
JURISDICTION: EUROPEAN UNION

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A. GENERAL INFORMATION

(i) Does European law provide rules to facilitate the recognition and enforcement of decisions issued by a court of another member state on commercial matters?

Yes.

The matter was initially regulated by the Brussels Convention on the enforcement of foreign judicial decisions, which was executed on 27th September 1968, and was then amended from time to time, to include new member countries.

The territorial scope of the Brussels Convention included all EU member countries and was then extended with the Lugano Convention, executed on 16th September 1988, to the countries which are members of the European Economic Interest Area. Most of those countries have subsequently joined the EU, except for Switzerland. In practice, the two conventions included all EU countries plus Switzerland.

Later on, with the new EU treaty, the judicial matters were included in the scope of the EU, and the speedy recognition and enforcement of decisions issued in EU member states became a key issue of European policy.

The matter is now regulated by Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of civil and commercial judgments, which is an improvement of the Brussels convention.

Additional rules concerning the cross border recognition of judicial decisions are set forth by EC Regulation 805/2005 of 21 April 2004, entered into force on October 2005, creating an European Enforcement Order for uncontested claims and EC Regulation 1346/2000 of 29 May 2000 regarding insolvency proceedings, which are outside the scope of this paper.

(ii) Which countries are subject to the provisions of Regulation 44 and/or to the Brussels Convention?

Regulation 44 is directly in force in all EU member states.

Switzerland is subject to the substantially similar rules provided for in the Brussels and Lugano Convention.

In summary, all commercial decisions issued by a court or a state which is member of the EU or by a Swiss court are recognized in every other state in accordance with European Law.

Given the substantial equivalence of the two sets of rules, we will only refer to Regulation 44 .

(iii) Which foreign judgments can be recognized for enforcement under European Law rules?

The scope of Regulation 44 is to cover the recognition and enforcement of judicial decisions issued by a court of a Member State in civil and commercial matters throughout the European Union.

The following matters are explicitly indicated as being outside the scope of the Regulation¹:

- 1) revenue, customs or administrative matters.
- 2) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- 3) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- 4) social security
- 5) arbitration.

Article 32 clarifies that, for the purpose of the Regulation 44/2001, the term “judgment” should be interpreted broadly, to include any order, decree, decision, writ or execution, as well as the determination of costs and expenses by an officer of the court. This means that the recognition is not limited to decisions which finally adjudicate the case and the enforcement procedure may be used also for interlocutory orders and interim remedies.

¹ See Article 1 and 2 of Regulation 44.

B. RECOGNITION UNDER REG. 44

(i) What conditions must a foreign judgment issued in an EU member state satisfy to be recognized for enforcement in another member state?

According to Article 33 of the Regulation, a judgment issued in a member state shall be recognized in the other member states without any special procedure being required. The actual reach of this provision is more limited than it seems as a recognition procedure will be required in order to be able to proceed with foreclosure. The principle of immediate and automatic recognition has, however, some practical autonomous effects. For example, the foreign decision could be considered by a court of another country as evidence of a factual situation.

Also, given the principle of automatic recognition, the foreign decision can be used as evidence of the final adjudication of the matter between the parties in all circumstances. For example, if the defendant starts a new action, the plaintiff may use the foreign decision as evidence of the res judicata on the subject matter, regardless of whether an exequatur procedure was ever commenced. Similarly, if a new case is commenced and such a case is dependent upon a finding adjudicated by the foreign decision, such a finding is res judicata and cannot be revisited again.

It must be noted that Regulation 44 does not require the judgment to be final in order to be recognized and enforced throughout the EU, however the court of the Member State in which recognition is sought may stay the proceedings if an ordinary appeal against the judgment has been lodged. Judgments given in Ireland or the United Kingdom may be stayed only if enforcement is suspended in the State of origin, by reason of an appeal.²

(ii) In what circumstances will a court refuse to recognize a judgment issued by a court of another EU member state?

The principle of full recognition of decisions issued in other EU member states has limited exceptions, which are listed in Article 34 and 35. According to those provisions recognition can be denied only in the following cases:

(a) the recognition is manifestly contrary to public policy in the Member State in which recognition is required;

(b) the judgment was given in default of appearance, and the defendant was not duly served in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is required;

(d) the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State where enforcement is requested;

² Art. 37 of Regulation 44.

(d) the judgment is in violation of certain exclusive jurisdiction provisions dictated by Section 3, 4 and 6 of Chapter II of the Regulation, for insurance litigation, consumer litigation and litigation over real estate and patent rights .

(iii) In what circumstances (if at all) Is it possible to re-open the merits of the decision of the foreign court?

It is never possible to reopen the merit of the case. In fact, Article 36 of the Regulation explicitly indicates that, under no circumstances a foreign judgment may be reviewed as to its substance.

(iv) What are the basic procedures for obtaining the Declaration of Enforceability for the purpose of a subsequent judicial enforcement of a judgment issued in another EU member country? Please summarize and give legal citation.

According to Article 38, judgments issued by a court of any EU member state and enforceable in such state may be enforced in any other EU member state after receiving a declaration of enforceability in such other state, following a request by any interested party.³

Article 39 provides that an application must be submitted to the court or competent authority indicated in the list in Annex II of the regulation, which is updated from time to time by the Commission.⁴

The procedure for making the application is governed by the law of the Member State in which enforcement is sought,⁵ subject to the guidelines set forth by the Regulation..

More specifically, according to combined provisions of Article 40, 53 and 54 of the Regulation, the applicant shall produce a copy of the judgment which satisfies the conditions necessary to

³ However, if the judgment is to be enforced in the United Kingdom, Article 38.2 provides the judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

⁴ Current list is available by looking at the consolidated text of the Regulation available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm.

⁵ See Article 40.1 of Regulation 44.

establish its authenticity, together with a standard certification, issued by the court that rendered the judgment, by using the form provided by the Regulation.⁶

Although the translation of the judgment is not mandatory, if the court or competent authority so requires, a translation of the documents shall be produced and the translation shall be certified by a person qualified to do so in one of the Member States.⁷ In practice, a translation is almost always required.

The applicant must give an address for service of process within the jurisdiction of the court where the application was filed or appoint a representative in that jurisdiction.⁸

The procedure is an ex parte procedure and does not provide for the defendant to make any submission. According to Article 41, the judgment shall be declared enforceable immediately on completion of the above mentioned formalities and the court is not entitled to make any review as to whether the judgment should be denied enforceability pursuant to Articles 34 and 35 of Regulation 44.

Once the decision on the application for a declaration of enforceability is issued, such decision shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party. The enforceability order carries with it the power to proceed immediately with protective measures, such as a seizure of assets. This is a very useful tool to “induce” the defendant to pay without slowing down too much the opposition procedure.

Following the receipt of the declaration of enforceability, the defendant may object to the enforceability of the foreign judgment by lodging an appeal according to Article 43 of the Regulation against the declaration of enforceability, within one month from the receipt of the service of process⁹. The opposition is to be lodged with the court indicated in the list provided in Annex III to the Regulation¹⁰ and will follow local rules for civil contentious matters.¹¹ The

⁶ According to Article 55, if the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

⁷ Article 55.

⁸ Article 40.2

⁹ This term is extended to two months if the party against whom enforcement is sought is domiciled outside the country of enforcement.

¹⁰ The updated list is available on the Europe web site at :
http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm.

¹¹ See Article 43.3 of Regulation 44.

appeal may lead to a revocation of a declaration of enforceability only on one of the grounds specified in Articles 34 and 35 and under no circumstances a review of the merit is admissible.¹²

(v) What appeals (if any) are available against the decision to declare the judgment enforceable following the objection of the defendant?

According to Article 44 of the Regulation, the decision of the court following the opposition procedure initiated by the defendant pursuant to Article 43, is subject to appeal according to the rules of the civil procedure of the country where enforcement is sought. The court to which the appeal is to be submitted are set forth in Annex IV to the Regulation.

(vi) How much time approximately will the procedure for obtaining recognition take with/without challenge or appeal?

The duration of the procedure depends on the backlog of the competent Court and completeness of documentation and varied from country to country..

(vii) What is the approximate cost of the recognition process?

With respect to administrative costs Article 52 of Regulation 44 provides that no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought. This leaves member state only with the ability to impose a flat administrative fee, if any. Also, no security, bond or deposit, may be requested on the sole ground that the applicant is not domiciled or resident in the state of enforcement.

With respect to legal fees, it will obviously depend on the relevant legal market. Legal aid is in principle available if the applicant benefitted from legal aid in the judicial proceeding whose enforcement is sought.

(viii) What costs are recoverable from the judgment debtor?

Regulation 44 does not include any provision regarding cost recovery, which is therefore subject to the local rules of the country where enforcement takes place.

¹² See. Article 45 of Regulation 44.

D. EMERGENCY OR PROTECTIVE MEASURES PRIOR TO ENFORCEMENT

(i) What, if any, emergency and/or protective measures are available to the claimant?

Prior to obtaining the Declaration of Enforceability, the claimant may resort to whatever emergency or protective measure available in the country of where enforcement is sought based on its domestic rules. According to Article 47, nothing shall prevent the applicant from availing himself of provisional and protective measures, as generally provided by the law of the Member State where enforcement is requested, without a declaration of enforceability under Article 41 being required. In practice, in those cases, the existence of the foreign judgment may be used to demonstrate the existence of a prima facie right regarding the claim against the defendant.

Following the issuance of the Declaration of Enforceability, the applicant shall have the right, under the Regulation, to proceed to obtain protective measures, even before serving the Declaration of Enforceability upon the defendant. Pending the time for the defendant to object to the Declaration of Enforceability according to Article 43, and throughout the time of the opposition procedure, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.