, in the present state of affairs, there is no compelling need to change the fundamental structure of the Brussels I<sup>bis</sup> Regulation. Notably, the reformed enforcement regime set out in Chapter

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<sup>2</sup> The Brussels system designates all EU instrument on jurisdiction, pendency and recognition in civil and commercial matters that are primarily based on the fundamental structure of the Brussels I<sup>bis</sup> Regulation. It does not include matrimonial and family matters nor insolvency, cf. *Hess*, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), paras .1.39 – 1.40.

<sup>3</sup> *Hess*, *Seminal Judgments in the case law of the European Court of Justice*, in: *Hess/Lenaerts* (ed.), *The 50th Anniversary of the European Law of Civil Procedure* (2020), p. 5, 43.

<sup>4</sup> *Hess*, *Seminal Judgments of the Court of Justice*, in: *Hess/Lenarts* (ed.) *The 50<sup>th</sup> Anniversary of the European Law of Civil Procedure* (2020), p. 5, 32 *et seq.*

<sup>5</sup> *Coester-Waltjen*, *Einige Überlegungen zum Gebot der übergreifenden systematischen Auslegung nach Erwägungsgrund 7 Rom I-VO*, *IPRax* 2020, 385, 386 *et seq.*

III has not yet been tested in practice – to date, the Court of Justice has, in fact, given only very few judgments on such new regime.<sup>6</sup>

Since the Millennium, the legal environment of the Brussels I<sup>bis</sup> Regulation has changed considerably. In the current “Brussels system”, the Regulation provides for basic definitions and concepts which are taken up by other parallel instruments (civil and commercial matters, judicial decisions, pendency based on priority, consumer etc.). The Brussels I<sup>bis</sup> Regulation regularly serves as a reference instrument to complete these instruments (current examples are article 6 Reg. (EU) 1896/2006<sup>7</sup> and article 32 Reg. (EU) 848/2015).<sup>8</sup> This residual function requires a thorough review of the Regulation Brussels I<sup>bis</sup> in the sense that the boundaries of the definitions and concepts, especially under Articles 2 and 3, need to be more clearly defined. For instance, the definitions of “courts”<sup>9</sup> and of “settlements”<sup>10</sup> are in need of improvement.

## 1.2 The Relationship with Other EU Instruments

A new category of problems has arisen with sectorial EU instruments aimed at the private enforcement of public interests. The wider political and systemic implications of this regulatory approach have not yet been sufficiently scrutinized. Usually, these instruments only contain a provision stating they apply “without prejudice” to the existing rules of private international and procedural law.<sup>11</sup> The most prominent instrument in this regard is the General Data Protection Regulation (GDPR) whose articles 89–91 entail disruptive effects to the Brussels system.<sup>12</sup> Clarifying the relationship between the Brussels system and cross-border litigation under sectorial instruments should become a priority of the reform of the Brussels Regulation.<sup>13</sup> Similar problems are found in the relationship between the Directive on Consumer Collective Redress and the Regulation Brussels I<sup>bis</sup>.<sup>14</sup>

An additional issue relates to the unclear definition of “cross-border” cases. As a matter of principle, the Regulation only addresses cross-border cases – taking up article 81 TFEU as the EU competence on which the instrument is based. The basic understanding relates to constellations where parties are domiciled in different EU Member States. However, the situation becomes more complicated if a

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<sup>6</sup> The most important was CJEU, 3 September 2020, case C-186/19, *Supreme Site Services*, EU:C:2020:638. Same opinion: *Oberhammer/Scholz/Auernig/Schumann*, Default Procedures and Judgments in Cross-border Settings, in: Hess/Ortolani (ed.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Luxembourg Report on European Procedural Law, Vol. I (2019), para 150.

<sup>7</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 10 II, paras 10.57 *et seq.*

<sup>8</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 9 IV, paras 9.60 *et seq.*

<sup>9</sup> CJEU, 9 March 2017, C-551/15, *Pula Parking*, EU:C:2017:193; *Mantovani*, Notaries and their debt-collection writs under the Brussels Ia Regulation. A difficult characterisation, JPIL 15 (2019), 393.

<sup>10</sup> See *infra* at footnotes 68 *et seq.*

<sup>11</sup> Cf. Recital 147 of the GDPR, Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 11 I, paras 11.102 *et seq.*

<sup>12</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 11 I, paras 11.4 *et seq.*

<sup>13</sup> Especially, the general rule of article 67 BX1 on the preference of sectorial EU instruments needs to be reviewed.

<sup>14</sup> Cf. *infra* text at footnotes 35 *et seq.*

domestic judgment is enforced abroad<sup>15</sup> or if a party to a domestic consumer contract moves to another EU Member States where he or she brings a lawsuit based on articles 17 and 18 of the Regulation.<sup>16</sup>

## 2. Third-State Relationships

### 2.1 The Increased Role of Third-State Relationships (Especially the Relationship with the UK after Brexit)

In 2012, the EU lawmaker did not endorse the far-reaching proposals of the EU Commission regarding the relationship of the Regulation with third states.<sup>17</sup> It only extended some of the protective heads of jurisdiction (consumer and labour disputes) to third state defendants.<sup>18</sup> Especially, the Commission's proposals to provide for residual heads of jurisdiction were not taken up.<sup>19</sup> Regarding pendency and related actions, the new articles 33 and 34 of the Regulation Brussels I<sup>bis</sup> on third states relations have not yet gained any practical impact. The recognition and enforcement of judgments coming from third states is still a matter of the national laws of EU member states.<sup>20</sup>

After Brexit, the practical impact of the limited approach of the Brussels regime to third state situations has increased the practical problems of litigants considerably. The hard Brexit in European private international and procedural law negatively affects existing and future legal relationships between parties living in the UK and on the continent.<sup>21</sup> The disruptive gap of the legal regime is enormous. In cases where litigation started before 31 December 2020, the former regime remains fully applicable – with all procedural guarantees and privileges the Brussels regime provides for litigants.<sup>22</sup> However, when litigation is initiated after 1 January 2021, the autonomous laws of the EU member states apply: exorbitant heads of jurisdiction, security for costs<sup>23</sup> and no guarantee that a judgment (of course, only after finality) will be recognized and enforced.<sup>24</sup>

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<sup>15</sup> The moment, a judgment of given by a court in Member State A is enforced in Member State B the Regulation applies, cf. articles 39 et seq. However, this constellation is not clearly addressed in the present instrument. The definition of “cross-border” cases in Article 3 of the Small Claims Regulation (867/2007) is too narrow.

<sup>16</sup> See *infra* text at footnotes 63 *et seq.*

<sup>17</sup> COM (2010) 748 final; discussed by *van Calster*, *European Private International Law* (3<sup>rd</sup> ed. 2021), paras 2.505 *et seq.*; *Basedow*, *EU Private Law* (2021), Part X, paras 39 *et seq.*

<sup>18</sup> The same applies to jurisdiction agreements where the scope of BX1 was increased to any prorogation of a court of an EU member state, article 25 (1) BX1. Cf. *Hess*, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 6 II, paras 6.150 *et seq.*

<sup>19</sup> Article 79 explicitly states that third state relationship shall be reviewed by the next reform of the BX1 Regulation.

<sup>20</sup> *Hess*, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 5 III, paras 5.82 *et seq.*

<sup>21</sup> *Dickinson*, *IPRax* 2021, 213 *et seq.* – with further references.

<sup>22</sup> Cf. article 67 Withdrawal Agreement, Bundesgerichtshof (BGH), 15 June 2021, II ZB 35/20 (*Air Berlin*), paras 40 *et seq.*

<sup>23</sup> BGH, 1 March 2021, X ZR 54/19 – Security for costs also applies to cases initiated before 1 January 2021.

<sup>24</sup> If someone wants to assess the achievements of the Brussels regime during the past fifty years, she or he may simply compare the current legal situation within EU27 and the growing uncertainty for private litigants after Brexit.

## 2.2 Assessing the Role of the Hague Conference

It goes without saying that the role of the Hague Conference might increase due to the latest developments in Europe, but also with regard to the changing global landscape of dispute resolution. Here, the present dominance of the western democratic culture, based on the rule of law, is being challenged.<sup>25</sup> The 2019 Hague Judgments Convention establishes a minimum regime for the recognition of judgments but is riddled with exceptions.<sup>26</sup> However, the Convention will cover the core areas of commercial litigation.<sup>27</sup> Consequently, both, the Union and the United Kingdom should ratify it in order to re-establish legal certainty in these core areas. This does not exclude the negotiation of a bilateral treaty between the Union and the United Kingdom which should encompass family matters (especially divorce and maintenance), too.

## 2.3 Providing for Residual Heads of Jurisdiction

In 2010, the EU Commission had proposed to expand the jurisdiction under the Regulation to defendants domiciled in third states.<sup>28</sup> The proposal was twofold. On the one hand, it argued that the special heads of jurisdiction should apply to third state defendants.<sup>29</sup> However, this idea runs counter to the basic understanding that the Brussels regime primarily aims at coordinating civil litigation within the European Area of Justice (article 67 TFEU). It may end up in the adoption of an “effet réflexe”-regime. Yet, in the (complicated) world of today, it may make much sense to extend some of the specific heads of jurisdiction of the Regulation Brussels I<sup>bis</sup> to third state defendants.<sup>30</sup> In addition, this expansion should operate alongside with two additional heads of jurisdiction (subsidiary jurisdiction<sup>31</sup> and *forum necessitatis*).<sup>32</sup> In this regard, it is recommended to take up again the proposal of the EU

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<sup>25</sup> *Muir Watt*, Le droit international privé au service de la géopolitique – les enjeux de la Convention de la Haye du 2 juillet 2019, *Rev. Crit.* 2020, 191 *et seq.*

<sup>26</sup> *Schack*, Das neue Anerkennungs- und Vollstreckungsübereinkommen, *IPRax* 2020, 1 *et seq.*; *Stein*, Das Haager Anerkennungs- und Vollstreckungsübereinkommen 2019 – was lange währt wird endlich gut?, *IPRax* 2020, 197, 199 *et seq.*; *Bonomi/Mariottini*, A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention, *Yearbook of Private International Law*, Volume 20 (2018/2019), pp. 537-567, esp. 542-545

<sup>27</sup> On July 16, 2021, the Commission issued a proposal to accede to the 2019 Hague Judgments Convention, COM (2021) 388 final.

<sup>28</sup> EU COM (2010) 748, p. 4–5.

<sup>29</sup> As a result, it seems preferable to expand only some of the heads of jurisdiction to third states, especially article 8 no. 1 and article 11 of BX1bis.

<sup>30</sup> Especially protective jurisdiction for insurance contracts – a topic with specific relevance after Brexit as many insurers are domiciled in the UK.

<sup>31</sup> Proposal of the Commission (2010): “Article [25] – Subsidiary Jurisdiction

Where no court of a Member State has jurisdiction in accordance with Articles [4] to [26], jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that

(a) the value of the property is not disproportionate to the value of the claim; and

(b) the dispute has a sufficient connection with the Member State of the court seised.”

<sup>32</sup> Proposal of the Commission (2010): “Article [26] Forum necessitatis

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:



Commission.<sup>33</sup> This would entail the replacement of the exorbitant heads of jurisdiction currently applicable against defendants domiciled in third states, as provided by the national laws of the EU Member States.

### 3. Cross-Border Collective Redress within the Framework of the Regulation

Recent developments of cross-border litigation relate to collective redress. On the one hand, the Directive (EU) 2020/1828 on Collective Consumer Redress<sup>34</sup> endorses a concept of mutual recognition of the legal standing of qualified entities (consumer associations) and does not directly address jurisdiction and enforcement. However, the Directive only provides for minimum harmonisation. At present, several EU Member States, especially the Netherlands, provide for additional, more effective remedies via collective redress.<sup>35</sup> In this regard, recent case law of the Court of Justice demonstrates the growing practical importance of collective redress in the Union.<sup>36</sup>

From the perspective of the Regulation Brussels I<sup>bis</sup>, collective redress raises issues of jurisdiction (especially the application of articles 7 no 2 and 8 no 1<sup>37</sup>), of pendency and relatedness (with regard to represented plaintiffs and the moment of pendency) and of recognition (regarding the binding effects of judgments and court approved settlements on parallel claims). Some basic clarifications in this area would definitely be useful and appropriate.<sup>38</sup>

With regard to jurisdiction, one might consider to provide for a specific head of jurisdiction for assigned or transferred<sup>39</sup> claims (i.e. to a consumer association).<sup>40</sup> In the case of consumer protection, jurisdiction might be located in the Member State of the consumers' domicile.<sup>41</sup> Regarding pendency, there should be a rule that only cross-border collective claims based on (explicit) opt-in are

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(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) ..."

<sup>33</sup> This head of jurisdiction would be in line with *Nait Liman vs. Switzerland*, GC judgment of the ECtHR of March 15, 2018, appl. no. 51357/07

<sup>34</sup> OJ 2020 L 209/1 ff.

<sup>35</sup> *Arons*, in: Mankowski (ed.), *Elgar Research Handbook Brussels I<sup>bis</sup> Regulation (2020)*, p. 1, 13 *et seq.*; *Bosters*, *Collective Redress and Private International Law in the EU (2017)*, p. 47 *et seq.*

<sup>36</sup> CJEU, 25 January 2018, case C-498/16, *Schrems II*, EU:C:2018:37; CJEU, 28 July 2016, case C-191/15, *VKl./Amazon*, EU:C:2016:612; CJEU, 9 July 2020, case C-343/19, *VKl v. Volkswagen*, EU:C:2020:534; 12 May 2021, case C-709/19, *VEB*, EU:C:2021:377.

<sup>37</sup> One might consider enlarging article 8 no 1 to defendants domiciled in third states in order to promote human rights litigation in the field of business and human rights, cf. *Hess/Mantovani*, *European Perspectives on Human Rights Litigation*, in: Ferrari/Fernandez Arroyo (ed.), *Private International Law: Contemporary Challenges and Continuing Relevance (2019)*, p. 293 *et seq.*

<sup>38</sup> Cf. *Hess*, *Europäisches Zivilprozessrecht*, § 11 III, paras 11.78 *et seq.*

<sup>39</sup> In the EU Member States, different models of transferring individual claims of consumers to the respective associations do exist.

<sup>40</sup> The CJEU did not apply article 18 to assigned claims in *Schrems II*, 25 January 2018, case C-498/16, EU:C:2018:37.

<sup>41</sup> This would correspond to article 18 of the of the Regulation Brussels I<sup>bis</sup>.

permissible.<sup>42</sup> Furthermore, article 30 of the Regulation Brussels I<sup>bis</sup> should be made mandatory in order to avoid overlapping collective claims. Finally, the moment of pendency (article 32 of the Regulation Brussels I<sup>bis</sup>) should be clarified in the sense that the relevant moment in time should be identified in the application to be admitted as a (lead) plaintiff in a collective case.<sup>43</sup> As a general rule, the first step to file a collective lawsuit should be decisive.

## 4. Specific Inconsistencies within the Current Regulation

Apart from these overarching issues, several questions related to the current case law of the CJEU remain to be tackled. The following section shall address the most urgent ones.

### 4.1 Article 7 no 1 – Revisiting the Concept of Contracts in the Case-Law of the CJEU

First, the basic structure of article 7 no 1 of the Regulation Brussels I<sup>bis</sup> is not balanced. At present,<sup>44</sup> the provision provides for a two-tier system: litterae a) and b) refer to the *Tessili*-formula of the CJEU<sup>45</sup> whereas lit c) provides for an autonomous concept of contracts for sale and services. Twenty years after the introduction of the autonomous concept, it might be advisable to apply this concept to all contracts and to cast aside the old *Tessili*-formula, which appears unnecessarily complicated: such formula, in fact, refers to the conflict of law rules and provides for different places of performance (and heads of jurisdiction) for the different obligations of the contract. However, casting aside the *Tessili*-formula does not imply that there would not be any fall back-provision. A new fall back-provision should be based on the autonomous concept of the place of performance.

Second, the (autonomous) concept of contract under article 7 no 1 BX1 appears unclear. According to the case law of the CJEU, a contract for the purposes of article no 1 presupposes the establishment of a legal obligation freely assumed by one person;<sup>46</sup> but the application of article 7 no 1 does not require

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<sup>42</sup> This solution follows article 9 (3) of Directive 2020/1828. Different opinion *Arons*, in: Mankowski (ed.), *Elgar Research Handbook Brussels I<sup>bis</sup> Regulation* (2020), p. 1, 37–38: An opt out-regime would be compatible with the BX1<sup>bis</sup> Regulation as represented parties who had not been properly informed are protected by article 45 (1)(b) of the Regulation Brussels I<sup>bis</sup>. However, this provision applies to the judgment debtor, not to the creditor. In addition, establishing an opt out-regime within the Area of Freedom, Security and Justice requires a legislative framework of the EU lawmaker because of the exclusive competences of the Union in this field.

<sup>43</sup> In the case of the German Capital Market Model Case proceedings (KapMuG) in a period of six months after the filing of the initial request (for a model case action), the plaintiff needs to be joined by at least nine additional requests (section 6 and 9 KapMuG). However, in the context of article 32 of the Regulation Brussels I<sup>bis</sup>, the first request for collective proceedings is decisive. This was not correctly decided by the District Court Amsterdam, 26 September 2018, NL:RBAMS:2018:6840 (*Steinhoff*), where the Dutch court referred to the moment when ten plaintiffs had filed their applications. Different opinion *Arons*, in: Mankowski (ed.), *Elgar Research Handbook on the Brussels I<sup>bis</sup> Regulation* (2020), p. 1, 32–33.

<sup>44</sup> The actual structure of the provision goes back to article 5 no 1 of the Regulation (EC) 44/2001.

<sup>45</sup> CJEU, 6 October 1976, case C-12/76, *Tessili*, EU:C:1976:133. Cf. *Michailidou*, The delineation between the special jurisdictions in contract and in tort. An interpretative approach in the light of the case law of the European Court of Justice (in Greek – forthcoming in 2021).

<sup>46</sup> CJEU, 17 June 1992, case C-26/91 *Handte*, EU:C:1992:268; for a summary and critique of the case law cf. *van Calster*, *European Private International Law* (2020), paras 2.386 *et seq.*

that the parties in the proceedings are direct parties to the contract.<sup>47</sup> The extension to non-parties of the head of jurisdiction for contracts has raised considerable doubts. Moreover, it is not easy to reconcile with the guiding principles of predictability and relatedness of the fora of the BX1bis.<sup>48</sup> In addition, the CJEU does not apply the same concept of contracts in consumer matters.<sup>49</sup> As a matter of principle, it seems advisable to restrict the concept of contracts in article 7 no 1 of the Regulation Brussels I<sup>bis</sup> and to restrict its scope to the parties of the contract at hand (and their successors).

## 4.2 Article 7 no 2 – Growing Fragmentation of the CJEU’s Case-Law

Even more uncertainty arises from the case law of the CJEU with regard to the concept of the place of the harmful event (which includes the place of the damage). In this regard, I would like to highlight two main problems: On the one hand, the localisation of non-tangible damages has triggered many recurring preliminary references. Unfortunately, the CJEU has developed a departmentalised case law that generated in turn more and more additional references. Recent cases as *VKL./Volkswagen* and *VEB* demonstrate the difficulties in localising the place of the pecuniary damage. Consequently, several Advocate Generals have invited the Court to give up jurisdiction at the “Schadensort” (place of the damage) in these settings.<sup>50</sup> According to the case law of the CJEU, pure economic losses (occurring at a bank account) do not create any “Erfolgsort” under article 7 no 2 Regulation Brussels I<sup>bis</sup> unless additional criteria are present.

Another distinct issue relates to the protection of personality rights. In *Shevill*,<sup>51</sup> the CJEU developed the “mosaic”-principle that permits the victim of a press delict to sue for partial damage in all places where the press article was distributed. However, *Shevill* was decided before the age of the internet. Today, information is globally available and not easy to ascertain and to evaluate by the “number of clicks” an article or post receives. In *eDate Advertising*,<sup>52</sup> the Court developed the concept further and declared the “centre of interest” of the person concerned to be the place where the damage occurred. In the case of a legal person, the centre of main interests is located where the latter carries out its main economic activities.<sup>53</sup>

Most recently in *Mittelbayerischer Verlag*, the Court restricted the scope of article 7 no 2 BX1<sup>bis</sup> in defamation cases by requiring that the application of the main centre of interest requires a direct reference to the plaintiff in the article or blog containing the alleged libel.<sup>54</sup> However, as AG *Bobek* clearly stated in his conclusions, the problem of this case was not primarily the establishment of

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<sup>47</sup> CJEU, 4 October 2018, case C-337/17, *Feniks* (actio pauliana), EU:C:2018:805; 7 March 2018, joint C-274/16, C-447/16 and C-448/16, *flightright* (air carrier), EU:C:2018:160; *van Calster*, European Private International Law (2020), paras 2.392 *et seq.*

<sup>48</sup> Cf. Recital 16 of the Regulation Brussels I<sup>bis</sup>, often quoted by the CJEU as an overarching principle of interpretation.

<sup>49</sup> CJEU, 26 March 2020, case C-215/18, *Primera Air Scandinavia*, EU:C:2020:235.

<sup>50</sup> Most recently Conclusion AG *Sánchez Bordona*, 2 April 2020, case C-343/19, *VKL./Volkswagen*, EU:C:2020:253, paras 46 and 47, and Conclusions AG *Sánchez Bordona*, 17 December 2020, case C-709/19, *VEB*, EU:C:2020:1056, paras 40 *et seq.* referring to the Conclusions AG *Szpunar*, 10 March 2016, case C-12/15, *Universal Music*, EU:C:2016:161, para 38.

<sup>51</sup> CJEU, 7 March 1995, case C-68/93, *Shevill./Presse Alliance*, EU:C:1995:61.

<sup>52</sup> CJEU, 25 October 2011, joint cases C-509/09 and C-161/10, *eDate and Martinez*, EU:C:2011:685.

<sup>53</sup> CJEU, 17 October 2017, case C-194/16, *Bolagsupplysningen*, EU:C:2017:766.

<sup>54</sup> CJEU, 17 June 2021, case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:489.

jurisdiction under article 7 no 2 of the Regulation Brussels I<sup>bis</sup> but the dismissal of the lawsuit for other grounds.<sup>55</sup>

The misuse of defamation lawsuits is currently discussed in the context of SLAPP.<sup>56</sup> In these cases, a recent study of the EU Parliament<sup>57</sup> proposes to concentrate jurisdiction at the domicile of the targeted person. This would entail that only article 4 of the Regulation Brussels I<sup>bis</sup> applies to these cases. With due respect, this proposal appears unbalanced. Although there is a need to effectively combat abusive litigation, there are equally many cases where victims whose privacy and personality rights are infringed need to bring a lawsuit at the place of their centre of main interest in order to get effective judicial protection.

An additional much discussed issue relates to injunctions against infringements disseminated via internet platforms and injunctions for delisting of content from platforms. In case C-18/18, *Glawischnig-Piesczek*, the Court had to decide over an application for an extraterritorial injunction against Facebook, launched by an Austrian politician who had been insulted via Facebook.<sup>58</sup> The Court permitted an injunction for a worldwide removal of the content and did not follow the conclusions of AG *Szpunar*<sup>59</sup> who had advocated for a much more restrictive solution, favouring a territorial limitation of the injunction supported by geo-blocking.<sup>60</sup>

Finally, it might be advisable to sort out the protection of privacy rights from article 7 no 2 Regulation Brussels I<sup>bis</sup> and address it in a separate paragraph within article 7. This new provision should take up the CJEU's approach of the main interest for internet infringements and reduce the mosaic principle to infringements by printed publications.<sup>61</sup> In addition, the new provision should clarify the jurisdiction and the (extra)territorial reach of injunctions by referring to geo-blocking.<sup>62</sup> Again, jurisdiction should be concentrated at the place of the main interests of the targeted person. Finally, a better concertation with injunctions under the GDPR seems desirable.

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<sup>55</sup> Conclusions AG *Bobek*, 23 February 2021, case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124. According to the Conclusions, it was not clear whether the case amounted to an abuse of procedure (the AG did not openly address the issue).

<sup>56</sup> This acronym stands for „strategic litigation against public participation“.

<sup>57</sup> PE 694.872 – June 2021.

<sup>58</sup> CJEU, 9 October 2021, case C-18/18, *Glawischnig-Piesczek*, EU:C:2019:821, *Kuschel*, Zur inhaltlichen und räumlichen Reichweite von Anordnungen gegen Hosting-Provider, IPRax 2020, 419 *et seq.*

<sup>59</sup> CJEU, 4 June 2019, opinion of AG *Szpunar*, Case C-18/18, *Glawischnig-Piesczek*, EU:C:2019:458, para 76 *et seq.* with reference to *Douglas*, Journal of Equity 12 (2018), 34, 54 *et seq.*

<sup>60</sup> In the opinion of case C-507/17, 10 January 2019, *Google (Portée territoriale du déréférencement)*, EU:C:2019:15, AG *Szpunar* proposed a similar solution for the dereferencing of information in the context of the protection of domain names effected by search engines.

<sup>61</sup> Until today, the CJEU has not yet given up the mosaic approach (although it dates from a different historic moment in time). AG Cruz Villalón, Conclusions in joint cases C-509/09 and C-161/10, 29 March 2011, *eDate and Martinez*, EU:C:2011:192, paras 54 *et seq.*, 67, proposed to alter the *Shevill*-approach by giving up the mosaic principle.

<sup>62</sup> *Van Calster*, European Private International Law (2021), paras 2.256 *et seq.*

### 4.3 The Concept of Consumers in Articles 17–19

It might also be advisable to revisit the protection of consumers. Here, the CJEU has enlarged the concept by including businesspersons and professionals into the protective concept in case they pursue non-professional activities.<sup>63</sup> On the other hand, the protection of consumers is limited to contractual disputes. The recent *Volkswagen* litigation demonstrates that claims arising out of product liability (and fraud) against consumers are not included into the protective system of the Regulation.<sup>64</sup> It might be worth closing this gap.

Another problem relates to the relevant time when determining the consumer's domicile. In several recent cases, the CJEU had to decide whether a domestic contract becomes cross-border when a consumer moves out of the EU Member States where she or he concluded the contract. Here the question arises whether the "new" domicile migrates with the consumer.<sup>65</sup> In case the CJEU decides differently, the EU lawmaker should clarify that jurisdiction under articles 17 and 18 of the Regulation Brussels I<sup>bis</sup> requires that the business directs commercial activities to the Member State of the new domicile of the consumer.<sup>66</sup> Finally, the exception in article 17 (3) for transportation contracts involving consumers should be deleted as it is currently used by airlines to avoid their responsibility for preserving passengers' rights under the Regulation /EC) 261/2004.<sup>67</sup>

### 4.4 Defining and Delineating Judgments and Settlements

Recent case law of the CJEU demonstrates uncertainties regarding the notion of judgment. Article 2 Regulation Brussels I<sup>bis</sup> provides for a broad definition.<sup>68</sup> In several cases – most of them involved Croatian notaries – the Court developed a qualified understanding of judgment as to be given in court proceedings offering guarantees of independence and impartiality and of compliance with the principle of *audiatur et altera* part.<sup>69</sup> This case law, which reflects the importance of judicial independence as guaranteed by articles 19 TEU and 47 CFR, should be inserted into the definition of the judgment in article 2 (a). However, there is a discrepancy between article 2 and 3 of the Regulation. Article 3 of the Regulation Brussels I<sup>bis</sup> expressly includes payment orders issued by Hungarian

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<sup>63</sup> Recently: CJEU, 10 December 2020, case C-774/19, *Personal Exchange International*, EU:C:2020:1015, qualifying a semi-professional poker-player as a consumer; similarly, CJEU, 3 October 2019, case C-208/18, *Petruchová*, EU:C:2019:825; CJEU, 2 April 2020, case C-500/18, *Reliantco*, EU:C:2020:264.

<sup>64</sup> Conclusions AG Sánchez-Bordona, 17 December 2020, case C-709/19, *VEB*, EU:C:2020:1056.

<sup>65</sup> CJEU, 3 September 2020, case C-98/20, *mBank*, EU:C:2020:672. The BGH referred a parallel case under the Lugano Convention, Case C-296/20 *Commerzbank* - pending.

<sup>66</sup> Otherwise, the balance between the protective interests of the consumer and the predictability of the competent court for the business will no longer apply.

<sup>67</sup> Correcting the result of CJEU, 10 December 2020, case C-519/19, *DelayFix*, EU:C:2020:1023; same opinion *Mankowski*, RIW 2021, 397, 400.

<sup>68</sup> Article 2(a) BX1<sup>bis</sup> states: "judgment' means 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 a decision on the determination of costs or expenses by an officer of the court."

<sup>69</sup> CJEU, 9 March 2017, case C-484/15, *Zulfikarpašić*, EU:C:2017:199, para 43; CJEU, 9 March 2017, case C-551/15, *Pula Parking*, EU:C:2017:193; CJEU, 25 March 2021, case C-307/19, *Obala i lučice*, EU:C:2021:236.

notaries into the scope of the Regulation. Yet, their status and procedures are similar to the Croatian notaries as Croatia follows the model of the Hungarian payment order procedure.<sup>70</sup> As a result, payment orders issued by Hungarian and Croatian notaries should not qualify as enforceable decisions circulating within the scope of the Regulation.<sup>71</sup>

Another issue relates to the delineation of judgments and settlements. This particular issue has become evident in the context of the approval of out of court settlements in collective proceedings. The question is whether the approval of the court qualifies as a decision (including *res judicata* effects) to be recognised under articles 36 *et seq.* of the Regulation or whether the contractual nature of the settlement is decisive.<sup>72</sup> Especially in Dutch WCAM proceedings, (represented) foreign members of the group who do not opt out of the settlement are considered to be bound by the court-approved settlement.<sup>73</sup> In this regard, a clarification that an approval of a settlement by a court does not transform the latter into a judgment seems to be necessary.

## 4.5 Provisional Measures

The 2012 Recast has clarified and consolidated the case law of the CJEU in this field.<sup>74</sup> Article 2 (a) of the Regulation Brussels I<sup>bis</sup> states that the cross-border enforcement of provisional measures requires not only the jurisdiction of the court under the Regulation but also the summoning of the defendant to the proceedings as well as the service of the provisional measure on the defendant before its enforcement.<sup>75</sup> According to the case law of the CJEU, provisional measures under article 35 are conditional on a “real connecting link”, the typical example are assets located in the Member State concerned.<sup>76</sup>

As provisional measures under article 35 of the Regulation Brussels I<sup>bis</sup> are aimed at supporting the main proceedings, the court of the main proceedings should be empowered to modify or to set aside

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<sup>70</sup> The use of the Hungarian payment order procedure equally triggered trouble: In case C-94/14, 10 March 2016, *Flight Refund*, EU:C:2016:148, the creditor (a debt recovery platform) filed an application for a European payment order before Hungarian notaries – in a case lacking any connection to Hungary. This litigation twist was clearly an abuse of procedure, cf. Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 10 II, para 10.81.

<sup>71</sup> This does not entail that the role of notaries in the Successions' Regulation is different, cf. CJEU, 23 May 2019, case C-658/17, *WB*, EU:C:2019:444.

<sup>72</sup> Recognition operates under articles 59 and 60 of the Regulation Brussels I<sup>bis</sup>.

<sup>73</sup> Cf. *Arons*, *Collective Proceedings in the BX1<sup>bis</sup> regime*, in: Mankowski (ed.) *Elgar Research Handbook on the BX1<sup>bis</sup>* (2020), p. 1, 37.

<sup>74</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 6 V, paras 6.277 *et seq.*

<sup>75</sup> Article 42 (2) takes up this requirement as the applicant has to document (via the form prescribed by article 53) that the decision was served on the defendant. Prior service takes away the *ex-parte* effect, *van Calster*, *European Private International Law* (3<sup>rd</sup> ed. 2021), para 2.558.

<sup>76</sup> CJEU, 17 November 1998, case C-391/95, *van Uden*, EU:C:1998:543; *van Calster*, *European Private International Law* (3<sup>rd</sup> ed. 2021), para 2.554. As a result, provisional measures under article 35 are typically local.

provisional relief given by another court under article 35 of the Regulation Brussels I<sup>bis</sup>.<sup>77</sup> In addition, both courts involved should actively communicate in these circumstances.<sup>78</sup>

#### 4.6 Aligning Article 45 (1) (c) with Article 29 of the Regulation Brussels I<sup>bis</sup>

Practical problems arise in the context of the grounds for non-recognition. In this regard, article 45 (1) lit c) and d) give priority to any domestic or recognisable judgment of another Member State in the Member State of enforcement. Yet, this provision is not in line with the rules on pendency of the Regulation Brussels I<sup>bis</sup> as it opens up for the refusal of recognition even in case when the domestic judgment was given despite the pendency of the proceedings in the Member State of origin.<sup>79</sup> Parallel instruments as articles 22 of the European Payment Order Regulation and of the European Small Claims Order Regulation address this situation in a way that preserves the prevalence of pendency.<sup>80</sup> Therefore, article 45 (1) (c) of the Regulation Brussels I<sup>bis</sup> should be adapted accordingly.<sup>81</sup>

### 5. Improving Procedural Implementing Rules

As a rule, the Regulation does not harmonize national procedures but shall only coordinate them in cross border settings. However, one might consider to adopt some implementing procedural rules in order to strengthen the uniform application of the Regulation.<sup>82</sup> The ongoing Efforts-project<sup>83</sup> demonstrates a great variety regarding the implementation of, in particular, the Brussels Regime in the EU Member States. In order to improve the uniform application of the Regulation, additional

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<sup>77</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 6 V, paras 6.280. The CJEU may give further clarification in the pending case C-581/20, *Toto*.

<sup>78</sup> See COM(2010)748final and *infra* at footnote 85 *et seq.*

<sup>79</sup> The Heidelberg Report already addressed this issue, Hess/Pfeiffer/Schlosser, *The Brussels I Regulation 44/2001* (2008), para 497; Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 6 IV, paras 6.251–6.252.

<sup>80</sup> The proposal would also correct the consequences of case C-386/17, 16 January 2019, *Liberato*, EU:C:2019:24, where the Court held that the non-respect of the rules on pendency could not trigger the application of public policy in the recognition process.

<sup>81</sup> Article 45 (1)(c) and (d) BX1bis should be redrafted as follows: “A judgment shall not be recognized: (...)

c) if it is irreconcilable with an earlier judgment or an order previously given in any Member State or third country, provided that

- the earlier judgment or an order involves the same cause of action between the same parties, and
- the earlier judgment or an order fulfils the conditions necessary for its recognition in the Member State of enforcement, and
- the pendency of the parallel proceedings, article 29, 32 and 33 of the Regulation Brussels I<sup>bis</sup>, or the irreconcilability could not have been sought in the court proceedings in the Member State of origin.”

<sup>82</sup> Hess/Ortolani (ed.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Luxembourg Report on European Procedural Law, Vol. I (2019).

<sup>83</sup> The acronym stands for: “Towards more EFFECTive enFORcemenT of claimS in civil and commercial matters within the EU”. The project investigates the implementation of the EU Regulations on the recognition and enforcement of judgments in 7 EU Member States; webpage: <https://efforts.unimi.it/>

harmonisation of the interfaces between the Regulation and the national laws of the EU Member States should be pursued.<sup>84</sup>

## 5.1 Assessment of Jurisdiction, Articles 27 and 28: Providing for Comprehensive Uniform Standards

At present, the assessment of the jurisdiction (including pendency) is mainly a matter of national procedural law. Articles 27 and 28 BX1bis only address two specific situations: article 27 addresses some of the exclusive heads of jurisdiction of of the Regulation Brussels I<sup>bis</sup> and requires the court seized to assess them ex officio. Article 28 addresses the situation of default of the defendant and requires the court to assess its jurisdiction ex officio.

It seems necessary to extend the ex officio evaluation review of jurisdiction (and of pendency) to all cases which are brought under the Regulation Brussels I<sup>bis</sup>. The recent case law of the CJEU already displays a tendency to enlarge the powers of the national courts to assess their jurisdiction in accordance the Regulation. Against this backdrop, the recast of the recast should clearly state the courts' general obligation to assess jurisdiction ex officio.<sup>85</sup> The recast of the Regulation should clearly state a general obligation to assess all heads of jurisdiction ex officio.<sup>86</sup> A new recital should clarify what "ex officio application" means in this regard. Courts of EU Member States must assess the heads of jurisdiction on their own motion, not only based on the factual allegations of both parties but also ask additional questions in case the allegations are insufficient to establish the jurisdiction of the court seized.<sup>87</sup>

## 5.2 Enhancing Direct Cooperation between Courts by Mutual Communication and Assistance

At present, the European Judicial Network in Civil Matters supports judges in the European Area of Freedom, Security and Justice in communicating directly to overcome any impediment hampering the free movement of judicial decisions within the system. However, stakeholders have reported that the practical implementation of direct communication is still difficult to achieve. For instance, direct communications between a German or Italian and a Portuguese or Bulgarian judge are difficult unless

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<sup>84</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 6 II, paras 6.175–6.179. Article 81 TFEU explicitly empowers the Union with regard to procedural harmonization in cross-border situations.

<sup>85</sup> CJEU, 28 January 2015, case C-375/13, *Kolassa*, EU:C:2015:37, paras 58 *et seq.*, 61 – according to this judgment, national courts need to take account of the factual and legal arguments of both parties; CJEU, 16 June 2016, case C-12/15, *Universal Music*, EU:C:2016:449, paras 45–46.

<sup>86</sup> The concept of ex officio assessment of jurisdiction under the Succession Regulation will be addressed in the pending case C-645/20, *VA and ZA*.

<sup>87</sup> *Texeiro de Sousa*, *Die Zulässigkeitsprüfung im Zivilprozess* (2010); Hess/Taelman, *Consumer Actions before National Courts*, in Hess/Law (eds.), *Implementing EU Consumer Law by National Courts* (2019), p. 95, 111 *et seq.*



both judges are speaking one common language. Liaison judges may help to overcome the impediment, but they are few and they mainly operate in family matters.<sup>88</sup>

Despite these practical difficulties, the Recast should provide for rules on direct communication when courts in different Member States are involved in the same proceedings. Communication should take place in the cases of pendency and relatedness, between the judge of the main proceedings and the judge granting provisional relief. One might even consider the cross-border transfer and consolidation of actions, for instance, in multi-party and collective litigation.<sup>89</sup>

### 5.3 Harmonising Procedural Time Limits

Setting and defining time limits in cross-border litigation has become a sensitive issue. It is clear that litigants (especially non-experienced litigants) in cross-border cases face specific difficulties where they are confronted with an unfamiliar, foreign procedure, the application of foreign law and where they are often facing language barriers. These impediments require additional time for the preparation of the case. In this regard, the different time limits provided by the national procedures of the EU Member States create additional barriers. The the recast of the Brussels I<sup>bis</sup> Regulation addresses this issue explicitly in its article 45 (2)(b). According to this provision, the recognition and enforcement of a decision can be refused when the document instituting the proceedings was served on the defendant in a way that did not permit a timely defence. Yet, this ground for non-recognition only addresses one (although a practically very important) of several instances.

Two recent cases before the CJEU highlighted the problems at hand: In joint cases C-453/18 and C-494/18, *Bondora*, AG *Sharpston* noted that the period of 30 days (as foreseen by article 16 of the EPO-Regulation) to contest a payment order was very (too) brief to guarantee effectively the right of defence in cross-border cases.<sup>90</sup> However, providing for uniform time limits (to appear, to defend the case) in ordinary proceedings presupposes similar structures of the procedures in the EU Member States. At present, this is not the case. Some Member States, like France, require the non-resident defendant to bring all defences within a time limit of two months,<sup>91</sup> whereas others, like Italy, allow a significantly longer period of time to bring a defence.<sup>92</sup> Therefore, without a uniform European procedure for cross-border cases, harmonising time limits for cross-border cases does not make much sense.<sup>93</sup> In the present state of affairs, the current solution of article 45 (1)(b) of the Regulation Brussels I<sup>bis</sup> appears appropriate: According to this provision, recognition and enforcement can be refused in

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<sup>88</sup> Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 1 V, paras 1.44 *et seq.*

<sup>89</sup> According to the model of articles 12 and 13 of the Regulation Brussels I<sup>bis</sup>.

<sup>90</sup> Conclusions AG *Sharpston*, 31 October 2019, joint cases C-453/18 and C-494/18, *Bondora*, EU:C:2019:921, paras 97 *et seq.*; Hess, *Europäisches Zivilprozessrecht* (2<sup>nd</sup> ed. 2021), § 10 II, paras 10.68–10.69.

<sup>91</sup> Article 643 French Code of Civil Procedure.

<sup>92</sup> Articles 163–166 Italian Code of Civil Procedure.

<sup>93</sup> The situation is different in the Small Claims Regulation which provides for uniform time limits, cf. articles 5, 7 and 14 Regulation 861/2007, OJ 2007 L 199/1 as amended by Regulation 1215/2421, OJ 2015 L 341/1.

cases where the defendant did not have sufficient time to bring a defence in the court of origin.<sup>94</sup> In addition, it might be advisable to adopt a rule on minimum deadlines for a first reaction of the defendant.<sup>95</sup>

However, in enforcement settings, the EU lawmaker should envisage the alignment of time limits regarding the enforceability of judicial decisions in the following circumstances: On the one hand, EU Member States provide for different prescription periods regarding the enforcement of (final) judgments. As a result, a judgment coming from Germany keeps its enforceability during 30 years<sup>96</sup> whereas a judgment given by a French court is enforceable for 10 years.<sup>97</sup> These differences entail legal uncertainty, as it is unclear whether the French prescription period applies to the German judgment in France and vice versa.

Similar uncertainties exist in relation to the enforcement of arrest warrants. In case C-379/17, the CJEU held that the time limit of 30 days to enforce an arrest warrant in Germany applied to an Italian arrest warrant although Italian law does not impose such time limit.<sup>98</sup> In his conclusions, AG Szpunar had proposed not to apply the German time limit in order to avoid a lack of judicial protection: In Italy, the warrant was still a valid title whereas in Germany enforcement was barred.<sup>99</sup> Providing for a uniform time limit of enforceability might overcome such situation and the uncertainty that arises therefrom.

## 6. Final Remarks: The Future of the Brussels System

The foregoing reflections demonstrate that a fundamental change of the present system is currently not required. However, this assessment does not entail that we will not experience a deep transformation of the present system in the upcoming years. In this regard, European procedural law has to expect a shift of the present justice systems to more and more IT-based (remote) procedures. These changes will also affect the coordination of the national civil procedures by the Brussels regime.<sup>100</sup>

In this regard, the ongoing e-Codex project will deeply influence national procedures.<sup>101</sup> This project aims at interconnecting the justice systems of the EU Member States by providing technical interfaces

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<sup>94</sup> For an exhaustive comparative survey cf. *Gascón Inchausti/Requejo Isidro*, A Classical Cross-border Case: the Situation in the First Instance, in: Hess/Ortolani (ed.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Luxembourg Report on European Procedural Law, Vol. I (2019), paras 125–138.

<sup>95</sup> *Gascón Inchausti/Requejo Isidro*, in: Hess/Ortolani (ed.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Luxembourg Report on European Procedural Law, Vol. I (2019), para 138.

<sup>96</sup> Section 197 no 3 of the German Civil Code.

<sup>97</sup> For a comparative survey cf. *Gascón Inchausti/Requejo Isidro*, in: Hess/Ortolani (ed.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Luxembourg Report on European Procedural Law, Vol. I (2019), para 210, listing different prescription periods in EU Member States varying between 2 and 30 years.

<sup>98</sup> The Court argued that the time limit was part of German enforcement law, CJEU, 4 October 2018, case C-379/17, *Al Bosco*, EU:C:2018:806.

<sup>99</sup> Conclusions AG Szpunar, 20 June 2018, case C-379/17, *Al Bosco*, EU:C:2018:472, paras 69 *et seq.*

<sup>100</sup> The recent reforms of the Service and of the Evidence Regulations have already anticipated the changes of the justice systems to the usage of IT tools.

<sup>101</sup> Cf. article 5 of Regulation (EU) 2020/1784 (on service) and article 7 of Regulation (EU) 2020/1783 (on evidence), commented by Hess, in Schlosser/Hess, *Europäisches Zivilprozessrecht* (5<sup>th</sup> ed. 2021 - forthcoming).

between the national IT systems. The new system permits direct electronic (cross-border) filings, direct communication between judges and will facilitate the enforcement of judicial decisions throughout the Union. In its Communication of December 2020, the EU Commission clearly stated that the establishment of the e-Codex system as a technical standard should be a priority for the upcoming years.<sup>102</sup> Once established, one needs to reconsider the whole Brussels system from a perspective of interconnected national justice systems. To take up one example: Providing for different heads of jurisdiction balancing the interests of the litigants to avoid remote courts might be considered differently when litigants can easily access electronically courts in other Member States.<sup>103</sup> Technical accessibility may trigger a need for additional harmonisation of procedural norms applicable to cross-border settings.

In the end, one might even wonder whether cyber justice will substitute the present cross-border litigation. It is certainly too early to assess this issue adequately. However, the upcoming potentials of organising court proceedings independently from court buildings open up new avenues for effective judicial protection of litigants in cross-border settings. Specialised and tailored proceedings may improve the judicial protection of parties within the Internal Market – the EU lawmaker and the Member States should be attentive in this regard. They should not miss the opportunities by leaving modern ways of dispute settlement to private service providers (as arbitration or ADR). Finally, the basic responsibility for the preservation of the law and its adaptation and improvement to meet societal needs lies with the judiciaries of both the Member States and of the Union.

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<sup>102</sup> Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, 2 December 2020, COM/2020/712 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0712&from=EN>

<sup>103</sup> Of course, cultural differences remain major impediments as long as no uniform Union procedure applies.



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