

Cross-border Enforcement in the European Framework

Heidi Lindfors

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1 Introduction

Cross-border enforcement has received very little attention in international civil procedural law research. The movement of judgments - judgment given in one country, its recognition and enforcement in others – has, as such, been recognised as an important continuation of court proceedings. The implementation of justice confirmed by a court in practice is decisively dependent on enforcement and its success, when a voluntary performance is not forthcoming. The enforcement procedure has been seen, however, as a national matter. In each country even a foreign judgment is enforced following national provisions, when the enforcement of a foreign judgment is accepted at all. A foreign judgment has also not been traditionally directly enforceable, but the enforceability had first to be confirmed by a national authority through a special *exequatur* procedure.

This was also the case until the beginning of the 2000s in the European Union. For the same reason, research on international enforcement has also concentrated, above all, on comparing the national regulations and systems of various states¹ The enforcement systems are indeed different in different countries and thus offer an interesting comparison. There is a separate and independent authority in Sweden and Finland handling the enforcement, while in many other countries the enforcement belongs to the court's (or its department's) jurisdiction. In some countries the enforcement of the judgments can also be handled by private proxies. The procedures applied to enforcement also vary in different countries. In Roman law and partly also in common law countries intermediary measures are resorted to, for example, threatening with imprisonment and interest sanctions. An attempt is made to pressure the debtor into 'voluntarily' fulfilling the obligation set by the judgment. In the Germanic and Nordic countries the enforcement is direct. In these countries the debtor's property is foreclosed to pay the claims of the creditors. The difference in the enforcement systems does present a challenge to uniform regulation of cross-border enforcement.

Cross-border enforcement in the European Union is now in transition. In ever increasing numbers, regulations have been given and are currently being prepared which, on the one hand, make it possible to directly enforce a judgment in another Member State and, on the other, contain provisions affecting national enforcement. The hegemony of *exequatur* seems to be losing ground. It is justifiable to say that there is every reason for a European enforcement law to be enacted. The above is also confirmed by the preparation of a Green Paper in the Union concerning the attachment of the assets in bank accounts. This article examines the European enforcement (debt recovery) law and the provisions forming its basis. Here the European enforcement law is understood to mean that section of the cross-border debt recovery law regulated by the European Union

¹ See e.g. Kaye, Peter, *Methods of Execution of Orders and Judgments in Europe*, Wiley, Chichester 1996; Kerameus, Konstantinos: *Enforcement in the International Context*, Nijhoff, The Hague 1997 and Andenas, Mads – Hess, Burkhard – Oberhammer, Paul (edit.): *Enforcement Agency Practice in Europe – JAI/02/FPC/19/UK*, The British Institute of International and Comparative Law 2005.

regulations. The examination will focus particularly on the enforcement in civil and commercial law matters. Observations on the national legislation are presented from the perspective of Finnish law.

In this article only regulations forming the basis of the European enforcement law are dealt with, and which directly regulate enforcement in the Member States including exequatur. From the perspective of successful enforcement other EU judicial regulations can also have an indirect effect. For example, getting information about the debtor's assets can affect the success of the enforcement in practice in an important way. The first and eleventh Directives on Companies Law partly regulate getting information about the financial situation of the debtor.²

2 Regulatory Basis of the European Enforcement Law

The Council Regulation No 44/2001 on the jurisdiction of courts, as well as on recognition and enforcement of the judgments in the area of civil and commercial law, can be considered the basic regulation of the European enforcement law, in other words, the Brussels I Regulation. The Brussels I Regulation still contains the regulations on exequatur, even though the procedure has been made easier compared to the original exequatur in the Lugano and Brussels Conventions. It is, however, already possible nowadays in certain situations, and in future even more often, that the enforcement of a foreign judgment can happen without exequatur. The Regulation No 805/2004 of the European Parliament and of the Council on creating a European enforcement order for uncontested claims (in other words the EEO Regulation) will in this respect start the ball rolling in the field of civil and commercial law. The judgments concerning uncontested claims intended by the Regulation can be enforced without exequatur being carried out in another Member State, if the judgment has been confirmed in the original country as European enforcement order.

In future the chosen procedure in the EEO Regulation might also continue in establishing a proposal for a regulation of both the European Parliament and the Council on a European order for payment procedure³, as well as Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure⁴. On coming into force, both the regulations would bring a simple and swift procedure for handling uncontested or small pecuniary claims in addition to the traditional processes used in courts and other authorities.

² See also Hess, Burkhard, *Study on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures*. Version of 2/18/2004, p.17.

³ Amended proposal for a regulation of the European Parliament and of the Council creating a European order for payment procedure, COM (2006)57.

⁴ Proposal for a regulation of the European Parliament and of the Council establishing a European small claims procedure, COM (2005)87.

Judgments given in these procedures would be directly enforceable in other Member States without exequatur. On the other hand, the creditor would still be able to get grounds for debt recovery for his or her claims in the traditional court proceedings. Resorting to the new payment demand processes would be voluntary. Resorting to the EEO regulation is also voluntary in the cross-border enforcement. The creditor can if he or she so wishes still apply for the enforcement of the judgment in a procedure in accordance with the Brussels I Regulation so exequatur does not necessarily disappear completely in collecting even the uncontested claims.

Nor is exequatur going to disappear in the near future in enforcement in Denmark. Originally Denmark opted out of the application of the Brussels I Regulation and the Brussels Convention was applied between it and other Member States. Currently, work is ongoing to widen the application area of the Brussels I Regulation to Denmark. The agreement has been signed but has not yet entered into force.⁵ Neither the EEO Regulation nor the future new regulations apply to Denmark, unless a comparable separate agreement is launched for them as well.

Collecting child maintenance nowadays follows the Brussels I Regulation or alternatively the EEO Regulation, when its application prerequisites are met. In the European Union, however, a proposal is being prepared for a regulation on court jurisdiction, applicable law, recognition and enforcement of judgments, and co-operation in matters relating to maintenance⁶ (a proposal for a regulation on maintenance later on). After coming into force, the regulation would replace the Brussels I and EEO regulations in the cross-border enforcement of maintenance obligations. In this regulation exequatur has also been abandoned. The proposal for a regulation also contains provisions affecting the direct enforcement procedure, especially concerning staying and outlining the enforcement proceedings. The regulation would also go even further, and have a cross-border effect. The court could actually give an order directly applicable in another Member State, which would by its effects be comparable, for example, to recovering salary and assets in bank accounts according to Finnish law.

3 Exequatur Yesterday, Today and Tomorrow

Traditionally each state has enforced only the judgements handed down by its own judicial bodies.⁷ Enforcement in its own area has been part of a state's sovereignty. The traditional point of view has assumed that to enforce in a certain country, the plaintiff has to set the court proceedings in motion in the

5 OJ L 299, 16.11.2005, p. 61 and OJ L 120, 5.5.2006, p. 22.

6 Proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005)649.

7 Koulu, Risto, *Täytäntöönpano Lugaanon ja Brysselin sopimuksen perusteella*, Lakimiesliiton Kustannus, Helsinki 1996, p. 1.

very same country regardless of a decision already given in the other state. The increase in international co-operation and cross-border economic activities has made the traditional point of view untenable. In Finland, for example, the traditional point of view remains in that the enforcement of a foreign judgment presupposes a particular norm, a provision in either a national or cross-national regulation, or an agreement between the Member State of origin and the Member State of enforcement. Without such a norm a foreign judgment will not be enforced.⁸

Recognition and enforcement of a judgment given in another state calls for trust in the functioning of the other state's judicial bodies. To make international enforcement possible, from the point of view of the state's sovereignty it is an easier step to allow enforcement of a foreign judgment in one's area only on the prerequisite that the judicial body of one's own country will first examine the enforceability of the judgment. The enforcement of a foreign judgment directly in this phase of development is not possible, but requires going through a particular confirmation procedure.

The Brussels I Regulation represents this development phase of the cross-border enforcement law. The starting point of the regulation is that a foreign judgment is not enforceable as such, but to achieve this feature the judgment must go through the confirmation procedure, *exequatur*.⁹ In *exequatur* the court (or other authority) of the Member State of enforcement examines that the judgment meets the prerequisites of enforceability. The *exequatur* is country-specific: the court of each country can only determine the enforceability of the judgment as far as their own country is concerned. If the enforceability is applied for in many countries based on the same judgment, the creditor or other applicant for the enforcement must make several *exequatur* applications and the same judgment must go through several *exequatur* procedures.

Even though the Brussels I Regulation still leans strongly on *exequatur*, it, however, represents a more modern approach than the Brussels and Lugano Conventions, which were the first instruments in the wider European co-operation in cross-border recognition and enforcement.¹⁰ In the Brussels I Regulation *exequatur* has been made easier compared to its equivalent in the Conventions. For example, meeting the grounds for refusal is not checked in *exequatur* according to the Regulation. The grounds for refusal will only be examined if the decision concerning the enforceability of the judgment is appealed. In *exequatur* governed by the Regulation, the court will only verify the existence of the formal prerequisites of the enforcement. The verification is based on the documents provided by the applicant. The applicant must present the court with a certified copy of the judgment, as well as a certificate given by

8 This is a Nordic principle, which is also followed thus by the Swedish court. See Bogdan, Michael, *Svensk internationell privat- och processrätt*, Norstedts, Stockholm 1995, p. 272.

9 More about *exequatur* procedure, see for example, Kennett, Wendy, *The Enforcement of Judgments in Europe*, Oxford University Press 2000, p. 213-231.

10 The regional application area of the Brussels Convention has expanded with the expansion of the European Community and European Union. Respectively the regional application area of the Lugano Convention has shrunk as some of its partner states have joined the European Union.

the authorities of the Member State of origin that shows the enforceability of the judgment in the Member State of origin. In exequatur the court does not verify the substantive correctness of the foreign judgment, since this is absolutely forbidden. Neither does the court clarify the legal force because it is irrelevant from the perspective of recognition and enforcement of the judgment. The exequatur application must be processed immediately. To speed this up, the debtor or someone from the opposing party is not heard in the exequatur procedure. The opposing party has no right to be heard unless the decision concerning the enforceability of the judgment is appealed.

According to the Brussels and Lugano Conventions the court handling the exequatur application must refuse to accept the application if any of the grounds for refusal are met. As stated above, in the enforcement according to the Brussels I Regulation the grounds for refusal are only examined if the decision regarding the exequatur application will be appealed. The grounds for refusal for the Brussels I Regulation are also more limited than those based on the Conventions. There are several grounds for refusal mentioned in the 34-35 Articles of the Regulation. In practice, the grounds for refusal are very seldom relevant. Grounds for refusal include recognising a foreign judgment would clearly be against the basis of the judicial system of the Member State in which recognition is being requested. A conflict of judgments concerning the same parties involved is also possible grounds for refusal. As the enforcement according to the EEO Regulation has abandoned exequatur, the existence of grounds for refusal is not verified according to the rules before the judgment is enforced. The debtor has, however, the right in certain situations to stop the enforcement of the judgment. The court in the Member State of enforcement can, upon the debtor's application deny the enforcement of such a judgment which is in conflict with an earlier judgment concerning the same matter and between the same parties. In addition it is preredquired that the earlier judgment is recognised in the Member State of enforcement and the conflict of judgments has not been referred to nor could be referred to in the litigation in the Member State of origin.

Even though exequatur in accordance with the Brussels I Regulation has been made easier in respect to its equivalent in the Conventions, processing the application will still, however, take time. The additional phase in a foreign country also requires more effort from the applicant and causes expenses.¹¹ Exequatur can also be seen on a more general level as a hindrance to European

11 National regulations are applied to the reimbursement of the legal expenses caused by the exequatur procedure. In Finland responsibility for the legal expenses is determined according to Chapter 21 of the Code of Judicial Procedure. The Supreme Court gave its decision of 2004:43 on the responsibility of legal expenses due to exequatur, which depends on whether the matter in question is mandatory or non-mandatory. Declaring a civil law judgment enforceable, the Supreme Court considered it a non-mandatory matter, and thus the losing party of the judgment had also to pay for the legal expenses caused by exequatur.

integration.¹² The next phase in the development of the European debt recovery law was the removal of exequatur from the enforcement grounds of certain kinds of claim. The uncontested pecuniary claims referred in the EEO regulation can be enforced without exequatur. Instead of verifying the enforceability of the judgment in the Member State of enforcement, the authority in the Member State of origin should confirm the judgment with a particular certificate as European Enforcement Order. The European enforcement order will be enforced in the Member States following the same procedure as the national judgments. For the first time in the EU, the Member States must treat the decisions given by a court in another Member State like those given by their own courts.

The EEO Regulation does not concern all matters belonging to civil and commercial law, but just the uncontested claims. Therefore, it is important to define what is meant in the Regulation by an uncontested claim. In some cases 'uncontested', as intended in the Regulation, clearly goes beyond its standard linguistic meaning. An uncontested claim is taken to mean paying a claim for an amount of money which has become due or whose due date is mentioned in the document to be verified as enforcement order. Such a pecuniary claim can be considered uncontested when the debtor, in particular, has accepted it. The claim is also considered uncontested when the debtor has at no stage during the court proceedings objected to the claim in the manner of national procedural law concerning the procedure in question. A third situation where the claim can be said to be uncontested, is if the debtor is absent from the court session where the claim is being processed. Even if the debtor objected to the claim at the beginning of the court proceedings, the prerequisite of 'uncontested' is met, if he or she is not present or represented in the afore-mentioned session. In this situation an additional request is placed on the uncontestedness of the claim that such a procedure is considered, according to the legislation of the Member State of origin, to be a tacit admission of the claim or of the facts alleged by the creditor.

Appealing typically indicates that the parties involved disagree about the outcome of the end result. In other words, the matter must be understood as being contested in the standard linguistic sense. The EEO Regulation is, however, also applied to decisions given as grounds for European Enforcement Order because of the appeal application of the confirmed judgments. Even they are uncontested as understood in the Regulation.

Paralleling the European enforcement order to a national judgment as far as the enforcement is concerned, requires mutual trust from the Member States in the administration of justice practiced in other states.¹³ To justify that trust, the EEO Regulation sets certain minimum standards for the national procedure by which the judgments concerning the uncontested claims are given. With the help

12 Andersson, Torbjörn: *Harmonization and Mutual Recognition: How to Handle Mutual Distrust*, in *Enforcement Agency Practice in Europe – JAI/02/FPC/19/UK*, British Institute of International and Comparative Law 2005, p. 247.

13 About the trust and distrust between the Member States see Andersson, Torbjörn, *Harmonization and Mutual Recognition: How to handle Mutual Distrust* in *Enforcement Agency Practice in Europe – JAI/02/FPC/19/UK*, The British Institute of International and Comparative Law 2005, p. 249-251.

of the minimum standards one ensures that the debtor receives information in sufficient time about the legal proceedings concerning him or her, as well as about how a claim can be contested and the consequences of doing nothing and being absent from the trial. The Regulation does not obligate the Member States to change their legislation to meet the minimum standards, but are only allowed to confirm the judgment for European enforcement order when the procedure followed has met the minimum standards set by the Regulation.

The minimum standards apply to situations where defining the creditor's claim as uncontested is a consequence of the debtor's passivity or absence: the debtor has not objected to the claim in a manner preredquired by the national legislation or he or she has not been present in the court session handling the claim. The minimum standards set for the procedure are there to ensure, above all, the notification of the application for a summons or similar document is early enough and in a manner allowing the debtor a chance if wanted, to defend him or herself. However, the minimum standards concerning the debtor's notification are not completely absolute. Even if the procedure in the Member State of origin does not meet the minimum standards, this can be remedied with certain prerequisites and the judgment can be certified as European order for enforcement.

4 Aiming at Steering National Enforcement

The starting point is the autonomy of debt recovery according to the Brussels I Regulation (and the Brussels and Lugano Conventions preceding it).¹⁴ Enforcement happens in the Member States according to their national norms. The Brussels I Regulation (or the Conventions) does not contain articles about carrying out the enforcement, the jurisdiction of the distrainers, distrainable property or choice of law in enforcement. However, these regulations are considered to have certain reflective effects on national enforcement. An example of the reflective effect is that one cannot carry out other enforcement procedures, except protective measures, on the property of the debtor before the decision in exequatur has the force of law. This injunction based on Article 47 of the Brussels I Regulation is valid, even if the national law would allow wider enforcement of judgments that are without the force of law. One can also consider the applicant's right as a reflective effect, that is based on Article 50 of the Brussels I Regulation, to receive as wide free legal aid as possible in accordance with the national legislation, in exequatur and in the appeal application concerning a decision made in exequatur if the applicant has been granted free legal aid in the Member State of origin.¹⁵

The EEO Regulation goes a step further than the Brussels I Regulation also in the respect that it has provisions that immediately concern the enforcement.

14 The autonomy of debt recovery can be said to be one expression of the common procedural autonomy. About procedural autonomy, see Pöyry, Tuomas, *Tehokkuus, informaatio ja eurooppalainen oikeusalue*, Forum Iuris, Helsinki 1999, p. 318.

15 The Brussels I Regulation also widened legal aid to apply to the appeal.

On the other hand, these provisions are by their application rather limited, but one can see them as an opening to uniform European enforcement law. In cases where the debtor has appealed either for European grounds for enforcement to a confirmed judgment or applied for the correction or cancellation of a certificate that confirms the European grounds for enforcement, the organ taking care of the enforcement can limit the enforcement or stay it altogether. The first choice is that the enforcement authority will limit the enforcement proceedings to protective measures or orders security for the prerequisite of the enforcement. The enforcement authority has discretionary power in choosing a suitable means. The enforcement is limited where security is ordered to be given, a slightly misleading statement, though, at least in the Finnish judicial system. The enforcement can actually continue until the end after posting the security. If the debtor's appeal is successful, the damages caused by the enforcement will be reimbursed from the security. As far as posting security is concerned, one must note that the debtor must not demand security just on the grounds that he or she is a foreign citizen or that he or she does not have a domicile or residence in the Member State of enforcement.¹⁶ In exceptional cases the enforcement authority can also stay the enforcement procedure. The prerequisites for staying are in principle met when it is rather likely that the appeal will lead to a positive solution on the debtor's behalf.

In the proposal for a regulation of a European order for payment procedure a comparable regulating model has been adapted, which include provisions directly affecting national enforcement. In their content these provisions also follow those of the EEO Regulation. After the regulation has come into power, the European order for payment should be enforced without exequatur as a national judgment. With certain prerequisites, the enforcement of the order for payment could be refused by the court in the Member State of enforcement. According to the proposal for the regulation, the organ responsible for the enforcement could, upon the defendant's application, limit the enforcement or stay it altogether under unusual conditions. As with the European grounds for enforcement, the enforcement of the European order for payment, could also be limited to protective measures or one could demand the debtor post security for the prerequisite of the enforcement, the size of which would be defined by the enforcement organ.

The preparation of the proposal for the European order for payment procedure shows in an interesting way the quick formation of the regulatory basis of the European enforcement law. The proposal for a regulation by the Commission given in spring 2004¹⁷ did not yet contain provisions directly affecting the enforcement procedure, even though exequatur had been already abandoned in this phase as a prerequisite of the enforcement of an order for payment. In the amended proposal¹⁸ of February 2006 by the Commission, the

16 A comparable injunction for demanding security from a foreign creditor is also followed in the enforcement according to the Brussels I Regulation.

17 Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure, COM(2004)173.

18 Amended proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure, COM(2006)57.

provisions directly affecting the enforcement were included. The model adopted in the EEO Regulation is thus repeated in the later proposal.

Another proposal that implements the model of provisions directly affecting the enforcement applies to the afore-mentioned regulation of maintenance. Even currently the enforcement of the maintenance claims is based on the Brussels I or EEO Regulations. The proposal for the regulation is an attempt to remove hindrances in collecting maintenance in the European Union. The aim is to remove the hindrances through comprehensive measures, concerning international jurisdiction of authorities, applicable law, recognition and enforcement of decisions, co-operation of the authorities, as well as removal of hindrances to allow the court proceedings to proceed smoothly.

The regulation is a wide entity regulating these questions, but in this article the focus is on the suggested provisions concerning the enforcement. With the help of the regulation the idea is to ensure not only the enforceability of the judgment concerning maintenance throughout the Union, but also the enforcement of the judgment in a simple and uniform manner. This demands provisions directly affecting enforcement. Naturally in this proposal *exequatur* as a prerequisite for the enforcement of a decision has also been abandoned. A copy of the decision meeting all the necessary requirements for verifying the authenticity is acceptable as grounds for the enforcement. An extract which a competent authority has drawn using the standard form attached to the regulation, is also needed. Legalising documents or similar formalities are not required in the enforcement, nor do the documents need to be translated into the language of the Member State of enforcement. This proposal for a regulation also follows the common principle of the European enforcement law in that the correctness of the substantive decision will not be examined in the enforcement. The injunction of the re-examination does not, however, stop the enforcement organ from only partially collecting maintenance claims, if collecting the amount in full would infringe on such wealth of the person liable to provide maintenance, which must not be attached according to the law of the Member State of enforcement.

After coming into force, the regulation would also have a direct effect on the enforcement for that part that contains a provision about the ranking of the claims, in other words, about the order, in which the claims are paid from the assets received from the debtor in the enforcement. According to the proposal, the maintenance claims should be paid before all the other debts of the person liable to provide maintenance, including debts caused by the enforcement expenses of the judgments. Staying the enforcement proceedings will prevent the payment of maintenance to the person entitled to it. Therefore, in the regulation proposal the jurisdiction of the enforcement authority is limited by regulating individually those reasons entitling one to limit or postpone the enforcement or refuse it altogether. In the provision the grounds are listed exhaustively, the enforcement authority is left with no discretionary power to stay or limit the enforcement proceedings for other reasons. The enforcement authority will still have discretionary power in regard to how the enforcement is limited.

It is possible to safeguard the rights of the person liable to provide maintenance, refuse the enforcement or postpone or limit it, if the person liable to provide

maintenance has already paid the debt or if the right to get the judgment enforced has fallen under the statute of limitations. Also a conflict of the judgment with that recognised in the Member State of enforcement entitles one to refuse or limit the enforcement. In addition if the person liable to provide maintenance has, according to the regulation, asked for the judgment to be re-examined¹⁹ and the proceedings of the case have not been finished, it is possible to stay or limit the enforcement proceedings.

The proposal for the regulation concerning maintenance is also significant in European enforcement law because, after coming into force in the proposed form, it would bring into the equation the selection of the cross-border enforcement orders given by a court, which will be comparable to debt recovery for their effects. Currently, in the international debt recovery there is a principle of territorial jurisdiction as a main rule, which emphasizes the sovereignty of a state. According to the principle of territoriality the enforcement authority has jurisdiction only in its own country and the attachment performed only has a legal effect in the country of the enforcement authority. On the other hand, the principle of territoriality does not have an equally strong position in all the Member States of the European Union.²⁰ Cross-border orders, comparable to attachment in their effects, contribute to the weakening of the principle of territoriality.

The proposal for the regulation would allow the court giving a maintenance judgment to give an order for monthly direct payments to the employer or the bank of the person liable to provide maintenance in another Member State, where, he or she has a bank account. The order is comparable in its effects to the attachment of salary or assets in a bank account. Even though in many Member States comparable procedures are possible even now, the regulation would ensure that such an enforcement procedure will be in use throughout the European Union. The court that imposed the maintenance could thus give, in addition to a directly enforceable judgment, an order directly affecting enforcement. In other words, the court that handled the case has the right to order the maintenance to be paid from particular property of the debtor. This means a fundamental change in Finnish law. Choosing the enforcement measures and property to be foreclosed would no longer be at the sole discretion of the enforcement authority.²¹ Moreover, the interim safeguarding of

19 The re-examination of the judgment does not mean an appeal. According to the proposal for a regulation, the question of re-examination is only under exceptional conditions, where one does not know if the defendant absent from the court received the application for a summons at all, or whether the defendant has not been able to oppose to the maintenance claim because of force majeure or because of the exceptional conditions independent of him or her. A demand for re-examination of the judgment stops all the enforcement procedures.

20 Hess, Burkhard, *Study on making more efficient the enforcement of judicial decisions within European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and protective Measures*. Version of 2/28/2004, p. 10-12 and Hess, Burkhard, *Comparative Analysis of the National Reports*, in Enforcement Agency Practice in Europe- JAI/02/FPC/19/UK, The British Institute of International and Comparative Law 2005, p. 25-26.

21 In Finland the distrainer decides as a principle rule the debtor's property to be foreclosed to deal with the pecuniary claims. The distrainer's power to decide is still affected by, for

maintenance claims would be possible, according to the proposal for the regulation, by a court of the Member State of origin. To protect the person entitled to the maintenance, the court handling the case could give an order for temporary freezing of the bank account of the person liable to provide maintenance in another Member State, with the aim of preventing destroying and hiding assets of the person liable to provide maintenance.

5 European Enforcement Law and its Research

In future the principle of territoriality will probably be increasingly weakened in the European Union. The trend seems to be towards cross-border orders being comparable to attachment in their effects as an ever more usual model to make enforcement more efficient in the European Union. The Commission is preparing a Green Paper on the attachment of assets in a bank account.²² It deals with improving the collection of pecuniary claims in the EU and proposes creating a European system for the attachment of assets in a bank account. There are various alternatives for forming the system and these are presented in the Green Paper.

One can ask how does the Europeanisation of enforcement appear in the enforcement law research. In the beginning, I already stated that the enforcement of judgments has so far been seldom researched in international civil procedural law.²³ Following the principle of territoriality and the paucity of cross-national regulations have been natural explanations as to why the subject has been sidelined in research. The development of the legislation of the European Union in the past few years has, however, started to clearly show the meaning of enforcement law as a necessary element of international activities. The interest in European enforcement law as a research subject will undoubtedly grow with the new regulations. Enforcement law is no longer isolated national legislation, but is becoming increasingly connected to general European Union law all the time.

The invasion of European legislation in debt recovery law appears to take place one step at a time. The all-embracing harmonisation of enforcement procedures would be a demanding task, though, because of the differences in the national systems, and a task which would, no doubt, meet with considerable resistance in the Member States. The main rule is still the execution of the

example, the order of foreclosure decreed by law. An exception from the main rule is the mortgage judgment where the judgment given by the court includes the foreclosure of the property given as security. A mortgage judgment can only be given when the suit calls for a repayment from the individualised property given as security for the claims, most typically from real estate.

22 Green Paper on Enforcement: *A European system for the attachment of bank accounts*. At the time of writing this article, the Green Paper had not yet been published.

23 However, interest has arisen of late in international private law research also concerning questions about the choice of law rules of foreclosure. See Koulu, Risto, *Uusia statuutteja kansainväliseen yksityisoikeuteen* in Business Law Forum, Helsingin yliopiston yksityisoikeuden laitos and Edita, Helsinki 2006, 9-23.

enforcement following the national procedure provisions of the law (*lex fori ex auctoritate juris executionis*) of the Member State of enforcement, but the national provisions must give way to those of the EU that conflict with them. In addition to the provisions that extend their influence to the direct enforcement procedure, the EU regulating effect in debt recovery law is also visible in the fact that the direct enforcement of debt recovery grounds given in another Member State, or other orders given in one Member State is ever more increasingly presumed to be followed as such in other Member States. Currently, a direct cross-border enforcement is made possible by the grounds for debt recovery, through court proceedings and similar processes following national provisions, even though EU provisions set certain minimum standards for a national procedure. In future, the grounds for debt recovery ensuring direct cross-border enforcement can also come about through special processes based on EU regulations. Provisions making direct enforcement possible and those affecting directly enforcement currently form the basis for the European enforcement law.

The European enforcement law may draw its theoretical matrix, its legal principles and legal doctrine from common European Union law and from its case law. Still currently it is difficult to examine European enforcement law completely separately from any individual national enforcement law, because the basis built on the EU regulations has not had time to become all-embracing. The enforcement of a foreign judgment as a procedure is still mainly based on national provisions. The step-by-step progress should not, however, be belittled. The most important thing is the direction of the progress and it clearly indicates the creation of European enforcement law at a surprising speed. The collective procedures connected to business activities, in other words bankruptcy and business reorganization were the natural research targets of EU regulation in the field of insolvency law only a couple of years ago.²⁴

The birth of the European enforcement law is strongly linked to making it easier for judgments to move freely, removing the enforcement hindrances and making it more efficient for the cross-border enforcement in the EU. Procedural intermediate phases will be removed and regulating will be made more uniform, so that crossing national borders would cause as little inconvenience as possible in implementing the rights confirmed by the judgment. The effortless movement of the judgments may well become the leading principle of European enforcement law. This principle would be genuinely understood as an optimising order leading to choose from the possible alternative interpretations of the provisions one which will make cross-border enforcement easiest.

The future will show if the formation of the regulatory basis of the European enforcement law will continue as swiftly as has happened lately. It is obvious that the possible slowing down would not, at least, be an outcome of the minor importance of the subject. The right of the creditor does not materialise until the obligation given by the judgment is in fact met. Without the possibility of enforcement, performing the obligation confirmed by the judgment could often depend on the goodwill and the sense of duty of the defendant. This statement

24 Koulu, Risto, *Den insolvensrättsliga forskningen i går, i dag och i morgon*, Tidskrift utgiven av Juridiska föreningen i Finland 2004, p. 680.

also rings true in international matters. In the EU where efforts have been made to advance the free movement of people, goods and services, it would be downright absurd if crossing the borders of individual states would significantly make matters worse and slow down the enforcement of a legitimate claim. European enforcement law has really earned its place, also as a new research subject.