

THE CONCEPT OF A JUDGMENT UNDER THE BRUSSELS IBIS REGULATION

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Abstract. The Brussels Ibis Regulation (hereinafter – the Regulation) established the free movement of judgments and mutual trust in civil and commercial matters among Member States. However, the Regulation does not provide a clear answer as to whether all decisions of the courts of Member States fall within the scope of this regulation. Although the Regulation introduces the concept of a judgment, it provides only a list of exemplary court documents, which is not exhaustive. This article analyzes the criteria by which the decisions of Member States must be evaluated to ensure their enforceability is recognized across borders. The article also suggests one broad interpretation of the requirement for a court decision to be rendered in adversarial proceedings in order to also include default judgments, court orders and court settlements therein. The author submits that only such a wide interpretation meets the goals of Regulation and is aligned with the political will it enshrines. Finally, the article analyzes whether the decisions of Member States made based on the decisions of third States or in matters of their recognition fall within the scope of application of the Regulation.

Keywords: the concept of judgment, Brussels Ibis Regulation, non-recognition and enforcement, court order, default judgment, court settlement, third country judgments.

Introduction

The Brussels Ibis Regulation (hereinafter – the Regulation), which replaced the Brussels I Regulation, reformed the system of recognition and enforcement of judgments in civil matters in the European Union (hereinafter – the EU). One of the essential innovations of the Regulation was abolishing exequatur and strengthening the mutual trust between EU Member States (hereinafter – Member States). The abolition of exequatur allows the principle of free movement of judgments in the EU to be effectively implemented. This novelty ensures one of the main goals set by the EU: the creation of an area of freedom, security and justice without internal borders, which cannot be implemented without the mutual trust and cooperation of Member States in civil cases (Article 3 of the Treaty on European Union). The concept of mutual trust was the leading idea throughout the whole process of changing the law to create conditions for the free circulation of judgments (Grajdura, 2016, p. 1).

However, the rules of the Regulation on the recognition and enforcement of judgments leave unanswered questions regarding how the principle of free movement of judgments shall be secured. One such question is: What falls under the concept of a judgment under the regulation? A uniform understanding of the word *judgment*

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across Member States is crucial for the application of the provisions of the Regulation. Though Article 2(a) of the Regulation provides the definition of a judgment, it leaves a lot of room for interpretation and discussion as to the judgments from the courts of the Member States that fall under this concept. The notion of a judgment has crucial importance since the principle of free movement of judgments namely concerns the recognition and enforcement of judgments to which this special EU law regime is applicable.

The lack of clarity in the definition of a judgment is rooted in the different procedural rules that apply in each of the Member States, given that the EU has not been given conferral to regulate this matter. Those differences therefore raise various questions, such as: Do all judgments rendered by the courts of the Member States fall under the scope of the Regulation? Does the definition of judgment in the Regulation include judgments rendered in summary proceedings in which the court renders a final decision without substantive analysis of the relevant factual circumstances? Are default judgments granted without the presence of the defendant and without raising any objections also intended to be within the scope of application of the Regulation?

Furthermore, the Regulation regulates only some aspects of the settlement of cross-border disputes including third States, and does not regulate the recognition and enforcement of judgments rendered by the courts of third States.⁴ It is therefore questionable whether the Regulation also includes the judgments of the courts of the EU Member States which recognize such third-State judgments. Does such a judgment of the court of an EU Member State also enjoy the same treatment as other judgments, or are its effects limited only in that state? These questions have been addressed to the CJEU, whose position on these issues is analyzed in this article, but they still raise various disputes regarding the extension of the principle of mutual trust and free movement of judgments to such decisions.

The aim of this article is to analyze the notion of a judgment under the Regulation. To achieve this goal, the first part of the article analyzes the concept of a judgment and discloses the criteria by which it is assessed whether a specific court decision falls into the aforementioned category. The second part of the article evaluates whether a default judgment, a court order and a court settlement fall into the category of a judgment under the Regulation. In the third part of this article, it is analyzed whether third-country court decisions recognized by Member States should be considered a judgment under the Regulation, and whether the EU principle of free movement of judgments applies to them.

This article uses the following legal methods that are common for such studies: analytical, descriptive, comparative, and historical.

1. The Definition of a Judgment Under the Brussels Ibis Regulation

The Brussels Convention defined a judgment as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court (Article 25 of Brussels Convention). The same definition of a judgment was established in Article 32 of the Brussels I Regulation. Article 2(a) of the Regulation establishes that a 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. The same article also establishes that, for the purposes of Chapter III, a judgment includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation have jurisdiction as to the substance of the matter. This does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement. Thus, in the definition of a judgment, court decisions regarding the application of temporary protective measures are distinguished.

⁴ Article 71(2)(b) of the Regulation establishes that, with a view to its uniform interpretation, paragraph 1 shall be applied in the following manner: judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation. According to Article 73(3) of the Regulation, this Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

The Regulation establishes the rules of the free movement of court judgments, authentic documents and court settlements throughout the EU. Although the Regulation abolished exequatur, the grounds for non-recognition of court judgments, authentic documents and court settlements remained. The grounds for non-recognition of court decisions are regulated in Article 45 of the Regulation. The conditions for non-recognition of authentic documents and court settlements are set out in Articles 58 and 59 of the Regulation. Unlike court judgments, authentic documents and court settlements can only be non-recognized if such enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed (see Articles 58(1) and 59 of the Regulation). Meanwhile, Article 45(1) of the Regulation establishes six grounds for non-recognition of a court judgment, including its manifest contradiction to public policy (*ordre public*) in the Member State addressed.

The different grounds for non-recognition applicable to judgments make it necessary to determine what judgments of the courts of Member States fall within the concept of a judgment under the Regulation. This is also determined by the differences in the procedural laws of Member States, which lead to different guarantees of the right to a fair trial in such processes. If a judgment of the court of a Member State does not fall within the concept of a judgment defined in the Regulation, the principle of free movement of judgments is not applicable for such a judgment, and the evaluation of the grounds for non-recognition of the decision also becomes irrelevant. Thus, it is important to apply the concept of a judgment set out in the Regulation in a uniform manner that truly achieves the goals of the Regulation.

In essence, the definition of a judgment in Article 2(a) of the Regulation is similar to the concept of a judgment in the previous regulation and the Brussels Convention. The only new wording in this definition is related to the provisional and protective measures which can be recognized and enforced under the Regulation. Thus, the notion of a judgment must, in general, be understood in the same way as under the Brussels I Regulation and the Brussels Convention (Dickinson & Lein, 2015, p. 94), and the case law of the Court of Justice of the EU (hereinafter – the CJEU) interpreting the Brussels Convention and Brussels I Regulation remains relevant.

Although the Regulation also uses an exemplary list of documents that fall into this category when defining the concept of a judgment, the list provided in the Regulation, like its predecessors, is not exhaustive. In the absence of an exhaustive list of documents, the question arises as to the interpretation of the mentioned concept and the criteria by which it is to be assessed whether a specific document of the court of a Member State falls under the concept of a judgment under the Regulation.

The definition of a judgment in the Regulation stipulates that it is an autonomous EU law concept. Thus, the notion of a judgment shall be interpreted not according to the national laws on civil procedure in individual Member States, but the goals and objectives of the Regulation. This definition of a judgment serves two purposes.

Firstly, it gives a general definition of judgments which benefit from the principle of free movement of decisions (Dickinson & Lein, 2015, p. 93). This definition shall be interpreted broadly. A restrictive interpretation of the concept of a judgment would be incompatible with the system established by Articles 39, 45 and 46 of the Regulation, which provides for the automatic enforcement of judgments and rules out the possibility of reviewing the jurisdiction of the courts of the Member State of origin by the courts of the Member State in which recognition is sought (*Gothaer Allgemeine Versicherung and Others*, 2012, para. 31; *J v. H Limited*, 2022, para. 31).

Secondly, it concerns the application of special procedural interim measures which are coupled with coercive actions to secure the smooth execution of the judgment. Although the previous regulations and the Regulation itself establish the concept of a judgment, the question of whether a particular decision falls within the definition of a judgment often arises, especially when dealing with issues of the non-recognition of such judgments.

The legal doctrine distinguishes three basic conditions according to which it must be assessed whether a specific decision falls within the concept of a judgment in the context of the Regulation. The decision must be: i) a judgment; ii) issued from a court or Tribunal; iii) of a Member State (Dickinson & Lein, 2015, p. 94). The requirement for a certain decision to be a judgment means that the decision must derive sovereign power from the State to settle the dispute in the society. Nevertheless, these criteria do not exactly answer the question of which judgments of the Member States fall under the concept of a judgment. For instance, do they cover judgments made in non-adversarial proceedings, such as proceedings for the issuance of a payment order?

The Regulation does not explicitly require that a judgment should be rendered in adversarial civil proceedings, in which both parties would have the right to submit arguments, contest the arguments of the other party, and provide an assessment of the evidence. The right to a fair trial, which derives from Article 6 of the European Convention on Human Rights, establishes that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a fair hearing within the meaning of Article 6 (1) of the Convention. They require a “‘fair balance’ between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents” (*Regner v. the Czech Republic*, 2017, para. 146). The Regulation also emphasizes that in cross-border civil proceedings, including the recognition and enforcement of a judgment, the procedural guarantees of the right to a fair trial shall be ensured (Recital 38 of the Regulation). Thus, one may argue that the requirement for adversarial civil proceedings in the courts of the State of origin is a fundamental aspect for a proper exercise of the right to a fair trial.

The case law of the CJEU shows that a necessary requirement for a judgment to be qualified as a judgment under the Regulation is that it was rendered in adversarial civil proceedings. Pursuant to the relevant case law, the following judgment-defining criteria can be distinguished: i) it is rendered in the course of adversarial process; ii) it is rendered by the judicial authority in the exercise of the powers granted to it; iii) the decision is given by the court of a Member State; and iv) the decision is enforceable in the Member State of origin. An additional requirement applies to provisional, including protective, measures: the decision on their application must have been made by a court that has jurisdiction to resolve the dispute on its merits. It could be argued that this follows from the requirement that the judgment be made in an adversarial process. However, in terms of the effectiveness of the application of temporary protective measures, this requirement can be seen as essentially redundant.

As can be seen, the CJEU practice in defining a judgment under the Regulation focuses on categories such as adversarial proceedings and enforceability.

The requirement that a decision was made in adversarial proceedings was confirmed in the case of *Denilauler v. SNC Couchet Frères*, where the question arose as to whether a court decision on the application of interim measures made without informing the other party about the process or serving that decision to the defendant is considered as a judgment within the meaning of the Brussels Convention. The Court found that a decision authorizing provisional or protective measures which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service does not fall under the notion of a judgment under the Brussels Convention (*Bernard Denilauler v. SNC Couchet Frères*, 1980, para. 18).

The CJEU held that the all the provisions of the Brussels Convention express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defense are observed (*Bernard Denilauler v. SNC Couchet Frères*, 1980, para. 13). Although the Court noted that enforcement proceedings may be unilateral, the fact that in the State of origin both parties have either stated their case or had the opportunity to do so is one of the guarantees justified by the enforcement procedure of the Brussels Convention. This conclusion allows it to be argued that one of the requirements for a decision to be a judgment in the context of the Regulation is that the process in which it was rendered was adversarial. It can be considered that the process was adversarial even if the process became one-sided only because the other party did not fulfil its procedural obligations, such as in cases of default judgment.⁵

However, in terms of the effectiveness of the application of temporary protective measures, this requirement can be seen as essentially redundant. In practice, the requirement that the process was adversarial – especially considering provisional, including protective, measures – gives rise to some questions. Firstly, provisional measures that may be ordered by a court or tribunal without the defendant being summoned to appear are not considered a judgment under the Regulation, unless the judgment containing the measure is served on the

⁵ In accordance with recital 34 of the Regulation, the Regulation repeals and replaces the Brussels I Regulation, which itself replaced the Brussels Convention. Thus, the CJEU’s interpretations of the provisions of the latter legal instruments also apply to the Regulation whenever those provisions may be regarded as equivalent (see *BMA Nederland*, 2022, para. 27). In *J v. H Limited*, the CJEU stated that Article 32 of the Brussels I Regulation is the provisional equivalent to Article 2(a) of the Regulation (see *J v. H Limited*, 2022, para. 24).

defendant prior to enforcement. This means that *ex parte* judgments on provisional, including protective, measures fall outside the scope of the Regulation. However, the application of *ex parte* provisional, including protective, measures becomes ineffective in cross-border civil proceedings because such measures cannot be directly enforced in another Member State. Moreover, if the defendant is informed about the question being considered by the court regarding the application of provisional, including protective, measures, there is a threat that they may transfer or delay the available assets before the application of provisional, including protective, measures and make those measures ineffective.

In the opinion of the authors, this situation contradicts the purpose of interim measures, which is to ensure the execution of a future court decision when there is a real threat that if these measures are not taken then the court decision may not be executed due to the dishonest actions of the other party. Recognizing judgments on the application of temporary protection measures as judgments in the context of the Regulation only when the court notifies the other party before their application, and thus ostensibly ensures an adversarial process, may make the purpose of this institute unfulfillable, as the debtor can hide, sell or otherwise transfer their assets before the application of interim measures.

It can be argued that the application of temporary protection measures without notifying the defendant of their application may cause negative consequences for them in another Member State, especially when such a decision is challenged in the Member State of origin. However, this argument should not be emphasized when it comes to temporary protection measures. This is because informing the defendant of the intention to impose interim measures may result in the defendant transferring or otherwise encumbering the assets to be seized and rendering the imposition of interim measures substantially ineffective. It can be assumed that the practice of the CJEU could be relevant in this aspect, which explains that if a decision becomes unenforceable in the Member State where it was adopted, it cannot be recognized as enforceable in the country where its enforcement is requested (*Prism Investments BV v. Jaap Anne van der Meer*, 2011, para. 38). The enforceability of the judgment in question in the Member State of origin is a precondition for its enforcement in the Member State in which enforcement is sought (para. 23).

These CJEU interpretations were given when interpreting the Brussels Convention and the Brussels I Regulation, when exequatur had not yet been abolished in the EU. Nevertheless, these interpretations are relevant and applicable in the interpretation of the Regulation. This means that if a court decision applies temporary protective measures without notifying the other party of their application, which is later annulled after the defendant contests their application, this should be an independent basis for not enforcing such a decision because it is no longer enforceable in the Member State of origin. However, the mere fact that temporary protective measures were applied without prior notification and without giving the other party the opportunity to comment on their application should not be a reason not to consider such a decision as a judgment in the context of the Regulation.

Secondly, considering that certain court decisions would be rendered in adversarial proceedings, the question arises as to how this requirement should be understood in practice. Should the adversarial nature of the court proceedings be assessed according to the actual circumstances of the specific situation, or according to the legal assumption of adversarial proceedings without considering the specific circumstances? This issue is further analyzed in the second part of this article when assessing the recognition of specific court documents as judgments under the Regulation.

To sum up, it can be stated that the concept of a judgment should be interpreted broadly, but when assessing whether a specific court decision is to be considered a judgment within the meaning of the Regulation, it must be assessed whether the specific decision is made: i) in an adversarial process; ii) by the judicial authority in the exercise of the powers granted to it; iii) by the court of a Member State; and iv) in a manner enforceable in the Member State of origin. For a decision on provisional, including protective, measures, it must be determined that such a decision was made by a court that has jurisdiction to resolve the dispute on its merits and their application must be notified to the other party, giving it the opportunity to speak on the application of such measures. Thus, it can be concluded that one of the essential elements of the concept of a judgment is that it was made in an adversarial proceeding, which is analyzed in the next part of this article.

2. Certain Types of Decisions of the Courts of Member States

As already mentioned, the Regulation defines the category of a judgment broadly. Although the Regulation harmonizes certain issues of international civil procedure, differences in the legal regulation of Member States often raise questions as to whether a specific court decision of a Member State falls into the category of a judgment. The requirement that a specific court decision was made in an adversarial process raises questions about decisions such as default judgments, court orders and court settlements.

2.1. A default judgment as a judgment

In the most general sense, a default judgment is a court decision issued in favor of the plaintiff when the defendant fails to respond to a court summons or does not appear in court. The specifics of default judgment requirements and rulings can vary across jurisdictions. For example, in Lithuania a default judgment may be made in cases where one of the parties, who has been duly notified of the time and place of the hearing, does not appear at the preliminary or court hearing; a request to consider the case in their absence has not been received from them; and the attending party requests a decision by default. This can also occur when a party does not submit a response to a claim or produce a preparatory document within the set deadline, and when the other party has requested a default judgment in its response to the claim or preparatory document (see Article 285(1) of the Civil Procedure Code of Lithuania, 2002). The possibility of adopting a default judgment is not a legal sanction for a party who has failed to appear at a court hearing or has failed to file a defense, but only one of the measures to implement the principle of procedural fairness. Therefore, the aim of ensuring procedural fairness by obliging the parties to civil proceedings to take care of the expeditious hearing of the case and by providing for the consequences of non-compliance with that obligation, one of which is the possibility of adopting a default judgment, should be reconciled with the fundamental aims of the civil procedure – the just hearing of the case and the principle of judicial defense (Ruling of the Supreme Court of Lithuania of 27 April 2005 in civil case No. 3K-3-167/2005).

In terms of scope, this means that the court must formally assess the factual elements submitted by the applicant and the factual elements that may be submitted by the other parties to the proceedings. In granting a default judgment, the court shall, within the scope of the investigation, assess all the evidence in the case, but shall not be obliged to call for further evidence. If the court considers that the circumstances of the case are complex and contradictory, so that it is not possible for it to rule on the substance of the case by granting or rejecting the claim by default, it shall not be obliged to give a default judgment and may deal with the case in the normal way in the event of the failure to appear of part or the majority of the persons involved in the case. An ordinary hearing would involve an examination of the substance of the case, rather than a formal examination of the case, which, in terms of its scope, means that evidence may be required to overcome any fragmentation, contradictions, inaccuracies or other fundamental defects in the evidence in the case or any lack of clarity of the facts of the case which would prevent the court from reaching a decision on the merits. A formal inquiry into evidence does not involve a full examination of the facts of the case, as witnesses are not examined in court and evidence is not disclosed. The court takes note of the content of the means of evidence and assesses them in order to confirm what each person claims (Ruling of the Supreme Court of Lithuania of 8 April 2008 in civil case No. 3K-3-227/2008).

As mentioned, the CJEU in practice has not provided an answer as to how the adversarial process should be understood (*de facto* or *de jure*). This question is especially evident when we talk about default judgments.

Some authors also argue that whether a decision will be considered as a judgment under the Regulation also depends on whether the court assesses the validity of the claim (Magnus & Mankowski, 2007, p. 786). On the one hand, when a court makes a judgment regarding the adversarial process (after hearing all the parties), this can be equated to a part of the adversarial process. On the other hand, it can be an exercise of the powers of judicial authority (assessing the validity of a claim regardless of whether the other party has presented its arguments).

This question arose in the case of *Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, where the CJEU had to assess whether the default judgment made by the United Kingdom courts was a judgment in the sense of the Brussels Convention. The court held that judgments made *in absentia* fall within the scope of the Brussels Convention, as follows from Article 27(2) of the Convention, which refers expressly to default of appearance by the defendant (*Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, 2009,

para. 24). Nevertheless, the CJEU did not clearly indicate whether all decisions made *in absentia* should be considered as a judgment – i.e., whether this was because of their form or the procedure *de jure*.

The question of whether judgments of the courts of the United Kingdom⁶ made *in absentia* can be considered as judgments is discussed in the legal doctrine. According to some authors, judgments of the courts of the United Kingdom rendered *in absentia* cannot be considered as judgments in the scope of Brussels Convention because, in the event of a default judgment, the court does not check the validity of the claim (Magnus & Mankowski, 2007, p. 788). In the opinion of the authors, the mere fact that one of the grounds for the non-recognition of a court decision is that it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable them to arrange their defense (p. 789), is not enough to make such a conclusion. A judgment *in absentia* means that the court did not assess in essence the subject matter of the case, nor the evidence and the position of the defendant. The lack of a right to a fair trial (in adversarial proceedings) may be a strong indicator that the defendant was not provided with an effective right to defense in the State of origin, and the extension of the legal effects of such a judgment in another Member State may hamper the requirements of the right to a fair trial.

In the practice of Lithuanian courts, it is recognized that a default judgment can be adopted if the defendant does not submit a response to a claim within the set deadline without justifiable reason, and if there is a request by the plaintiff to accept a judgment by default. However, the adoption of a court decision *in absentia* is not a legal sanction for the party that did not submit the relevant procedural document or did not participate in the court session, but is only one of the means to implement the principle of concentration of the process. Therefore, it must be compatible with the main goal of the civil process – the fair trial of the case (Ruling of the Supreme Court of Lithuania of 2012 February 13 in civil case No. 3K-3-24/2012; Ruling of the Supreme Court of Lithuania of 2013 April 26 in civil case No. 3K-3-251/2013; Ruling of the Supreme Court of Lithuania of 2018 April 4 in civil case No. e3K-3-123-421/2018). According to this, a default judgment can be rendered in cases where the defendant is properly informed about the court proceedings, but behaves passively and does not appear before the court. Thus, a person may be properly informed about the court proceedings initiated against them, but voluntarily refuse to appear before the court.

There is no doubt that the evaluation of the validity of a claim by the court is one of the expressions of the adversarial process. However, the question may arise as to whether it should be assessed whether the decision was made in an adversarial process. Should this be associated with procedural possibilities to make a judgment in an adversarial process, despite the fact that one of the parties can refuse such a process by its actions, or should it be associated with a specific case, the specific circumstances of the case, and the actions of the parties?

It can be assumed that when deciding whether a default judgment was made in an adversarial process, the essential significance is not whether the process between the parties to the dispute was actually adversarial, but that the judgment was made in a process in which the adversarial principle applies – i.e., it is important that the process is adversarial, despite the fact that one of the parties has refused the adversarial process and acted passively. This conclusion also follows from the grounds for non-recognition established in the Regulation, one of which states that the recognition of a judgment shall be refused where the judgment was given in default of appearance if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable them to arrange for their defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for them to do so (see Article 45(1)(b) of the Regulation).

The opposite interpretation would be incompatible with the principle of the right to a fair trial, as the circumstances where a specific decision could be enforced in another Member State could depend on the actions of the defendant. This would also be incompatible with an effective right to judicial protection.

If a person has not been properly informed of court proceedings, such a person should be given the opportunity to request a review of the decision in the Member State of origin of the default judgment, otherwise this may lead

⁶ Although the Regulation does not apply to the United Kingdom in post-Brexit cases, this case is relevant to the article's inquiry as an exemplary case for revealing the content of the concept of a judgment.

to the non-recognition of such a judgment under Article 45(b) of the Regulation. However, this does not mean that a default judgment does not fall under the category of a judgment under the Regulation.

2.2. A court order as a judgment

A court order is one of the model documents specified in the concept of an *expressis verbis* decision which fall within the content of this concept. Therefore, it can be stated that the court order falls within the category of a judgment under the Regulation.

That the court order falls into the category of a judgment is also recognized in the practice of the CJEU. In *J v. H Limited*, the CJEU noted that if a court of a Member State were able to deny that an order for payment – which a court of another Member State has made on the basis of final judgments delivered in a third State – was a judgment, this would reduce the importance of the principle of mutual trust between the courts of Member States with regard to the enforcement of judgments (*J v. H Limited*, 2022, para. 29–30). The CJEU noted that an order for payment made by a court of a Member State on the basis of final judgments delivered in a third State constitutes a judgment, and is enforceable in other Member States if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable in that Member State.

As can be seen, the requirement of competition also applies to court orders. However, CJEU case law does not reveal whether the limits of the adversarial process also apply to court orders. The question of the validity of the claim is also important when deciding whether a court order issued in summary proceedings, in which the court does not verify the validity of the claim, should be considered as a judgment under the Regulation.

In legal doctrine, the suggestion that EU lawmakers should exclude payment orders issued under national procedural law from the scope of the Regulation is provided (Hess et al., 2022, pp. 7–8). This is based on the argument that such payment orders are often given in a procedure that does not satisfy the minimum requirements of a fair trial in cross-border settings (pp. 7–8).

For example, in Lithuania the court order procedure (which is essentially analogous to the European payment order procedure) can be issued under the Code of Civil Procedure of Lithuania (2002). When deciding on the issues of accepting a claim and issuing a court order, the court does not check the validity of the creditor's claim (see Articles 433(3) and 435(3)). In such a procedure, the entry into force of such an order and its enforceability is determined by the debtor's activity and will. If the debtor is passive and does not object to the issued court payment order within the time limit set in the law, the court order takes effect and becomes enforceable. It should be noted that in such a process the court does not assess the validity of the creditor's claim, and the debtor's objections may also be unmotivated. Therefore, the question arises as to whether the fact that the debtor has the opportunity to object to the issued court order allows us to conclude that such a process is adversarial.

Summary proceedings for a payment order are also regulated in the Articles 688–703d of the Code of Civil Procedure of Germany (2005). According to Article 699(1), if the debtor does not object to the order in time, the creditor is entitled to apply for a writ of execution. The writ of execution is equivalent to a default judgment declared provisionally enforceable (Article 700(1)).

In the authors' view, the above-mentioned proposal to exclude court orders from the definition of a judgment in the Regulation is controversial and raises certain risks. First of all, a final court order, for example in Lithuania and Germany, is equivalent to a court judgment in terms of the effects it produces⁷ – i.e., once a court has issued a court order and it has entered into force, a dispute between the same parties, on the same cause of action, and concerning the same cause of action and subject matter, can no longer be re-litigated in court due to the rule of the identity of proceedings. Removing court orders from the definition of a judgment may adversely affect the

⁷ Article 436(4) of the Code of Civil Procedure of Lithuania stipulates that a court order must comply with the requirements for an enforcement document. Pursuant to paragraph 7 of the same Article, the court order shall become final if the debtor does not object to the creditor's application within the time limit set by law. Pursuant to Article 137(2)(4), the court shall refuse to accept an action if there is a final judgment of a court or an arbitral tribunal rendered in respect of a dispute between the same parties, concerning the same subject matter and on the same grounds, or if the court's order accepts the plaintiff's withdrawal of their claim or approves the parties' amicable settlement. On the same grounds, the court shall refuse to accept the creditor's application for a court order pursuant to Article 435(2).

right to an effective judicial remedy, which also includes enforcement proceedings (*Hornsby v. Greece*, 1997, para. 40). In practice, it is possible that at the time when the court order is issued, there may not yet be a need to enforce such an order in another EU Member State because, for example, the defendant does move to another EU Member State after the court order is issued. Therefore, removing court orders from the definition of a judgment would lead to a situation where creditors' claims approved by the court in such a way would fall outside the scope of the Regulation, which would mean that the principle of free movement of judgments in the EU would not be applicable to such court documents. This is particularly important where the parties have an agreement on the handling of disputes in the country concerned. Therefore, the exclusion of court orders from the definition of a judgment in the Regulation could lead to intolerable situations where the debtor could avoid enforcing a creditor's claim confirmed by a court order.

The possibility for the debtor to submit unreasoned objections to the order issued should, in the authors' view, also be considered as a sufficient indication of an adversarial process.

Thus, the authors believe that court orders should remain within the concept of a judgment and that the guarantee of the right to a fair trial in such proceedings could be challenged through grounds for the non-recognition of such judgments, including those contrary to public policy. Whether the proceedings in which the order was issued were adversarial should be assessed in terms of the scope of the procedural safeguards provided for in national provisions in such proceedings and the ability of the other party to avail itself of them, and not in terms of whether the debtor actually availed itself of those safeguards. Thus, the debtor's ability to object to the issued payment should be considered an adversarial process.

2.3. A court settlement as a judgment

A court settlement is defined in Article 2(b) of the Regulation as a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings. This means that court settlements are excluded from the concept of a judgment and do not fall into it.

The latest sources of legal doctrine suggest that judgments and settlements need better delineation in the Regulation (Hess et al., 2022, p. 5). It is indicated that settlements are often preferred to actual judgments, but their binding effect requires formal approval by the court. Such court-approved settlements should be differentiated from purely contractual settlements and treated as judgments (pp. 5–6). Thus, in a discussion held at the Conference on the Recast of the Regulation at the Max Plank Institute in Luxemburg on 9 September 2022, it was proposed to the European Union law maker to clarify that the approval of a settlement by a court transforms it into a judgment under Article 2(a) of the Regulation (pp. 5–6).

The authors believe that this suggestion is reasonable because a settlement approved by a court in most countries acquires the same force as a court judgment, as well as the power of *res judicata*. Therefore, a dispute resolved by a settlement approved by a court can no longer be re-settled in court. Not treating a settlement as a court judgment can have a negative impact in disputes with an international element. The parties may not be interested in resolving the dispute by making a court settlement, because if the parties conclude such a settlement, the claims arising from the same dispute can be filed again in the courts of another state.

The case of *Solo Kleinmotoren GmbH v. Emilio Boch* (1994) is a perfect example of this. In this case, Mr. Boch sued Solo Kleinmotoren (a German company) in the Milan District Court for breach of a supply contract. The Court of Appeal of Milan ordered Solo Kleinmotoren to pay an amount of over 48,000,000 LIT, with interest, to Mr. Boch. On Mr. Boch's application, an order for enforcement was issued in Germany in accordance with the provisions of the Brussels Convention. Following an appeal brought by Solo Kleinmotoren against that enforcement order, the parties concluded a settlement in the Higher Regional Court of Stuttgart. The parties agreed that all the parties' claims against one another arising from their business relationship were thereby resolved. Mr. Boch undertook not to assert the claims forming the subject-matter of the present legal dispute against Solo Italiana (a company owned by Solo Kleinmotoren). However, the Court of Appeal of Bologna held that Solo Kleinmotoren and Solo Italiana were jointly liable for misuse of the Solo trade name and acts of unfair competition prejudicial to Mr. Boch, and ordered the two defendant companies to jointly pay him damages. The CJEU stated that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle

legal proceedings which are in progress does not constitute a judgment, within the meaning of that provision, “given in a dispute between the same parties in the State in which recognition is sought,” which, under the Convention, may preclude recognition and enforcement of a judgment given in another Member State. In the authors’ view, this position of the CJEU is debatable and should not apply in the context of the Regulation for the following reasons.

In Lithuania, the parties can settle a legal dispute, prevent a future legal dispute, solve the issue of execution of a court judgment or other disputed issues by means of a settlement (Article 6.983 of the Civil Code of Lithuania, 2000). In civil proceedings, the parties at any stage of the proceedings can end the case with a settlement, if it can be concluded considering the nature of the dispute (Article 51(1) of Civil Procedure Code of Lithuania, 2002). As can be seen, the parties are free to conclude a settlement through mutual concessions, which would resolve the dispute between the parties. Otherwise, the internationally recognized principle of a contract binding in contract law is negated.

In opinion of the authors, a settlement approved by a court or tribunal decision should be considered as a judgment due to the essential feature of such an agreement – the ability to enforce it by means of enforcement. In contrast, an ordinary (out of court) settlement between the parties cannot be enforced without a court decision approving such a settlement.

Thus, a court decision to approve a settlement agreement concluded by the parties should not be distinguished in the Regulation from the concept of a judgment, as such a court settlement has the same consequences for the parties as a court judgment on the merits of the dispute. In addition, before approving the settlement agreement, the court will assess its compliance with the mandatory norms of the law, public interest, etc. This essentially corresponds to the court’s assessment of the validity of the claim. The fact that there is no clear conflicting interest of the parties during the conclusion of the settlement agreement from which the adversarial nature of the process follows should not lead the court to not classify the settlement agreement as a decision. As already mentioned, the question of whether the process in which the decision was made was adversarial should not be understood as a requirement to have an adversarial process in a specific case (*de facto*), but should be associated with the existence of legal measures that created the conditions for the adversarial process to take place (*de jure*).

3. Member States’ Judgments Recognizing the Court Decisions of Third States

The qualification of a judgment of an EU Member State which recognizes a judgment rendered by the court of a third State raises problematic issues. What is the legal power of a decision rendered by the court of an EU Member State which recognizes and allows the enforcement of a judgment rendered in the court of a third State? Should only the judgments of courts of EU Member States be considered judgments under the Regulation? The answers to these questions depend on whether the judgment of a Member State to recognize a court judgment made in third State acquires the principle of free movement of judgments and should also enjoy the principle of mutual trust.

At first glance, one may argue that the judgments of the courts of EU Member States regarding the recognition of the decisions of the courts of third States do not go beyond the territory of the State in which the court makes the judgment of recognition. However, the relevant case law of the CJEU, such as *J v. H Limited*, reveals that the answer to this question raises problematic issues.

In *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, the CJEU dealt with the question of whether the Brussels Convention applies to proceedings concerning the recognition and enforcement of judgments given in civil and commercial matters in non-Member States. To justify the application of the Brussels Convention in such a case, the defendants claimed that such proceedings involve civil and commercial matters. They argued that a distinction should be made between an order for enforcement *simpliciter* and a decision of a court of a Member State on an issue arising in proceedings to enforce a judgment given in a non-Member State, such as the question of whether the judgment in question was obtained by fraud. Decisions of the second type, they argued, are independent of the enforcement proceedings. The main argument in this case was to preclude as far as possible a situation where a Member State refuses to recognize a decision of another Member State on the ground that it

is irreconcilable with a decision given between the same parties in the Member State in which recognition is sought (*Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, 1994, para. 29).

As can be seen, the CJEU analyzed the problems of free movement of decisions on the recognition of the judgments of courts from third States and whether a such situation is compatible with the objectives of the Brussels Convention. This also leads to another question: What is the legal power of the decision of a court of a Member State to not recognize a court decision rendered in a third State – for example, on the grounds of the violation of public order?

The CJEU found that the essential purpose of a decision given by a court of a Member State on the recognition of a judgment of a court of a third State is to determine whether, under the law of the Member State in which recognition is sought, the grounds for non-recognition exist. It is assumed that such a decision is not separate from the question of recognition and enforcement (*Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, 1994, para. 29).

The scope and application of the Regulation suggest that the grounds for non-recognition provided for in Article 45 of the Regulation are to be applied only to judgments rendered by the courts of Member States. These grounds shall not be applicable to judgments on the recognition of a judgment of a court rendered by a court of a third State. The answer to the question of whether the Regulation is applicable in such a case depends on whether the enforcement action is based on a Member State's court judgment rendered on the merits of the dispute. A judgment which resolves the issue of the recognition of a judgment given by a court of a third State should not be considered a decision on the merits of the dispute. It is more likely to be considered a decision of a procedural nature, which depends on the possibility of carrying out enforcement actions in the territory of the Member State deciding the issue of recognition and granting the power of *res judicata* in the territory of the third State.

However, the recent decisions of the CJEU in *J v. H Limited* raise the question of whether such an interpretation is correct. The crux of the matter in this case is whether a payment order issued by a court of a Member State, which was based on a judgment of a court of a third State, falls within the scope of the Regulation (*J v. H Limited*, 2022).

In this case, the CJEU dealt with exceptional factual circumstances on the issue of the recognition of a payment order of a former Member State (UK) court. Firstly, Jordanian courts had ordered the borrower, J. S., to reimburse a loan to HSBC Bank Middle East Limited, which presented this Jordanian judgment to the English High Court. The UK court rendered a so-called merger decision (this type of judgment is not a decision on the recognition of a foreign judgment, but a new judgment on the merits, although based on the foreign judgment's payment order). After that, HSBC Bank Middle East Limited tried to enforce the judgment of the English High Court in Austria under the Regulation. J. S. stated that a judgment that is based on a foreign judgment should not be enforced in another EU Member State according to the rules of Chapter III of the Regulation in order not to circumvent the Member State's rules on the recognition and enforcement of third-State judgments.

In the case of *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, the CJEU decided that decisions of the courts of Member States regarding the recognition and enforcement of judgments of third States do not fall within the scope of the Brussels Convention. However, in the case of *J v. H Limited*, the CJEU concluded that a payment order issued by a court of a Member State on the basis of a third-State court judgment falls within the concept of a judgment, as it is understood according to the Regulation. The court took the position that these conclusions do not negate the fact that, in essence, the above-mentioned order was issued in compliance with court decisions issued in a third State, which are not enforceable in Member States (*J v. H Limited*, 2022, para. 33).

In the opinion of the CJEU (in *J v. H Limited*, abovementioned), mutual trust would be undermined if a court of a Member State were able to deny that an order for payment – which a court of another Member State has made on the basis of final judgments delivered in a third State – was a judgment. According to the CJEU, a restrictive interpretation of the concept of a judgment would have the effect of creating a category of acts adopted by courts which, although not included among the exceptions exhaustively listed in Article 45 of the Regulation, could not fall within that concept of a judgment, and which the courts of the other Member States would therefore not be

required to enforce. Such a category of decisions would be incompatible with the system established by Articles 39, 45 and 46 of the Regulation, which provides for the automatic enforcement of judgments and rules out the possibility of the review of the jurisdiction of the courts of the Member State of origin by the courts of the Member State in which recognition is sought (*J v. H Limited*, 2022, para. 30–31).

However, the question arises as to whether this decision did not unreasonably expand the concept of a court judgment, thereby essentially giving the principle of free movement of decisions to decisions rendered by third States. Although in this case there is no doubt that the payment order issued by the former Member State (UK) became an enforceable court decision, such a situation essentially makes it possible to avoid the recognition of third-State court decisions in each Member State separately according to the relevant procedural rules and grounds for non-recognition. It should be noted that the CJEU followed a rather unpragmatic path in this case, indicating that the scope of application of the Regulation is limited only to the jurisdiction of the courts of the Member States and the recognition and enforcement of the decisions made by them, and there are no provisions governing the issues of the decisions made by the courts of third States. Therefore, the Member States are in principle free to determine the conditions and procedures enabling national courts to deal with disputes referred to them. In the absence of harmonization at the EU level, the courts of one Member State, following the applicable national law, can legally make enforceable judgments based on third States' judgments, although in other Member States the requirement of *exequatur* may continue to apply when considering the same court judgments.

Nevertheless, the CJEU emphasized that the recognition of such an order by a court decision, as understood under Article 2(a) of the Regulation, does not deprive the debtor of the right to object to the execution of this decision, based on one of the grounds for non-recognition mentioned in Article 45. Specifically, based on the public policy clause.

It should be noted that these arguments were criticized by scholars after the opinion of the Advocate General appeared in this case. According to G. Van Calster (2022), the application of the public policy clause in the above-mentioned case is a serious error in the scope of the Regulation and is not justified by arguments such as the need to apply a “safety valve” (fr. *souape de sécurité*) to maintain the principle of mutual trust. According to him, in *Diageo Brands* the CJEU confirmed the narrow application of the grounds for refusing to recognize a court judgment based on the public policy clause. Allowing the non-recognition of the payment order adopted in the aforementioned case on the ground of opposition to public order would unreasonably extend the application of this clause (Van Calster, 2022).

The court involved in the non-recognition procedure should address objections related to the public policy of a decision made by a Member State. However, it should not handle the non-recognition of a decision made by a third State which served as the basis for a decision made by the court of a Member State. Consequently, doubts arise regarding the validity of the interpretation chosen by the CJEU, particularly concerning the use of public policy as a clause for non-recognition in this specific case.

This is also confirmed by the fact that the Austrian Supreme Court dismissed arguments based on public policy and stated that general considerations could not be regarded when assessing public policy (Judgment of the Supreme Court of Austria of 27 January 2022 in case No. 9 Ob 74/21d). Only the proceedings in question could give rise to public policy infringement – and in the case at hand, the court of first instance had found that the English High Court had given J. S. the opportunity to oppose the claims from the Jordanian judgment (Eichmüller, 2022).

According to Paul Lorenz Eichmüller, if Member States were to invoke their public policy too loosely, the decision of the CJEU would mean a step backwards rather than forwards in the uniform recognition and enforcement of judgments in the EU. *Ordre public* is not and should not be a reason for generally denying the recognition and enforcement of certain types of judgments instead of looking at the specific circumstances and the final outcomes of the individual case (Eichmüller, 2022).

To sum up, it can be concluded that the relevant case law of the CJEU regarding the enforcement of third-State judgments under the Regulation raises more questions than it answers. Therefore, it can be assumed that the Regulation requires, for the sake of clarity, appropriate provisions on the EU-wide enforcement of judgments

issued by third-State courts. This means that the Regulation should be amended in order to include such clarifying provisions. In opinion of the authors, the position of the CJEU in the case of *J v. H Limited* may be criticized because it enables Member States to establish rules favorable to third States, thereby making it possible to avoid the recognition of such decisions in each Member State separately according to international bilateral treaties or the rules of international civil procedure. This could have serious consequences for the mutual trust and recognition of court judgments in the EU – especially considering that in the analyzed case the English High Court explicitly stated that a foreign judgment for a definite sum, which is final and conclusive on the merits, is enforceable by claim, and is unimpeachable (as to the matters adjudicated on) for errors of law or fact (Eichmüller, 2022).

Conclusions

1. The concept of a judgment which is used in the Regulation should be interpreted broadly, and it must be assessed whether a specific decision is made: i) in an adversarial process; ii) by the judicial authority in the exercise of the powers granted to it; iii) by the court of a Member State; and iv) in a manner enforceable in the Member State of origin. In the authors' view, for a decision on provisional, including protective, measures it is necessary that such a decision was made by a court that has jurisdiction to resolve the dispute on its merits, and their application must be notified to the other party, giving it the opportunity to speak on the application of such measures. This would contribute to a more efficient use of interim measures and the development of the legal system in the EU.
2. In the authors' opinion, the requirement that a certain court decision is rendered in an adversarial procedure should be understood as a court process in which the adversarial principle applies (*de jure*) – it is not necessary that the process between the parties to the dispute was actually adversarial (*de facto*). This should mean that default judgments fall into the category of a judgment under the Regulation, despite the fact that the proceedings were not actually judicial. However, although an injunction is clearly defined in the definition of a judgment in the Regulation, due to the limited procedural guarantees in ensuring the right to a fair trial, default judgments should not be equated with a judgment under the Regulation due to the lack of an adversarial process and the court's limited ability to assess the merits of the claim. It is also worth considering whether court agreements should not be equated to the category of a judgment, considering the binding nature of such agreements and the resulting consequences in Member States.
3. It is assumed that a court order should not be excluded from the definition of a judgment in the Regulation. Otherwise, this would mean that the Regulation would not apply to court orders, which would have a negative impact on the right to an effective and efficient judicial remedy for the violation of rights by allowing debtors to avoid the enforcement of a creditor's claim in other Member States.
4. The authors consider that the decisions of a court of a Member State on the recognition of a judgment of a court of a third State cannot be equated to the category of a court judgment under the Regulation, and do not acquire the principle of free movement as they resolve a question of a procedural nature and not a dispute in substance. The same principle should be applied to situations where one Member State has issued an enforceable document, such as a payment order, based on another third State. This is because when dealing with the issue of non-recognition of such judgments under the public order clause, the evaluation of a judgment of a court of a third State does not fall under the subject of such a procedure.

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