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TOPIC

Infringement of the right to a fair trial as a ground for non-recognition of a foreign judgment under the Brussels Ibis Regulation

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LIST OF ABBREVIATIONS

ECHR - The European Convention on Human Rights

ECtHR The European Court of Human Rights

EU – The European Union

ECJ – European Court of Justice (Court of Justice of the European Union)

UN – United Nations

UK – United Kingdom

INTRODUCTION

The relevance of the topic. Through the years of existence of the European Union, we can observe the gradual improvement and building up of the integration process. Each new treaty and each new regulation give increasingly more powers to the European Union institutions. Furthermore, year after year the scope of the harmonized legal fields is also rising[1]. Such historical development of the European Union and its legal instruments was definitely beneficial for the economic progress of the EU member states and of the union as a whole.

Evidently, one of the fields of EU law that also undergone such a development and that contributed not only to the economic growth but also to such important features as the common market of goods, services, and common market of labor. This sphere is the cooperation between the member states in the field of civil justice. Probably the main part of this cooperation is the cross-border recognition and enforcement of civil judgments between EU member states. Clearly, it is impossible to overestimate the importance of cross-border enforcement for the development of the common markets as well as for further integration[2]. For example, the introduction of the common market has opened the possibility for companies registered in one member state to sell goods or provide services in other member states without any interference from the respective institutions of that state. Consequently, such a situation created a huge amount of cross-border civil cases that ought to be solved and enforced efficiently.

The EU had to come up with a legal framework that would allow for the fast and efficient enforcement of foreign judgments not only because it would be more comfortable for the parties to the civil procedures, but mostly due to the fact that the existence of the common markets depends on the efficient civil procedure. Without a possibility to enforce decisions in a timely manner, the companies that do their businesses across multiple member states would be reluctant to engage more in cross border economic activities due to the fact that they cannot efficiently protect their rights and interests because of an inefficient framework on recognition and enforcement of judgments. Another reason to create an efficient framework is the huge number of citizens who changed their place of living to other member states, which creates even more civil cases with foreign elements, that have to be solved and enforced.

Eventually, the EU created a framework for the recognition and enforcement of civil judgments that allows for smooth cross-border enforcement. Nevertheless, despite all the positive

[1] Zeitlin, J., Nicoli, F., & Laffan, B. (2019). Introduction: The European Union beyond the polycrisis? Integration and politicization in an age of shifting cleavages. Journal of European Public Policy, 26(7), 963

[2] Hazelhorst, 18

sides, such a framework also generates many risks to the ensuring of fundamental rights, especially to the protection of the right to a fair trial. The prevalent idea is that the less power member states have in the process of recognition and enforcement of foreign decisions, the fewer possibilities they have to check whether the right to a fair trial was violated[3].

The protection of the right to a fair trial should not be taken easily. Here it is important for us to remember the EU positions itself as an organization that cares about human rights, moreover, European Union Charter on fundamental rights (EU CFR) also recognizes the importance of protection of fundamental rights including the right to a fair trial. [4]

The threats that enhanced the free movement of judgments are rather evident. Nevertheless, currently, we can observe that the dominating idea in the EU is not to better protect the right to a fair trial but on the contrary to further simplify the movement of civil judgments. From the most recent developments in this direction, we can name the abolition of the exequatur and the proposal to abolish the grounds for refusal under the Brussels I Regulation. Furthermore, another important development was the abolishment of the ground for refusal in certain situations under the Brussels II regulation.[5] To fully understand the consequences of those developments that have simplified the regime of movement of judgments we have to understand all the implications of the usage of the right to a fair trial in the process of the challenge of recognition and enforcement of foreign decisions. We have to assess whether it is possible to use alleged violations of the right to a fair trial in order to challenge the enforcement of a decision and if yes, what consequences of this possibility could bring proposed developments to the current legal framework.

The relevance of the topic is supported not only by the fact that the free movement of judgments receives a huge amount of attention from European institutions. But also from the recent developments of relations between the EU and the ECtHR. Since the refusal of the EU to join the ECHR, the ECtHR adopted a stricter attitude toward cases involving secondary EU legislation, and it is evident in one of the cases that we will analyze in this research, what is even more important about this case is the fact that the law in question is the Brussels I bis Regulation.[6] On the example of this case, as well as on the many other examples of the relevant case law that was developed through the tears of existence of the current framework, we would be able to see all the

[3] Asif Efrat (2019) Assessing mutual trust among EU members: evidence from the European Arrest Warrant, Journal of European Public Policy, 26:5, 656

[4] Article 47 of the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

[5] Marta Requejo Isidro. (2014) Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast)1 : The Abolition of Exequatur. 12

[6] Paul Gragl. An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case. 551

possible implications and affects that further simplification of the free movement of judgments might have on the protection of the right to a fair trial within the EU.

Also, it is important to mention that the change in the ECtHR attitude toward the protection of the right to a fair trial in the EU must not be underestimated. In case if in future the court would adopt a decision that recognizes the violation of article 6 by one of the member states while it was acting under either Brussels I or Brussels II regulations would have dire consequences on the development of further integration within the union[7]. Therefore, it becomes even more important to understand what problematic issues the current legal framework has and how they can be improved so the possibility to use the right to a fair trial as a ground for non-recognition of foreign decisions would be ensured.

Scientific problem of the research. Considering the abovementioned information, the scientific problem of this research could be formulated as what are the possibilities to use the right to a fair trial as a ground for non-recognition of foreign judgments under the current version of the Brussels I bis and Brussels II bis legal regimes? How this possibility can be affected in case of further simplification of the enforcement process, and how it would affect the protection of the right to a fair trial in the EU considering the position of ECtHR?

The current level of analysis of the research problem. Regarding the current level of the analysis of a given research problem, it would be fair to say that in the general context the topic already gets some amount of attention from the academic community.

The authors that we have analyzed during our research almost always consider the topic in a wide context of the enforcement of cross-border decision looking at all the legal instruments that exist in EU law and that are related to the cross-border enforcement of civil judgments in the EU. For example, probably the most encompassing work that considers the issue of cross-border enforcement and its relation to the fundamental rights protectios is the “Free movement of civil judgments in the European Union and the right to a fair trial”, written by M. Hazelhorst. In this vast research, the author analyzes the main pillars of the current regimes of movement of civil judgments and their relation to the protection of the right to a fair trial. It is important to mention that this work goes beyond analyzing Brussels I bis and Brussels II bis, author also consider other instruments of enforcement of civil judgments, that frequently have a more simplified attitude. After analyzing those documents authors make interesting connections to Brussels I and II in the

[7] Marguery, Tony. Je t'aime moi non plus The Avotiņš v. Latvia judgment: an answer from the ECrtHR to the CJEU. Review of European Administrative Law, Volume 10, Number 1, June 2017, 113

context of the danger of further simplification[8]. Also, this is one of a few works where the author proposes new ways of developing the protection and ensuring of the right to a fair trial in the context of free movement of judgments. Furthermore, Hovaguimian in his work also uses a wide attitude toward the issue of protection of the right to a fair trial.[9] Jan-Jaap Kuipers in this regard wrote another interesting work, where on the contrary to Hazelhorst he concentrates on the implications of the right to a fair trial in the narrow context of the Brussels I Regulation. He paid special attention to the role of the national court in the interpretation of this issue[10]. Previously, this line was well-researched by Fawcett, but it concentrated mostly on the view of UK courts[11].

Furthermore, it is important to mention that a considerable amount of authors such as the work written by Kramer concentrate on the issue of the abolition of the exequatur and its influence on the protection of the right to a fair trial[12]. Moreover, it would be important to mention that a few authors also described the topic of the attitude of the ECtHR toward the protection of the right to a fair trial, in the context of cross-border enforcement within the EU. From these works, we can especially mention Kathrin Kuhnert[13], in her research she rightfully pointed out the main problems of the Bosphorus doctrine and how it does not always protect the right to a fair trial to the fullest extent. The same line of thoughts regarding the Bosphorus doctrine, we can observe in the work of Cathryn Costello[14].

It would be also wise to mention that almost all the academic works that discuss that topic tend to pay a lot of attention to the case law of either ECtHR or ECJ, for example, Groussot [15]. In general, we can say that theoretical aspects of the topic are well-developed, however, the possibilities of improvement of the practical implications of the theoretical findings are not exausted, especially in light of the most recent case law that is not always discussed in the literature. Moreover, there is a place for new proposals for solving the main conflict between the benefits of enhanced freedom of judgment and obligations to protect the right to a fair trial.

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[8] Monique Hazelhorst, Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial.

[9] Philippe Hovaguimian (2015) The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns, Journal of Private International Law, 11:2, 212-251

[10] Kuipers, Jan-Jaap. (2010). The Right to a Fair Trial and the Free Movement of Civil Judgments. Croatian Yearbook of European Law and Policy. 6. 10.3935/cyelp.06.2010.98.

[11] JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007)

[12] Xandra E. Kramer. Abolition of exequatur under the Brussels I Regulation: effecting and protectingrights in the European judicial area. Nederlands Internationaal Privaatrecht, 2011(4), p. 633-641.

[13] Kuhnert, K. (2006). Bosphorus: Double Standards in European Human Rights Protection?. Utrecht Law Review, 2(2), 177-189.

[14] Costello, C. (2006). The Bosphorus ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe. Human Rights Law Review, 6(1), 87-130.

[15] X. Groussot et al., 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?', in O.M. Arnardóttir and A. Buyse (eds.), Shifting Centres of Gravity in Human Rights Protection (Routledge 2016)

Scientific novelty. The scientific novelty of this research can be explained as an attempt to assess the protection of the right to a fair trial in the context of the free movement of judgments under the Brussels I bis and Brussels II bis regulations, with an aim to understand perspectives of using alleged violations of this right as a ground for non-recognition under this legal regimes, and how it can be affected in case of further simplification of the enforcement process. Moreover, another element of the scientific novelty of this work is a new way of solving the problem of balance between the protection of the right to a fair trial and the benefits of ensuring free movement of judicial decisions between the EU member states. Furthermore, this research includes the study of the recent case law and its effects on the research purpose.

The significance of the research could be explained through the practical and theoretical implications of the results of the research. They could be used either in the academy for the further development of the topic, as well as for the advance of the level of command of the research topic by the students. From the practical side, the results of this research could be used for the possible reforming of the regimes of movement of civil judgments as well as for the prediction of the ECtHR reaction to those changes.

Methodology of the research. In order to solve the main problem of the research and to achieve its objectives, several scientific methods from various sides of legal science were used.

1) The historical method helped us to understand the development of the topic and how the right to a fair trial was used over the course of the history of the enforcement of judicial decisions within the EU.

2) The method of comparative research was used in order to understand how the right to a fair trial could be used to challenge the enforcement of a decision in a different jurisdiction. Also, this method helped us to compare the attitudes of the ECtHR and ECJ toward the issue in question.

3) The linguistic method was also used in order to study different documents, foreign research as well as case law.

4) Another method used for the research of existing literature was the doctrinal method, it contributed to the broad understanding of the topic.

The aim of this thesis can be described as to achieve an understanding of the current possibilities to use violations of the right to a fair trial as a ground for non-recognition of foreign decisions under the Brussels I and Brussels II bis regulations. Another aim is to understand how current possibilities can be affected by the further simplification of the enforcement process considering the ECtHR attitude in view of the recent case law.

The objectives of the research. In order to achieve the main aim of the research, we have set up the next objectives.

1) To present the dynamics of development of the regulations on civil movement of judgments within the EU and the consequences of such development on the protection of the right to a fair trial.

2) To reveal the possibilities of protection of the right to a fair trial in the context of existing grounds for refusal.

3) To analyze the ECtHR attitude to the EU secondary legislation is the sphere of movement of civil judgments in the context of the Bosphorus doctrine, and other relevant case law.

Structure of the research. This master thesis has a common structure that consists of an introduction, three chapters, and a conclusion. Each chapter is divided into subchapters. The first chapter concentrates on the theoretical aspects of the right to a fair trial and the free movement of judgments. The second chapter provides readers with more detailed information on the possibility to use infringements of the right to a fair trial as a ground for non-recognition of foreign decisions in the context of grounds for refusal that can be found in Brussels I bis and Brussels II bis regulations. The third chapter of the thesis analyses the ECtHR cases that consider secondary EU legislation including regulations on the movement of civil judgments. With the conclusion of the thesis recommendation for future development of the issue are also provided.

Defense statement: While the further development of the mutual trust principle would indeed would have a beneficial impact on the free movement of civil judgments and consequently on other free movements that exist within the union, it would also endanger the protection of the right to a fair trial due to the increasing impossibility to use the protection of the right to a fair trial as a ground for non-recognition and non-enforcement of foreign decisions under the Brussels I and Brussels II legal regimes. Such development would be problematic not only from the point of the importance of protection of the right to a fair trial as one of the most vital fundamental rights but also in view of further development of relations between the EU and ECtHR which could deteriorate due to EU's inability to balance the need to ensure the smooth movement of judgment that is necessary for the functioning of the common market, and the obligations to protect the right to a fair trial. The problem would not become serious if the legal regimes of recognition of judgments would further contain the grounds for refusal (especially the public policy exception) and if the courts in countries of enforcement would be still able to check foreign decisions for this matter.

CHAPTER I. RIGHT TO A FAIR TRIAL IN THE CONTEXT OF THE FREE MOVEMENT OF JUDGMENTS WITHIN THE EU.

Before diving deeply into the analysis of the other objectives of our research, firstly, we have to assess why the smooth movement of judicial decisions is so much important to the legal order of the EU, and which risks it brings to the right to a fair trial. Moreover, in this part of the work, we will analyze the legal regimes on movement of judgments developed within the EU as well as its relations with the right to a fair trial. This will help us to understand the deep roots of the issues that we research. The importance of such analysis we have indicated in the introductory part of the thesis.

Historical development and the importance of the free movement of judgments for the EU legal order

If we look at the history of the EU, we would see that the first attempts to create a legal order that would ensure smooth movement of judgments within the EU could be found long before 1999 when the idea of the so-called area of freedom, security, and justice was proclaimed in the Amsterdam treaty[16].

In fact, even in the treaty of Rome, we can find the requirement for the Member States to create a simplified order of recognition and enforcement of judgments[17]. And the reasons for such requirements are rather apparent. The context of the free markets and the freedom of movement within the union leads to the situation in which the number of legal cases involving a foreign element would definitely increase. Therefore, there is a need to facilitate the process of recognition and enforcement. It is clear that without the possibility to enforce a decision issued in other member states in a fast and efficient way businesses would think twice before entering any cross-border relation. Which would have a devastating effect on the common market and on other aims of the community. Moreover, on the personal level smooth enforcement and recognition of decisions is also important because of the number of people who enjoy free movement and settle in other member states which creates many possibilities for litigation in personal and family matters, this issue we will discuss furthermore in the context of Brussels II bis Regulation.

Moreover, legal order, which existed in the member states before the adoption of the Brussels Convention, did not help the smooth movement of judgments at all. Most of the rules in this matter were regulated internally. Consequently, it was much harder for creditors to enforce a

[16] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10.11.1997, p. 1–144

[17] Treaty of Rome (EEC)

decision in another member state, it was even harder in case enforcement was sought in several countries, because in this case, the costs of enforcement increased significantly due to different rules[18]. Furthermore, without supervision countries could keep ineffective systems of recognition and enforcement.

These obvious reasons resulted in member states adopting the Brussels convention that created legal order for recognition and enforcement of judicial decisions in civil and commercial matters. The convention aimed for creating common rules on recognition and enforcement of decisions. To achieve those aims, Brussels Convention established a unified procedure for enforcing foreign decisions that were called exequatur[19].

In fact, exequatur was not just a legal instrument it was a cornerstone of the convention, because of the exequatur, the procedure for obtaining enforcement orders was unified for all parties to the convention, and it significantly simplified the circulation of judgments. What was even more important is that since the option of the Brussels Convention all the judgments issued within the union are recognized automatically[20].

In this regard, it is necessary to remember that the Brussels regime clearly distinguishes judgment recognition and judgment enforcement. Recognition refers to the process when a court acknowledges that the decision has legal power over the territory of the country where the court has jurisdiction. While enforcement refers to the obtaining of permission to enforce remedies listed in the title of the decision that is sought to be enforced[21].

Judgment import and judgment inspection

It is also necessary to talk about the first version of the Brussels Convention that addressed both judgment import and judgment inspection stages[22]. Now, we think it is important to speak about these stages a bit more, especially in the context of the factual abolishment of one of those stages in the recast of Brussels I.

Let us start from the first stage which is called judgment import. Judgment import could be described as a more formal part of the process of enforcement of a foreign decision and under the regime of the Brussels Convention as well as under the first version of Brussels I regulation this stage had a form of the abovementioned exequatur. The stage itself is very formal and does not

[18] Hazelhorst, 55

[19] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

[20] Artcile 26 of the 1968 Brussels Convention

[21] Hazelhorst, 57

[22] Oberhammer (2010)

provide debtors with the possibility to invoke grounds for non-recognition. Again, previously, before the recast of Brussels I this stage was done in a form of exequatur, which allowed at least formal control from the judicial bodies. However, with the abolishment of the exequatur, the judgment import stage turned out to be an even more formality. Because now a creditor needs to only provide a competent body of the state, where enforcement is sought with a special certificate which form is unified for all the member states[23].

Consequently, the factual abolishment of the judgment import stage raised many questions about the protection of the rights of the debtor, including the possible infringement of the right to a fair trial[24]. Moreover, the severe restriction of this stage could also lead to the limitations of the member states in their ability to protect their public orders, this issue we will discuss in another part of our work.

If on one hand, we have the very formal, especially in modern legal order, judgment import stage, on the other hand, we would have a much more substantive stage that actually allows challenge of the enforcement, and the stage is called judgment inspection.

The name of the stage already provides us with an explanation of its functions. During this stage, the court of the country where enforcement is sought inspects or checks whether this decision cannot be enforced if it triggers one of the grounds for non-recognition[25]. For the purposes of our research, the judgment inspection stage is the most important because only judgment inspection allows debtors to challenge the enforcement of the decision on various grounds, and, as we will show you further in the text, including the violation of the right to a fair trial.

So, the Brussels Convention created conditions for the free movement of judgments in Europe. And it can be argued that these conditions were rather balanced. At the same time, the smooth circulation of judgment was ensured and the rights of the debtors were protected. Also, member states were able to effectively protect their legal orders, the issue that we will pay more attention to in the chapter below.

However, with the recast of the Brussels I the situation was changed. The main reason for these changes is the abolishment of the exequatur. As we have already mentioned above the abolishment of the exequatur significantly changed the legal order and as a result of it the balance between the smooth movement of judgment across the borders and the rights of debtors to

[23] Articel 37 of Brussels I bis Regulation
[24] Xandra E. Kramer. 635
[25] Rosner (2004) 253-254

challenge the enforcement was also changed, and it could have had a huge effect on the right to a fair trial.

Therefore, here we will give a bit more context to this clash of the need to ensure the smooth movement of judgments and the member state's obligations to protect the right to a fair trial. However, here we also have to mention that right to a fair trial has to be protected not only from the point of view of the debtor but also from a creditor's.

Clash of rights

We will discuss the right to a fair trial from the point of view of a debtor in detail in the following parts of this thesis because it is the most crucial part of the research which requires a detailed explanation. For now, let us speak a bit about the creditors' rights. In the famous Hornsby v. Greece[26] decision, the ECtHR acknowledged that enforcement of a decision still remains within the boundaries of Article 6 of the convention. Moreover, in the following decision in the case McDonald v. France[27] the court recognized that enforcement of a foreign decision also falls within the scope of Article 6. Furthermore, for the purposes of our research the case Saccoccia v. Austria is the most important because in this decision ECtHR decided that proceeding for obtaining exequatur also falls within the scope of Article 6[28]. If we think about the right to a fair trial from a wider perspective, it becomes clear that indeed without the effective enforcement of judicial decisions the right to a fair trial would not be fulfilled. Therefore, we need a balance between the right of the creditor to enforce a decision that was already made and the right of a debtor to challenge it if he or she thinks that during the process right to a fair trial was violated.

Moreover, as we already mentioned, without a clear order of enforcement of foreign judgments, the common market would not function properly. Therefore, considering the abovementioned reasons in the recast version of the Brussels I regulation the balance of rights was changed with the abolishment of the exequatur procedure, which gave more attention to the creditors' right to enforcement.

Reasons for the abolishment of the exequatur

In this part of the research we have to mention that while abolishing exequatur, the commission was trying to get rid of an ineffective means of judgment import. For example, one of the aims of the exequatur was to allow the enforcement of the decision in the member state where

[26] ECtHR Case Hornsby v. Greece,
[27] ECtHR Case McDonald v. France
[28] ECtHR Case Saccoccia v. Austria

the enforcement is sought, however, as it was already pointed out, such function is unnecessary in the current state of development of the EU law[29].

Moreover, the Heidelberg report showed that in 93% of all cases the exequatur proceeding was a simple formality, therefore it did not contribute to the defense of the rights of debtors[30]. Moreover, in view of the commission, abolishment of such a formal proceeding would only benefit the common market and its goals because the simpler enforcement is the more businesses would enter cross-border relations[31]and the importance of it we have already discussed.

Also, another reason for the abolishment was the fact that a debtor could become aware of the enforcement, only after a court issued exequatur, therefore debtors could only appeal the decision on the enforcement[32]. This means that with the adaption of the new order not much would change because like with exequatur, under the recast version of Brussels I the debtor would be required to appeal the decision on enforcement that already exists.

Furthermore, we can mention that in the commission's opinion there were even more reasons for abolishing exequatur such as the length of the procedure[33]. However, discussing all of them would be beyond the objectives of our research, but we can mention that all of them made the process of enforcement more complicated which was negatively affecting the effectiveness of the whole legal regime.

The current state of development

The legal order established by the recast of the Brussels regulation significantly simplified the movement of judgments within the EU. As we have indicated above, the main part of this simplification was the abolishment of the exequatur. Now, under the Brussels I bis regime there is no need for the special court procedure, a creditor may directly go to the enforcement authority with a decision itself and with a special certificate that is issued by the court of origin[34].

Under the recast version of the Brussels, I certificate became a new cornerstone of the cross-border enforcement process. The certificate has a common form for all the member states and can

[29] P. OBERHAMMER, The Abolition of Exequatur, IPRax 2010, p. 197- 199.

[30] Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009) 174 final ("2009 Brussels I Commission Report"),

[31] 2010 CSES Impact Analysis (note 43), at 63; 2010 Commission Impact Assessment (note 3), Annex VI, Figure 2, at 59-60

[32] Articles 41, 42(2) of the 2001 Brussels I Regulation.

[33] Dorothee SCHRAMM ENFORCEMENT AND THE ABOLITION OF EXEQUATUR UNDER THE 2012 BRUSSELS I REGULATION Yearbook of Private International Law, Volume 15 (2013/2014), pp. 143-174

[34] Article 42 of the Brussels I bis regulation

be found in an annex to the regulation[35]. It should contain information on the court that issued the decision, on the parties to a proceeding, and on the decision that is ought to be enforced in another member state[36]. As we have mentioned, under the Brussels I bis, the creditor just needs to bring this certificate to the responsible agency in the member state where he or she wants to enforce a decision. At this stage, the creditor might face the only relatively lengthy procedure that has left, which is the issue of translation. Because the enforcement agency might ask the judgment creditor for the translation of a certificate, in case it is done in another language[37]. Nevertheless, it would be fare to say that for the judgment creditors, abolition of the exequatur was definitely beneficial.

Afterward, the debtor should receive an enforcement certificate in a reasonable time in order to prepare for the possible challenge of the enforcement. So, as we can see, under the new legal order creditors might enforce decisions much faster and with fewer legal proceedings which certainly better protects their right to enforcement and also facilitates the free movement of judgments which was the aim of this recast.

However, there are questions about the effects that such simplification could have on the protection of the rights of debtors. And if regarding the exequatur we could say that in fact not much has changed, because as we have indicated above still the enforcement could be challenged by the debtor, and only after the initial decision on the enforcement was served.

Moreover, there were also intentions by the EC to abolish the grounds for non-enforcement and their replacement with minimum standards, such development in case it was adopted would have a significant impact on the protection of the right to a fair trial in the EU[38]. And we will discuss it more in the following chapters where we will analyze the modern grounds for refusal and the proposal for their abolition.

Furthermore, we have to mention that despite the abolishment of the exequatur, the legal regime on the cross-border enforcement of judgments under the Brussels I is still far from the complete (or full) free movement of judgments, and the reason is the fact that the civil procedure in member states is not harmonized and in process of enforcement, some hidden peculiarities of national process on enforcement might complicate the whole process. [39]

[35] Art. 53 Brussels I-bis Regulation
[36] Annex I to the Brussels I bis regulation
[37] Article 42(4) Brussels I-bis Regulation
[38] Xandra E. Kramer Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area. Nederlands Internationaal Privaatrecht, 2011(4), 637
[39] Xandra Kramer, Alina Ontanu…The application of Brussels I (Recast) in the legal practice of EU Member States Synthesis Report. 2020, 24

Free movement of judgment within the scope of Brussels II bis

As we can see from the history of the development of the Brussels I regime the recognition and enforcement of the decision in most civil and commercial matters were simplified significantly. Nevertheless, despite the willingness of the EC to narrow down even the grounds for refusal, they are still applicable.

However, Brussels II, which regulates the regime of recognition and enforcement in family matters, can show us how works regime that in certain cases is even more simplified than Brussels I bis and how it can affect the defense of a right to a fair trial.

While in many instances Brussels II bis is similar to the Brussels I bis there are still differences, and in issues that are within the scope of our research, those differences are sufficient. For example, in matters that concern orders of return of a child or access orders, Brussels II provides a very liberal regime of enforcement, which clearly favors more the free movement of judgments than the rights of debtors to challenge enforcement[40]. It was even argued that in these matters regime allows almost full free movement of judgments[41]. And we can agree with this position because in these cases court of the country where enforcement is sought cannot check whether all the rights were observed, this obligation is entirely imposed on the court of origin of decision which must check it while issuing the enforcement certificate[42]. The impossibility by the court of enforcement to check the observance of fundamental rights was subsequently settled by the case-law of ECJ[43] and ECtHR[44]. The risks of such an approach will be discussed in the following chapters of this research.

Mutual trust

Another very important issue that has to be discussed if we want to understand the development of the right to a fair trial in the context of the free movement of judgments is the notion of mutual trust. The principle of mutual trust is closely connected to another important notion of the EU law which is the principle of mutual recognition, which was developed in the case-law of the CJEU (Cassis de Dijon)[45]. To put it simply these principles require member states

[40] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

[41] Hazelhorst, 68

[42] Article 42 of the Brussels II bis regulation

[43] ECJ Case Zarraga

[44] ECtHR case Povse v. Austria

[45] ECJ Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42 (Cassis de Dijon)

to have trust in the legal systems of each other, for example in the abovementioned case the issue of trust was the marking of goods and their distribution within the market.

Inside the EU the principle of mutual trust is based on the common values that are written in article 2 of the TEU[46]. Starting from the belief that all EU member states share values of democracy, equality, and respect for the fundamental rights and rule of law it is possible to build an area where all the members share mutual trust that allows close cooperation in order to achieve the goals of the community[47].

Moreover, this principle should also work in the realm of civil law because it is impossible to have simplified legal order in the sphere of recognition of judgments where there is no mutual trust between member states. In case there is no mutual trust, it could not be impossible for member states to recognize foreign decisions automatically or even "semi-automatically".

Officially, the principle of mutual trust was firstly introduced in Tampere European Council[48]. This principle should have helped to create the area of justice, security, and freedom. Quite obviously such an aim could not be achieved in a situation where there is no trust between member states, especially in judicial matters. Moreover, during the Tampere Council EC called for the abolishment of the exequatur and for further simplification of the movement of judgments and enhanced cooperation in the judicial area.

Furthermore, regarding the issue of mutual trust, we can discuss one interesting question, which is how we can challenge the recognition of a foreign judgment on the ground of violation of the right to a fair trial while mutual trust between member states in the judicial area exists, and ideally, all the decision should be recognized automatically.

The answer to this question, rather unexpectedly came from the other area of the European Union law – asylum law. In the Joined cases of N.S. v United Kingdom and M.E. v Ireland ECJ[49] decided that mutual trust between the member states is not absolute because EU legislation does not allow presumptions that a member state in question does not violate human rights. Therefore, states cannot deport asylum-seekers to the member states if serious doubts about human rights exist in this member state. Consequently, we can say that human rights can be considered to be higher than mutual trust and mutual recognition and that the protection of human rights must not be infringed by the desire to create a free movement of judgments. Applying this decision to the

[46] Article 2 of Treaty on the European Union

[47] Matthias Weller. Mutual trust: in search of the future of European Union private international law. Journal of Private International Law, 2015. 74

[48] TAMPERE EUROPEAN COUNCIL 15 AND 16 OCTOBER 1999 PRESIDENCY CONCLUSIONS

[49] ECJ Case - C-411-10 and C-493-10, Joined cases of N.S. v United Kingdom and M.E. v Ireland

realm of cross-border enforcement, we can conclude that the mutual trust principle would not be an obstacle when refusing recognition of a judgment that violates the right to a fair trial.

Moreover, in this regard, it would be worth mentioning the ECtHR case of M.S.S v. Belgium[50]. Where the court found that Belgium violated Article 3 of the convention when sending the applicant to Greece. This case will be further discussed in the following chapters of this thesis.

Protection of human rights in the EU

As we have briefly mentioned above in the N.S. and M.E. cases ECJ decided that despite the existence of the principles of mutual trust and mutual recognition, it cannot be presumed that a member state does not violate fundamental rights. Therefore, considering the importance of human rights protection for the EU legal order, it would be beneficial to discuss the instruments of protection of human rights within the EU and how they can be used for the protection of the right to a fair trial in the context of foreign enforcement.

Let us start from the main instruments of protection of human rights in Europe which are obviously ECHR and EU CFR[51], and for the sake of coherence let us start from the latter. Firstly, since its adoption, the EU CFR did not have a full binding effect on the member states of the EU[52]. However, with the adoption of the Lisbon treaty[53], the situation has changed, and now EU CFR has a legal status similar to the treaties of the EU. However, it is worth mentioning that even before the adoption of this document, Fundamental Rights were recognized to be a part of the EU legal order by the ECJ.[54][55]

Just like ECHR, EU CFR also protects the right to a fair trial, speaking more precisely, article 47 of the document guarantees the right to a fair trial within the EU. Moreover, the member states are definitely obliged to observe article 47 while deciding on the recognition and enforcement of a foreign decision, because in such a case they implement EU law, and therefore they can be regarded as an "institution" of the EU.[56] Consequently, while deciding cases based on Brussels I or Brussels II they must observe the chapter, including article 47[57].

[50] ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09

[51] Chapter of Fundamental Rights of the European Union, 2000

[52] Craig, Paul; Grainne De Burca; P. P. Craig (2007). "Chapter 11 Human rights in the EU". EU Law: Text, Cases and Materials (4th ed.). Oxford: Oxford University Press. p. 15

[53] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

[54] ECJ Case 11-70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel ECLI:EU:C:1970:114

[55] ECJ Case 29-69 Stauder ECLI:EU:C:1969:57

[56] Besselink (2001) p. 77

[57] Hazelhorst, p229

Melloni doctrine and the protection of the right to a fair trial

When speaking about the protection of human rights within the EU it is important to mention not only treaties on the EU as well as EU CFR but also the Melloni doctrine that was developed in the eponymous case of the ECJ[58], and which had a huge impact on the understanding of the human rights protection within the EU.

If we want better understand the implications of the doctrine, we have to start from the factual background of the case. The defendant Mr. Melloni was found guilty of fraud in Italy. However, it is important to mention that he was not present during the whole proceeding and the judgment was delivered in his absence. Consequently, he was arrested in Spain where the court ordered his surrender to Italy. After the case was heard before a few higher courts in Spain, the defendant finally challenged this decision to the Spanish Constitutional Court based on an alleged violation of the right to a fair trial by Italy. In view of the defendant, Italy violated his right due to the fact that under Italian law the decision that was issued in absence of the defendant cannot be appealed[59].

Here we have to mention that arrest and surrender orders in Spain were made under the European Arrest Warrant regime that is built on the principle of mutual trust. Moreover, in EAW this principle is more strictly applied[60]. Consequently, the Spanish Court asked ECJ for a preliminary ruling on whether Spain can refuse to surrender the defendant to Italy. The main issue that the Spanish Court wanted to clarify was whether it can refuse the surrender of the defendant to Italy and not execute obligations under the EAW based on the fact that such surrender would violate the constitution of Spain[61]. It can be also said that the Spanish Constitutional Court wanted to clarify whether the legal norms of constitutions of EU member states could override secondary EU legislation if they provide a higher level of protection of fundamental rights. It is also important to mention that in the question Constitutional Court used article 53 of the EU CFR[62].

Firstly, it should be noted that under the EAW decisions made in absence of the defendant are acceptable if the defendant was duly notified about the criminal proceedings and if there was

[58] ECJ Case Melloni

[59] Giorgi Mirianashvili, "Doctrine of Supremacy of the European Union Law over Member State's Constitutions according to the Melloni Case," Journal of Constitutional Law 2018, no. 2 (2018): 102

[60] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision

[61] Mirianashvili, 103

[62] Maartje de Visser, "Dealing with Divergences in Fundamental Rights Standards – Case C-399/11 Stefano Melloni v. Ministerio Fiscal, Judgement (Grand Chamber) of 26 February 2013, Not Yet Reported," Maastricht Journal of European and Comparative Law 20, no. 4 (2013): 576

a proper legal representation[63]. In this case, it is relevant because according to the factual background the defendant knew about the proceeding and was represented in the court with a proper defense that consisted of two lawyers[64].

Moreover, the ECJ stated that under the legal instrument in question national courts do not have any discretion to refuse enforcement simply because there is no possibility for retrial in the country of origin of the decision. Furthermore, the ECJ found that the right to a fair trial was not violated in this case because its elements such as the right to be present cannot be considered absolute and that it can be waived in certain situations[65].

Regarding the issue of invoking the constitutional norms that protect fundamental rights to a higher degree, the ECJ said that it could not support such an approach because it would undermine the primacy of EU legislation. Also, as ECJ noted, such use of the domestic constitutional law would not be possible due to the fact that EU secondary legislation, including the EAW, express the consensus among member states on certain issues and such use of domestic legislation would undermine it[66]. Moreover, in ECJ's view, it would be impossible to give a national court ability to put into question the level of protection of fundamental rights that exist in EU secondary legislation because it would be harmful to the principle of mutual trust[67].

This decision has many consequences that influence all the spheres of the EU law including the cooperation in civil justice. Furthermore, the application of Melloni decision to the issue of refusal of enforcement of civil judgments is possible because like the EAW, Brussels I, and Brussels II regulations are built on the principles of mutual trust, also the notion of European consensus is applicable with this regulations as well.

While applying the Melloni case to the Brussels I bis regulation we can conclude that national courts cannot use any other ground for refusal than those that we can find in article 45 of the regulation. Even if those grounds are listed in the constitution of a member state and provide a higher level of protection. In our opinion, such an approach is beneficial for the smooth movement of judgments, however it can appear to be questionable from the point of the protection of the fundamental rights.

Article 6 of the ECHR in the context of the free movement of judgments

[63] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

[64] Mirianashvili, 103

[65] ECJ Case Melloni, para 9

[66] ECJ Case Melloni, para 62

[67] ECJ Case Melloni, para 63

Now, when we have discussed the development of the free movement of judgments in the EU and briefly looked into the protection of human rights within the union, we have to speak about the right to a fair trial in the context of article 6 of the ECHR. It would help us to understand which violations of this right could happen while free movement of judgments exists, and which instruments can prevent or remedy them. Moreover, we have to analyze the attitude of ECtHR toward this issue in the context of both Brussels I and Brussels II.

It is an undisputed fact that the ECHR is the main document with the central role in the field of human rights in Europe which does not lose any credibility for the purposes of our discussion as long as all EU member states are at the same time parties to the convention. Moreover, it gained even more credibility since the adoption of the Lisbon treaty where Article 6 gave the binding effect to the EY CFR[68]. Therefore, the standards established by the convention and by the subsequent case law of the ECtHR must not be violated by the EU member states, this obviously includes standards for the right to a fair trial (Article 6 of the convention).

Firstly, as we have already mentioned above, the scope of article 6 covers all the stages of a civil proceeding, including the stage of enforcement, even if the enforcement is sought in another country[69]. Therefore, the instruments that we discuss in this work are within the scope of article 6.

Elements of the right to a fair trial and their application in the process of enforcement

Moreover, if we want to understand whether a violation of the right to a fair trial might be a ground for refusal of recognition. We must examine the scope of article 6 not only from the point of the stages of civil proceedings that are covered but also from the point of the elements that constitute the right to a fair trial according to article 6 of the ECHR and Article 47 of EU CFR.

The first element that we want to discuss is the right to a fair hearing, it is probably the most important element with the biggest scope, and sometimes it even became confused with the right to a fair trial[70]. Indeed, the right to a fair hearing contains many principles that go far beyond oral hearing[71]. Therefore, it is rather hard for us to define which elements exactly can be crucial in our case, because violation of many of the principles might be so harsh that it would be impossible to enforce a decision, for example, if the defendant was not able to present evidence, or if the court did not properly analyze those evidence[72].

[68] Article 6 of the TEU
[69] Page 14 of this thesis.
[70] Rozakis, C. (2004). The right to a fair trial in civil cases. Judicial Studies Institute Journal, 4(2), 96-106.
[71] Guide on Article 6 of the Convention – Right to a fair trial (civil limb)
[72] ECtHR Case Dombo Beheer B.V. v. the Netherlands, 1993,

Furthermore, sanctions that courts may impose on the parties to proceeding could be disproportionate and violate the right to a fair hearing. For example, in the famous Krombach case,[73] where the defendant was excluded from the proceeding as a form of sanction and later it was recognized to be a violation of the right to a fair hearing and lead to the refusal of recognition.

The second element that is definitely worth discussing is the right to access a court. And in the context of Brussels I and II it can be said that this element could be also applied if the defendant was not given this right for example in a form of refusing him or her legal aid[74]. Also, this right might be violated if the court fees are unreasonably high[75].

Another important for our discussion element is the effective service. It would be very hard to enforce a decision where the defendant was not aware that a proceeding against them was opened or if the court did not take measures to notify parties or if it was done in an unreasonable time[76].

The next element that we have to discuss is the right of the parties to access the evidence. It means that both parties to a proceeding must be able to effectively access and analyze the evidence in possession of another party. Also, if it is necessary they must have a right to comment on that evidence. Moreover, the court should give the parties due time to study the evidence[77]. We can easily imagine that a decision might be refused to be enforced if a debtor was not able to study evidence that the creditor presented or if the court did not give sufficient time for it.

Furthermore, we should not overlook the right to a public hearing which is often regarded as the right to an oral hearing[78], which could be overlooked. Firstly, when speaking of the right to an oral hearing we have to mention that this right has many exceptions, and parties are not entitled to an oral hearing in all cases. In the ECtHR and ECJ case law we can find many limitations on this right, however, it is still important, and in certain cases, its violation might be harsh and trigger non-recognition of the decision[79].

For example, if the nature of the case requires an oral hearing, its absence might be considered a violation of the right to a fair trial. An example of such a proceeding could be a child placement case where under some circumstances court is required to hear the child's testimonials.

[73] ECJ Case C-7/98 Dieter Krombach v André Bamberski ECLI:EU:C:2000:164
[74] ECtHR Case Steel and Morris v. UK, 2005
[75] ECtHR Case Kreuz v. Poland, 2001
[76] ECtHR Case Petroff v. Finland, 2009
[77] ECtHR Ruiz-Mateos v. Spain appl. no. 12952/87 ECHR A262;
[78] Guide on Article 6 of the Convention – Right to a fair trial (civil limb) p-91
[79] Guide on Article 6 of the Convention – Right to a fair trial (civil limb)

Moreover, regarding this right, we have to mention that in the case-law of ECtHR it is well-established that the right to a public hearing is almost equal to the right to an oral hearing when the case is viewed in the first instance. Consequently, the strict requirements regarding an oral hearing are mostly imposed on the proceedings in the courts of the first instance. While higher courts might review cases without an oral hearing, but only if such hearing was performed during the process in the lower instance[80]. However, still in each case, the decision about hearing shall be taken separately, depending on the nature of the case. Also, this position was supported by the ECJ in the caselaw[81].

Therefore, despite the fact that the right to a public hearing is definitely not absolute, it is still an important part of the right to a fair trial, and because almost everyone (even incarcerated) is entitled to an oral hearing we can conclude that it is possible not to recognize a decision where such right was violated[82].

Probably one of the most important parts of the right to a fair trial is the right to present the case before an independent and impartial tribunal[83]. Firstly, we need to say that it is rather hard to imagine a situation where enforcement of a decision within the EU would be challenged on the ground of violation of the independence of the court. The reason for that is the high standards of justice within the union as well as the abovementioned principle of mutual trust, (however, here we might see interesting developments connected to the situation with the rule of law in Poland, but it is a topic for another research).

Nevertheless, the ground of impartiality still might be invoked. Because doubts about the impartiality of any judge might occur regardless of the standards of justice in a given country. For example, the relations between a judge and a party to a proceeding might become a trigger for a discussion about impartiality[84].

However, each case of alleged impartiality requires careful assessment, therefore it would be almost impossible to challenge the enforcement of a decision on this ground. Moreover, we have to mention that both ECtHR and ECJ tend to consider this issue rather restrictively which lowers the chances of the successful challenge of enforcement even more.

[80] ECtHR Case Göç v. Turkey [GC], 2002
[81] ECJ Case C-341/04 Eurofood IFSC Ltd, ECLI:EU:C:2006:281
[82] ECtHR Case Igranov and Others v. Russia, 2018
[83] Simonis, M. (2019). Effective court administration and professionalism of judges as necessary factors safeguarding the mother of justice-The right to a fair trial. In IJCA (Vol. 10, p. 47).
[84] ECtHR Case Micallef v. Malta [GC], appl. no. 17056/06

The next crucial element of the right to a fair trial is the principle of equality of arms. The main aim of this principle is to ensure that both parties to the proceeding have equal opportunities in defending their positions[85], to put it simply there should be no situation where one of the parties finds itself at a disadvantage. The principle of equality of arms is very large and is applicable to all stages of a civil proceeding[86]. An example of the violation of this principle could be a situation in which a request to hear a witness of a party was dismissed without substantial reasons[87].

However, for the points of our work, it is important to note that this principle has imitations and in some cases, some degree of inequality between parties is tolerated[88].

Moreover, another aspect of the right to a fair trial that has to be discussed is the consistency and certainty of the judgments. Basically, this principle means that a judgment cannot be changed after it was officially proclaimed by the court unless certain requirements are met[89]. Another application of this principle is that within one country should not exist completely different attitudes to solving alike legal issues. Meaning that similar cases should be decided similarly[90]. However, it remains to be unclear how to use the violation of this principle in order to stop the enforcement of a decision. Because it is highly unlikely to imagine a situation, in which a court of enforcing member states would deeply consider the case law of other member states to find some incoherence in judgments. Nevertheless, such application is still possible in most obvious cases when the decision was changed without sufficient grounds.

The final part of the right to a fair trial that we suppose to be necessary to discuss in the context of our research is the requirement for the reasoning of judicial decisions. The meaning of this principle is easy and means that when taking a decision a court should give substantial reasons[91]. When talking about the reasoning behind the decisions we must remember that it cannot be expected for courts to give a detailed explanation to any point that exists in a decision.[92] Therefore, it can be rather hard to decide whether this obligation was violated because each case should be regarded separately as long as it has distinctive nature and circumstances that might trigger differences in the reasoning.

[85] ECtHR Case Regner v. the Czech Republic [GC], 2017
[86] Guide on Article 6 of the Convention – Right to a fair trial (civil limb) p-83
[87] ECtHR Case Dombo Beheer B.V. v. the Netherlands, 1993
[88] ECtHR Case Guigue and SGEN-CFDT v. France (dec.), 2004
[89] ECtHR Case Pravednaya v. Russia, appl. no. 69529/01
[90] ECtHR Case Borovská and Ferrai v. Slovakia, appl. no. 48554/10, 25 November 2014
[91] ECtHR Case H. v. Belgium, 1987
[92] ECtHR Case García Ruiz v. Spain [GC], 1999

Moreover, what is also important in the case of the recognition of foreign judgments is the fact that countries have a rather large margin of appreciation in this regard[93] which might raise questions during the enforcement proceeding, and we will look deeply into this issue in the following chapter. The line of ECtHR that prescribes that alleged violation of the obligation to give a reasoned judgment was also supported by the ECJ in its case law[94].

Conclusions to the first chapter

In the conclusions to the first chapter of our research, we can say that the free movement of judgments within the EU has crucial importance for the common market of the union as well as for the freedom of movement of its citizens. Furthermore, the great importance of the free movement of judgments poses a risk to the protection of the right to a fair trial, because it is hard to strike a proper balance between the protection of the right to a fair trial and the free movement of judgments in the context of the smooth enforcement of the foreign decisions under the mutual trust principle.

However, in this chapter, we have also shown that despite the economic benefits of the enhanced free movement of judgments, the EU as an organization is aimed to protect human rights including the right to a fair trial. Moreover, such protection could be achieved through the means of Article 6 of the ECHR. Therefore, we can conclude that challenge of the enforcement of a foreign decision in the context of the Brussels I bis and Brussels II bis regulation is theoretically possible, despite the developments that were aimed at further simplification of the enforcement process.

In the next chapter, we will discuss which grounds of non-recognition of a foreign decision could be invoked in case of an alleged violation of the right to a fair trial.

CHAPTER II VIOLATION OF THE RIGHT TO A FAIR TRIAL AND THE GROUNDS FOR REFUSAL OF RECOGNITION

In the first part of the research, we have concentrated on the theoretical aspects of the topic of this thesis. In the second chapter, we can move on to more practical issues. Firstly, we will look into the grounds for the refusal of recognition listed in article 45 of the Brussels I bis regulation starting from the violation of public order, or how it is frequently referred to – public policy exception. The discussion about this issue is important not only in the context of the possibility to

[93] ECtHR Case Suominen v. Finland, appl. no. 37801/97, 1 July 2003.
[94] ECJ Case C-619/10 Trade Agency Ltd v Seramico Investments

use a violation of the right to a fair trial as a ground for non-recognition. Understanding the public policy as well as other grounds for refusal will help us to assess how protection of the right to a fair trial could have been affected if EC has succeeded in the abolishment of the grounds of refusal. Moreover, as we will show at the end of the chapter, the results of this discussion might have wider implications on the dynamic of the development of mutual trust within the EU.

Let us start by the outlining the fact that, in the context of our discussion, it is necessary to understand all the sides of implications of the public order clause because it is the only ground for refusal in the Brussels I bis regulation that can be considered to be open[95], therefore we can fit violation of the right to a fair trial into the meaning of the public order violation.

The notion of the public order can be described as the fundamental pillars on which legal systems are built or as a safety net[96] that countries can use to stop undesirable effects of foreign decisions on their legal orders. And in the context of the discussion about the violation of the right to a fair trial, this issue is very important because while recognizing a foreign decision courts accept it into the legal system of a state, therefore it must not contradict the underlying principles of this system which constitute public order, it can be even argued that the principle of public order was created to protect the legal system of a state from the harmful influence of other systems[97]. Therefore, we can regard public policy as a purely defensive mechanism.

It is also interesting to mention that if previously sources of public policy were only internal (e.g. constitutions, legal doctrines of states), now such sources can be also external (EU law, ECHR). Therefore, we can speak about some common principles of public policy among all EU member states[98], also the existence of such common principles is very important for the operation of the free movement of judgments, and to the mutual trust principle.

Moreover, it is also important to mention that concept of public order is constantly changing[99], for example, even in some EU member states 20 years ago recognition of a decision involving a right of registered same-sex couples could be considered to be contrary to the public policy, but now such situation is hard to imagine. The notion about the changing nature of the public policy is important in the case of an alleged violation of the right to a fair trial and must be not disregarded when applying public order to stop the enforcement. Because some restrictions on

[95] T. Keresteš: Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow, p-84

[96] Mills A. The dimensions of public policy in private international law //Journal of Private International Law. – 2008. – Т. 4. – №. 2. – С. 201

[97] Jerca Kramberger Škerl. European Public Policy (with Emphasis on Exequatur Proceedings) – 2011

[98] Princen, Sebastiaan. "Agenda-setting strategies in EU policy processes." Journal of European Public Policy 18.7 (2011)

[99] Goffman, Erving. Relations in public: Microstudies of the public order. Routledge, 2017. P-33

the right to a fair trial were not considered to violate public order in past but could be considered too grave now, and would trigger the application of public policy exception.

Another important issue related to the public policy can be found in the commission report on the application of the Brussels I, where the EC stated that the judgment debtors very frequently use public policy exception in order to block the enforcement of a decision. However, at the same time courts very rarely accept it, even if the violation of the fundamental rights was involved, the reasons that trigger such courts' attitude we will discuss in this chapter. Also, in the report, we can see that if courts refuse enforcement due to the violation of public policy it mostly concerns procedural elements.[100]

Public order issues in civil judgments

In the context of civil justice, exist two types of issues covered by public order, substantive (also sometimes called material) and procedural. The meaning of those issues can be easily derived from their names, substantive public policy covers issues that can be found in the substance of the judgment, while procedural considers elements of a judicial proceeding[101].

It is important to mention that, as long as the courts in member states where recognition is sought could not look into the substantive part of a decision, the possibility to challenge a decision on substantive grounds is very limited. Consequently, procedural public policy becomes the main point of our interest. Moreover, the idea that substantive public policy is rarely invoked is supported not only by the theory but also in practice. In the abovementioned report of the EC, we can find that cases, where substantive public policy is involved, are very rare[102].

Nevertheless, before diving into the discussion about the details of the application of procedural public policy, we have to mention that still in some cases even a substantial part can be invoked. Such a possibility occurs when the outcome of a proceeding violates the public order of the state where the enforcement is sought[103]. However, here is also important to remember that ECJ clearly distinguishes the law and the public order, so the mere difference in the laws is not enough for invoking public policy ground, contradiction between the outcome of the decision must be not with the law but with a fundamental principle of the country where enforcement is sought.

[100] 2009 Brussels I Commission Report p-4
[101] Mills 2008
[102] 2009 Brussels I Commission Report p-4
[103] ECJ Case C-38/98 Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento ECLI:EU:C:2000:225

Moreover, such a restrictive approach should be taken seriously if we want to use a violation of the right to a fair trial to challenge enforcement. Because the ECJ uses a restrictive attitude not only toward substantive public policy but also toward procedural public policy, which is more important for our discussion. As we will show in a number of cases, the ECJ limited the use of the public policy exception to the point where successful usage of this principle is achievable only in the most obvious cases.

For example, let us take a look at the Krombach decision, which is one of the most important pieces of the ECJ case law in the sphere of the enforcement of foreign judgments. In this decision, the court not only stated that recurring to public policy is justified only in cases where enforcement of a decision would be totally against the main principles of the law of the state where enforcement is sought or if the right that is fundamental for this system was violated.[104] Another important observation that was made by ECJ in this case, is that violation of fundamental rights should be manifest because a not evident violation would be hard to spot without reviewing the substance of the decision. Moreover, in the same decision ECJ established that member states are free to decide on their own what constitutes their public policies[105].

Speaking about procedural public policy more theoretically, we can say that this notion is closely connected to the rule of law and the main principles of judicial procedure in the EU. Moreover, most of the elements of the right to a fair trial that we have mentioned in the previous chapter are considered to be a part of the procedural public order, since article 6 of the convention is a part of the public policy of every state member to the convention[106].

Regarding procedural public policy, it is important to mention that national courts have their discretion in cases concerning civil procedure because it is in their expertise to decide whether the procedural violation was of such gravity that enforcement of this decision would violate public order[107]. Nevertheless, they still should not disregard ECJ's position that such violations must be manifest.

However, it is also needed to be said that while most of the main principles of procedural law within the EU are harmonized, member states still can emphasize the importance of one or another aspect of procedural public policy for their legal order. For example, in Hungary, the decision could not be recognized if such aspect of procedural public policy as the right to

[104] Judgment of the Court of 28 March 2000. - Dieter Krombach v André Bamberski. - Reference for a preliminary ruling: Bundesgerichtshof - Germany. - Brussels Convention - Enforcement of judgments - Public policy. - Case C-7/98. Para 32

[105] ECJ Case Krombach. Para 23

[106] ECtHR Case Loizidou

[107] Kuipers, p-44

translation was not ensured, while other countries give little attention to this aspect[108]. Concerning this case, we find it important to mention that it is the right to translation of a Hungarian citizen was violated, and as Mills put it, the most difficult public order issues arise when there is a certain "degree of proximity between the dispute and the state of the forum".[109] Therefore, we can only wonder what the decision on enforcement would look like if the Hungarian citizen have not been involved. Which adds an additional layer of difficulty to the issue of public order.

Another interesting example of the differences among member states in the approach to public order could be a refusal of recognition of a decision in France justified by the high cost of justice in England. In view of the French Court de Cassation, it violates Article 6 of the ECHR. Again, we can say that such an approach to the costs of litigation could not be supported in other member states[110].

Also, in this context, we have to mention that in Brussels I and II, public order can be defined as external and internal. The EU law defines borders of the external public order. For example, such boundaries are the abovementioned EU CFR or four freedoms that exist within the EU legal order[111]. Furthermore, it is important to mention that since the famous Eco Swiss decision public order of the community is regarded to be a part of the public order of the member states[112]. At the same time, borders of internal public order are defined by the main principles of the internal law as we have indicated above.

ECJ and its attitude toward public order

Given the importance of the ECJ for the EU legal order, it comes as no surprise that the case law of this court hugely impacted the development of the usage of public order as a ground of refusal of enforcement both on the EU level and level of member states. Therefore, it is very important for our research, to clearly understand the stance of the ECJ on this issue.

Firstly, we have already started to discuss this issue when we mentioned the case Krombach v. Bamberski. In addition to the positions of the court that we have already discussed, it is important to say that the ECJ recognized the right to adversarial proceedings to be a part of the

[108] Heidelberg report
[109] Mills 2008
[110] Pordea v. Times Newspapers Ltd. 2000 I L Pr 673
[111] Vėbraitė, Vigita. "Future of the Public Policy Clause in EU Civil Procedure." Verslo Ir Teisės Aktualijos 6, no. 2 (2011): 250–64. doi:10.5200/1822-9530.2011.14.
[112] ECJ Case C-126/97. Eco Swiss China Time Ltd v Benetton International NV

law of the union. And if such right was violated in a member state the member state of enforcement can protect this right by refusing enforcement of the decision[113].

It is also important that the word "manifest"[114], which in the context of a violation of public policy had firstly appeared in this decision, was later added to the public policy clause in the Brussels I regulation.

Another case that hugely shaped the attitude of the ECJ toward public order is Gambazzi v. Daimler Chrysler[115] .The main issue of the case concerned the rights of defense that were allegedly violated by the refusing access to the documents necessary for the defense and by the sanctions that were imposed on the defendant during the proceeding. Once again, ECJ was asked whether such violations could justify the refusal of enforcement.

The ECJ decided that in general sanctions against parties to a process could be justifiable if the aim of these sanctions is legal, however, they must not be too severe and must stay proportional. Furthermore, the court said that it is up to the national courts in the country of enforcement to decide whether sanctions imposed on a party were so severe that the right to a fair trial was violated, and if a violation occurred, the enforcement could be refused based on the public order infringement. So, here ECJ once again affirmed that in principle, courts can refuse enforcement of foreign decisions based on the public order feature if the right to a fair trial was violated. However, at the same time, the court noticed that each time courts in member states should perform a separate assessment of each decision.

It is also interesting that when the case get back to Italy, the Italian court decided that sanctions were proportionate and did not violate Italian public order so the decision was enforced[116]. It once again proves the level of discretion that member states have over the issue of public policy.

The case Eurofood[117] despite the fact that it concerns insolvency regulation still provides us with valuable information on the ECJ's attitude toward cooperation in civil justice and toward the issue of public order. In the decision, ECJ once again says about the importance of the right to a fair trial, underlying its importance for the public order. Furthermore, the court adds that this position is based on the legal traditions that are common for the EU member states and to the

[113] ECJ Case Krombach
[114] ECJ Case Krombach. Para 37
[115] ECJ Case Gambazzi
[116] Hazelhorst p-85
[117] ECJ Case C-341/04 Eurofood

ECHR. From that, we can conclude that it is definitely possible to use the right to a fair trial as a ground for the non-recognition of a decision.

The next case that we want to discuss also concerns the interpretation of the regulation which is not the main aim of our discussion, but it still contains a valuable view of the ECJ on the public policy exception, here we are talking about the case flyLAL-Lithuanian Airlines.[118] Where ECJ stated that public order should protect those interests that "are expressed through the rule of law rather than through the purely economic interests". This is an important position because it once more limits the application of the use of the public order exception to the most fundamental rights.

Another interesting for our research position given by the ECJ could be found in the case Renault v. Maxicar,[119] where the ECJ noted that public order has to be applied very carefully because even if the court of another member state violated the EU law (and as we have already discussed fundamental rights are part of this law) the resort to public order is not automatically justified. Therefore we can say that this decision further develops the process of limitation of the public policy exception. Regarding this case, it is also important to mention that here ECJ explicitly said that it is not up to national courts to review whether courts in other member states violated EU law because the interpretation of the EU law is in the realm of the ECJ.

For a broad understanding of the use of the public order exception, it would be worth mentioning the case Apostolides v Orams[120], where the ECJ examined whether enforcement of the decision that could not be enforced in the country of origin could be regarded as a violation of public order in the country of enforcement. And ECJ decided that such a decision could be enforced, despite the impossibility to enforce in the country of the origin of a decision. This decision is important not only in the context of further limitation of the public policy exception but also for the development of the judgment creditor's right to enforcement which we have already discussed above.

In the Omega case[121], ECJ further defined the limitations of public policy use. The court was asked a question about whether the free movement of goods can be restricted based on the public order exception. The ECJ answered that EU law does not preclude the prohibition of products that are contrary to human dignity if it violates the public order of the state. This decision

[118] ECJ Case C-302/13, flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiskā lidosta Rīga VAS, Air Baltic Corporation AS, para 55

[119] ECJ Case Renault v. Maxicar

[120] ECJ Case C-420/07 - Apostolides

[121] ECJ Case Omega

has implications far beyond the free movement of goods and can be also used in the context of the movement of civil judgments because it once again shows that respect for human dignity and human right is an important part of the EU law Therefore, it is possible to use a violation of fundamental rights including the right to a fair trial in order to trigger the application of the public policy exception.

Also, another worth mentioning case is Gasser where ECJ established that the courts while applying grounds for refusal should keep in mind the philosophy and the objectives of the Brussels regime[122]. It can be said that here the ECJ once again reminds us about the need to balance the protection of public policy and the need to ensure the smooth movement of judgments.

It is also interesting that in the number of cases regarding cross-border litigation the ECJ held that in civil cases with foreign elements even such obvious things as a distance might affect the weaker parties, so it must be a point of concern for national courts[123]. This once again proves that the actual application of public policy exception would heavily depend on the factual background of each case, even if the alleged violation would seem to be similar.

One more case that would be interesting to discuss in the context of our research is the case Zarraga v. Pelz[124]. This case is about the enforcement regime under the Brussels II regulation and the main question that the ECJ dealt with during the proceeding was about the right to be heard which is a very important element of the right to a fair trial, and if the right was indeed violated it would mean that the enforcement of the decision could be refused. What complicated the case, even more, is the fact that the person whose right could have been violated was a child, and member states have different legislation on child protection as well as different procedural guarantees for children during a civil process.

The court in Spain issued the order to return a child from Germany where the girl was with her mother to her father who was a Spanish national living in Spain, however, the German court refused to enforce this order because of the alleged violation of the right to a fair trial[125]. If we spoke about Brussels I regulation, the situation would have been easy because under this regime court in the country of enforcement has all right to refuse enforcement of the decision on the ground of protection of public policy as we have seen in other cases above.

[122] ECJ Case C-116/02 - Gasser
[123] ECJ Case C-168/05 Mostaza Claro [2006] ECJ Case C-243/08 Pannon; ECJ Case C-40/08 Asturcom [2009]
[124] Hazelhorst, 111
[125] ECJ Case Joseba Andoni Aguirre Zarraga V Simone Pelz, paras 15-37

However, in the Brussels II regime, the level of mutual trust is significantly higher and in the number of issues, including the issue in question, courts in countries of enforcement do not have the right to check the decision issued in other member states even if there are concerns that the fundamental rights were violated. Under the Brussels II bis regime, such control should perform a court in the country of origin of a decision while issuing the certificate of enforcement[126].

As a result, such a regime triggers concerns about the protection of fundamental rights[127], including the right to a fair trial, and we will discuss this issue in detail in the next parts of the thesis.

Coming back to the case, we can say that ECJ confirmed the countries where enforcement is sought have no ability to check whether human rights were violated and that all the control can be done only in the state of origin[128]. Here, ECJ once more reaffirmed the primacy of the EU law and confirmed that even an alleged violation of human rights cannot empower courts to review the enforcement of foreign decisions if they do not have such powers under the EU secondary legislation.

As we can see from this rather small collection of the ECJ case law on the public policy and enforcement of civil judgments, the court's attitude is that it is possible to challenge the enforcement of the decision on the grounds of violation of public order of the state where enforcement is sought if there is a possibility that fundamental rights, including the right to a fair trial and its elements, were violated. However, only if the instrument under which the enforcement is sought allows for any control in the country of enforcement.

Nevertheless, at the same time, the ECJ sets a very high bar for violations of the right to a fair trial that might trigger the non-recognition of a decision. For example, in Krombach the ECJ says that the ground of public order might be used only if the violation of the right to a fair trial was manifest. The word manifest might relate to many different violations so it can be hard to decide which violation is hard enough to be manifest. Also, this question becomes even more complicated if we add the fact that member states have their own standards when coming to the protection of public order.

Nevertheless, there is an idea that a manifest violation does not necessarily mean a grave violation[129]. As we have mentioned above, review of the substantive part of decisions is prohibited,

[126] Brussels II bis regulation Article 42
[127] Kramer, p-350
[128] ECJ Case C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz
[129] Hazelhorst, p-68

which means that all the possible violations should be spotted without substantive review, therefore the severity of the violation does not matter, what is matter is whether the violation is obvious for a court. For example, to check whether the right to translation was violated the court of enforcement does not need to perform a review of the substantive part.

That is also a reason why in Gambazzi the ECJ decided that it is to the courts that enforce a decision to decide whether a violation is hard enough to infringe public order of a member state[130].

Moreover, from the abovementioned cases, we can see once again that ECJ tries to strike a balance between the defense of the right to a fair trial, the importance of which ECJ mentioned in all of these cases, and between the free movement of judgments which has huge importance for the aims of the EU and must be ensured despite the possible violations of the right to a fair trial. These attempts of the ECJ to balance these issues can perfectly justify why the bar established by the court is so high. It allows the smooth circulations of judgments but at the same time protects from at least the most flagrant violations of the right to a fair trial (with the exception of certain issues under Brussels II). Furthermore, another reason why the ECJ is so restrictive in the application of the public policy even if it can be used to protect fundamental rights is that even the review of the procedural public policy might negatively affect the principle of mutual trust[131].

Also, it must be pointed out once again that in the case law of the ECJ there is no distinctive line that defines where the use of public order can be justifiable, and in each case member states have to decide it separately. However, it is clear that the general approach of the ECJ is that countries must be very careful with the use of public order exceptions and resort to them only when the violation of a fundamental right is obvious.

Moreover, after the analysis of the case law, we can say that the conflict between the need to ensure the right to a fair trial and the freedom of movement of judgments clearly affected the court's attitude. As a result, ECJ tries to balance the abovementioned needs. Alternatively, it could be put in other words; “ECJ tries to merge the Europe of human rights and Europe as an economic union”[132].

Public order and the ECtHR

[130] ECJ Case C-394/07. Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company. 2008

[131] Hazelhorst, p-86

[132] Horatia Muir Watt, "Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions," Texas International Law Journal 36, no. 3 (2001): 539

Now, when we understand the notion of public order and how it works in the EU, we can talk about the relations between the public orders of European countries and the ECtHR. Speaking of this we have to mention that ECtHR has a position that countries should regard the convention to be a part of the internal public order[133], which is rather logical considering the great importance of the convention. Therefore, we can already assume that enforcement of a decision might be challenged based on a violation of a right to a fair trial because in all the EU member states right to a fair trial must be a part of the public order.

Moreover, there is a substantive case law of the ECtHR that supports this assumption. Probably the most controversial case in this regard is Pellegrini v. Italy[135] . In this case, the ECtHR ruled that Italy violated the convention when the Italian court recognized a divorce decision issued by the ecclesiastical court in the Vatican. Italy violated the convention because it did not check whether all the procedural rights prescribed by article 6 of the convention were fulfilled[136]. Therefore, the conclusion could be done that countries parties to the convention while recognizing foreign decisions shall check it on the violations of the rights listed in the convention.

However, there are problems with such a conclusion, the first problem is that Holy See is not a party to the convention, therefore the case can be made that this rule might not be imposed on the countries members of the Council of Europe. Indeed, in the same decision, we can find that the court limited the scope of such analyzes to the decisions issued in countries that are not part of the convention.

Nevertheless, it must be said that in the further case law of the ECtHR, we can clearly see that there could not be any presumptions that a decision issued in a country member of the convention could not violate article 6[137]. Therefore, courts cannot blindly enforce decisions from other member states. Moreover, the argument can be made that it does not matter whether a decision originated from a country member of the convention or not because in both cases, recognizing state would violate article 6[138].

Another interesting ECtHR case that makes the situation clearer is the case Drozd and Janousek v. France and Spain[139]. In fact, this decision is even older than Pellegrini v. Italy and the case came from the sphere of criminal law. Nevertheless, it still has important implications for our

[133] ECtHR Case Loizidou
[135] ECtHR Case Pellegrini
[136] ECtHR Case Pellegrini
[137] Case Maronier v. Larmer
[138] E Fohrer, "L'incidence de la Convention européenne des droits de l'homme sur l'ordre public international français", (Brussels, Bruylant, 1999), p28-29
[139] ECtHR Case, Drozd and Janousek v. France and Spain, 1992

research. Because, in the decision, ECtHR held that the country could not recognize a foreign decision if serious violations of human rights, including the right to a fair trial were observed It can be said that this decision as well as Pellegrini constitute the main pillars of the ECtHR legal approach toward the issue of the recognition of foreign judgments and human rights including the right to a fair trial in the public order context[140]. Consequent decisions of the ECtHR, in general, do not change this attitude.

National Courts attitude

Above, we have already briefly talked about the fact that it is for the courts of enforcement to define what constitutes the public order of a state and recognition of which decisions could violate it. Also, we have mentioned that countries tend to put emphasis on the different aspects of the right to a fair trial due to differences that still exist in public orders.

Now, when we have examined the attitudes of the ECJ and ECtHR toward public order in the context of recognition of civil judgments we can look into some of the decisions of national courts more closely. Because it shall help us to understand the peculiarities of the applications of the right to a fair trial in a court where recognition and enforcement are challenged.

The first case that we want to mention in this part of the discussion is the case Maronier v Larmer[141], and despite the fact that Great Britain is no longer a member state of the EU, this decision is still valuable because it shows how national courts can use the case law of the ECtHR and the ECJ and combine their attitudes.

The original decision, in this case, was held in the Netherlands, and after it was sought to be enforced in the UK, the decision itself concerned a case of medical negligence. The defendant claimed that enforcement of this decision in the UK was not possible because his right to a fair trial was violated due to the fact that the original proceeding was stopped and then resumed 12 years later, and he was unaware of the latter fact.

The decision of the UK court of appeal on the enforcement of the original decision is interesting because the court mentioned that there exists a presumption that all the states which signed the ECHR have a procedure that is “compliant with the article 6”. It is surprising because at that time we could not see such a presumption in the ECJ cases, only the principle of mutual trust, ECtHR case law also does not contain such direct presumptions. Moreover, at the same time, the court took seriously ECJ's attitude in Gasser and mentioned the objectives of the Brussels

[140] Kramberger Škerl, p-7
[141] JJ Fawcett. 15

Regulation, and put great emphasis on the importance of the free movement of judgments within the EU.

However, it is also interesting that despite the fact that in the reasoning of the decision UK Court of appeal actively embraced free movement of judgments, it still decided that there was a violation of article 6 of the convention because the defendant could not effectively exercise his rights[142]. Therefore, here court supported the approach that despite the importance of the free movement of judgments recognition of the decisions that violate the right to a fair trial would be contrary to the public order[143].

In this regard, we also have to mention that failure to notify the judgment debtor about the start of the proceeding as well as about its resuming would be regarded as a violation of the right to a fair trial in several member states. For example, similar decisions can be found in Germany[144] and France[145].

Another interesting issue that was dealt with by the national courts in cases regarding the public policy is the abovementioned notion of the common European public order which gained special attention since the EcoSwiss decision[146] . For purposes of our discussion, it would be beneficial to mention an Austrian case, in which a local court decided that refusing enforcement of a decision that violates common European public order is possible only if the violation was flagrant or manifest. As we can see this reasoning goes in line with the ECJ's attitude toward the violations of national public policies that also have to be manifest in order to trigger public policy exception.

In the conclusion to the analysis of the courts' attitude toward the challenges of enforcement of foreign decisions based on the violation of the public order on the grounds of an alleged violation of fundamental rights, we can say that such a legal move is rather possible. However, the success of such a challenge would depend on a handful of different issues. Including the exact public order that could have been violated, because as we have shown above, even within the EU different public orders exist, and what could be considered to be a violation of one legal order does not necessarily mean that it would be considered as such for other order.

[142] England and Wales Court of appeal case Maronier v Larmer [2002] EWCA Civ 774
[143] JJ Fawcett. 15
[144] OLG Zweibrücken 10.05.2005, 3 W 165/04
[145] France: Ca Versailles, 5 July 2006, No 05/04718;
[146] Jerca Kramberger Škerl. European Public Policy (with Emphasis on Exequatur Proceedings) Journal of Private International Law, Vol. 7, No. 3 of December 2011. 16

Nevertheless, the general line supported by the case laws of the ECJ and ECtHR is that violation of human rights including the right to a fair trial could be a ground for non-recognition of a foreign decision.

Moreover, it can be said that despite all the limitations that were imposed on public order by the ECJ, this institute remains to be a valuable instrument for the protection of human rights including the right to a fair trial. Therefore, the abolition of this institute could be dangerous for human rights in Europe, and the exact reasons we will discuss in the next part.

Consequences of possible abolishment of public order as a ground for refusal

In the previous chapter of this research, we have already mentioned that in the process of drafting the recast version of the Brussels I regulation, EC proposed not only abolishment of the exequatur but also the Commission wanted to get rid of the ground for refusal, including the public order. The reason for this was simple, to further facilitate the movement of judgments within the EU and to strengthen the mutual trust between the member states[147].

So, the positive sides of this decision, if it was adopted, are evident. However, concerns about the perspective of such development for fundamental rights including the right to a fair trial were raised by many[148]. And for the purposes of our research, it is important to understand what could have happened with the right to a fair trial as a ground for refusal of recognition of a foreign decision if public policy exception was abolished. Moreover, it is especially important because there are no guarantees that EC would not come back to this issue, especially considering the negative view that EC holds toward public order.

The first issue that we need to discuss in this regard is that we already have regimes of movement of judgments that do not contain any grounds for refusal of recognition. Firstly, as we have already mentioned above while discussing the Zarraga case, the enforcement of some decisions under the Brussels II legal regime can not be challenged. Moreover, we have regulations where grounds for refusal are abolished to the fullest degree. The main examples of such regulations are the European Enforcement Order Regulation[149] and the European Small claim regulation[150]. On the example of work of these regulations, we can clearly see how the Brussels I regime would look like if the grounds for refusal, including public order, were abolished.

[147] Keresteš, Tomaž. "Public policy in Brussels regulation I: Yesterday, today and tomorrow." LeXonomica 8.2 (2016): 77-91.
[148] Keresteš p-79, Kramer p-641, Hazelhorst p-261
[149] Enforcement reg
[150] Small claim reg

It can be noted, that on the one hand, such developments significantly improved the right of judgment creditors to the enforcement of the decision. Also, such a simplified approach definitely facilitated freedom of movement of judgment and enhanced mutual trust between member states.

However, at the same time, as was shown in Zarraga such an attitude could be very dangerous to human rights because it removes one layer of protection. Some would counter this argument by referring to the principle of mutual trust, and by stating that in general standards of civil judgments in Europe are high and that human rights in the EU are protected better than anywhere else.

Nevertheless, despite the fact that those statements have some degree of truth, there are still cannot guarantee better protection of fundamental rights. For example, as we have already mentioned, the principle of mutual trust is not absolute and even more, simple use of this principle without consideration of the factual background could be considered a human rights violation. Moreover, despite the approximation of civil procedures between member states, there are still differences, and as we showed in this chapter, those differences could be of such a degree that would trigger the use of public policy exception.

Probably the last argument against the abolition of the grounds of refusal would be rather moral. As some researchers pointed out, favoring the free movement of judgments over fundamental rights is just wrong and cannot be accepted in a democratic society that cares about fundamental rights[151][152].

Judgments in default of appearance and the protection of the right to a fair trial

The second ground for refusal of recognition in article 45 of Brussels I bis regulation is the default of appearance[153]. In this part of the research, we will examine how this ground can be used if the right to a fair trial was violated.

Part B of article 45 was specifically designed to protect the defendants in case they did not appear during proceedings. The default proceeding on the other hand exists to protect the rights of claimants from unfair defense tactics such as ignoring the proceedings and allows courts to issue judgments even in default of the appearance of the defendant. However, even if a defendant does

[151] Kramer (2011a) p. 640.
[152] Beaumont and Johnston (2010a) p. 106
[153] Article 45 (b) Brussels I bis regulation

not appear in a proceeding they still have rights that have to be protected and such a proceeding contains many risks for violations of these rights.

Probably the main risk is that a defendant might lose a case without even knowing that the proceeding has started[154]. That is the precise reason why article 45 B of the Brussels I bis Regulation, while not prohibiting the judgments in default of appearance prescribes that such judgments can be done only if the defendant was aware of the proceeding by means of being "served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense"[155]. If the court failed to do so, the ground for non-recognition might be invoked. Moreover, the next part of article 45 is written in a way that imposes an obligation on the defendant to take action, namely to challenge a decision in a court of origin.

However, it is not always easy to serve a defendant with such a document, especially in cases that involve a foreign element. The abovementioned Heidelberg report found that this ground of refusal is "the most important ground" with a significant number of successful cases[156]. Therefore, we can make a conclusion that for the purposes of our research this ground for refusal is important not only due to its nature which is closely connected to the right to a fair trial but also due to the importance of this ground for the current legal regime.

So, theoretically, this ground for refusal appears to be a rather simple legal instrument. However, the actual application of this ground in practice raises many questions about its elements. Mostly those questions were answered by the ECJ in the case law. So, now we will look at the most prominent ECJ cases that interpreted this ground for refusal of decisions.

The first case is Hendrikman[157], and it is an important case because in this decision ECJ interpreted the meaning of the term to appear in the context of the default of appearance. In the disposition of the case, the defendant did not know about the proceeding, yet the German court has appointed lawyers on the behalf of the defendants and held a decision while stating that the rights of the defense were observed. In view of the ECJ, such a defense would be only technical and therefore would violate the rights of the defense.

Another case that developed the ECJ interpretation of the default of appearance as a ground for non-recognition is the case Sonntag[158], where ECJ held that in the case of simultaneous

[154] Hazelhorst, p-98
[155] Article 45 (b) Brussels I bis regulation
[156] 2009 Brussels I report
[157] ECJ Case Heindrikman
[158] ECJ Case C-172/91. Sonntag

criminal and civil proceedings, the defendant is deemed to be considered as appeared before a civil tribunal, if they answered this dispute already, before the criminal tribunal.

The next case, which can help us to understand the default of appearance in the context of the right to a fair trial, is the case ASML[159]. This judgment is interesting because the defendant knew about the proceeding, however, it was not served with the judgment itself, therefore the company was not able to arrange further defense, and on this grounds, the enforcement was challenged.

The ECJ held that simple knowledge about the proceeding couldn't be considered a proper serving of judgment to the defendant. As long as the aim of serving the defendant with the judgment is to enable them to prepare the further defense and the challenge of the decision in a country of origin. For this purpose, the defendant should receive the decision, because only the text of the decision could help them to prepare for the possible challenge of the decision. Moreover, ECJ noted that it should be done in the time that allows for preparing challenge of the decision under the domestic legislation Furthermore, in the decision ECJ mentioned that the rights of defendants could not be overridden by the considerations of the mutual trust principle[160].

Also, we have to note that the ECJ established that the purpose of Article 45 (B) is to protect the rights of defendants (including the right to a defense). What is even more important is the fact that to interpret these rights ECJ used the case law of the ECtHR. Which once again underlines the importance of the ECtHR interpretations, even for the ECJ. Given ECJ's attitude, there are no universal standards regarding the time requirements, because there are no similar cases, and the speed of justice is different among the EU member states. Moreover, the time requirements in domestic legislation are also different. Therefore, if the enforcement is challenged based on the time requirements for the default judgment, the court that deals with the case should take all those abovementioned conditions and assess whether the time was sufficient[161]. Furthermore, the same approach was used by the ECJ regarding the issue of the delivery of the court documents.

The irreconcilability of judgments as a ground for refusal of recognition and its role in the protection of the right to a fair trial.

[159] ECJ Case C-283/05 ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)
[160] ECJ Case C-283/05 ASML paras 20-25
[161] ECJ Case 228/81 Pendy Plastic Products BV v Pluspunkt Handelsgesellschaft GmbH

Besides the public policy exception and the default judgments, Brussels I bis has a few more grounds for refusal of recognition, and in this part of the research, we will analyze one more ground that can be used in the protection of the right to a fair trial.

This ground can be found in Article 45 (C) which says that enforcement of a decision can be refused "if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed"[162] and article 45 (E), which also deals with the irreconcilability but with earlier judgments in other member states.

Theoretically, those grounds could be used in order to protect the right to a fair trial, as long as enforcement of another and irreconcilable decision would definitely contradict this right. However, as the Heidelberg report indicates, this provision had little use for the challenge of enforcement, as the report also says, the reason for this is the rules that Brussels I contains on the pendency, that prevent such cases from happening and that in general are respected by the member states. What is also important in this regard is that if the case of irreconcilability occurs, the priority belongs to the judgment issued in the country of enforcement[163].

Rules on the special jurisdiction as an instrument of protection of the right to a fair trial

Above, we have mentioned the most common grounds for refusal of recognition of judgments that are constantly used in civil cases. However, article 45 of the Brussels I bis regulation contains a few more grounds that are connected with special jurisdiction rules[164]. And these grounds should not be overlooked when we are discussing instruments of the protection of the right to a fair trial.

Firstly, it should be noted that special jurisdiction itself could be regarded as an instrument of protection of the right to a fair trial because its main purpose is to give a weaker party (a policyholder, consumer, employee) a possibility to take court actions in its own domicile[165]. The reason for such an approach is the fact that they have far fewer possibilities to sue and to effectively present their legal position outside of their domiciles.

Therefore, we can state that recognition and enforcement of a decision that violated the special jurisdiction rules would be a violation of the right to a fair trial. Consequently, such a

[162] Article 45 (c) Brussels I
[163] 2009 Brussels I report
[164] Article 45 Bruseels I bis
[165] Mankowski and Nielsen (2016) p. 443

decision should be refused to be enforced. It should be mentioned that it is the only possibility to review jurisdiction under the Brussels I legal regime.

Specific grounds for refusal of recognition in Brussels II

Besides the common grounds for refusal of enforcement, such as public policy exception, Brussels II regulation has some grounds that are very specific and exist exclusively under this regime. Now, we will analyze them in order to understand how they can be used to protect the right to a fair trial.

The first exclusive ground can be invoked if the child concerned by the case was not heard during the proceedings[166]. For the purposes of this research, it is important to remind that right to a fair hearing is a part of the right to a fair trial, and children who can already form their opinions are eligible for this right as well. Such provisions we can find in article 12 of the United Nations Convention on the Rights of the Child[167] as well as in article 24 of the EU CFR. Mentioning of this element of the right to a fair trial in those documents could mean that it should have even more layers of protection. However, there are questions about whether Brussels II protects the right of a child to be heard to the necessary extent, for example, research shows that only 11 children out of 66 were given the right to be heard[168].

Here, it is important to mention that right of a child to be heard is not absolute, and can be implemented only under certain conditions. However, still, the cases where the small number of children that were actually heard still raise many questions about the application of this right.

Furthermore, the complexity and uncertainty of the right could be a reason for the frequent challenge of enforcement of such decisions where a child was not heard and probably such a situation could trigger even frequent refusal of the enforcement. However, the current legal regime established by the Brussels II bis does not allow the enforcement to be challenged in the country of enforcement. As we have already mentioned all the control on possible violations should be done in the country of origin. Therefore, as we have seen in Zarraga, usage of this ground in the context of a violation of the right to a fair trial is not possible in the country of enforcement.

The second specific ground for refusal is very similar to the first one; however, it concerns not children but the persons whose parental responsibility could be infringed by the judgment if

[166] Article 23 (B) Brussels II bis

[167] Article 12 of The United Nations Convention on the Rights of the Child. 1989

[168] Paul Beaumont. Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU. 16

they were not heard during the proceeding[169]. Therefore, it can be said that the second ground has the same implications for the protection of the right to a fair trial.

Conclusions to the second chapter

In the second chapter of our research, we have reviewed the ground for non-recognition of decisions that exist under the Brussels I bis and Brussels II bis legal regimes. After this review, we can note that under different circumstances, all of the abovementioned grounds could be used to challenge the enforcement of a decision if it violates the right to a fair trial.

However, at the same time, it can be said that the most important ground in this regard would be the public policy exception. Public order allows the protection of the right to a fair trial in cases when the elements of this right that are not covered by more specific grounds for refusal were violated. Moreover, public policy exception allows for protecting the elements of the right to a fair trial that are specific to the country where enforcement is sought.

However, we also can conclude that the use of the public policy exception for the purposes of the protection of the right to a fair trial is severally limited by the ECJ. As we have shown in a number of cases, the ECJ's attitude toward the balancing of the free movement of judgments and protection of the right to a fair trial is mostly in favor of the former. This manifests itself in the court's position that only "manifest" violations of the right to a fair trial shall trigger the use of the public policy exception. Also, such a legal position is applied even if the common European public policy was violated Furthermore, another limiting factor for the more widespread usage of public policy exception is the principle of mutual trust.

Nevertheless, despite these limitations we still consider public policy exception to be a valuable instrument of human rights protection that should not be abolished as was proposed by the commission. The negative consequences of such abolishment we have already discussed in this chapter. Also, the existence of the common for all EU member states elements of the public order should be given some attention.

Regarding the other ground for refusal of recognition, we have to especially note the default judgment which is the most direct instrument of the protection of the right to a fair trial, which proved to be very effective and which does not have as many limitations as public order. Other grounds for non-recognition can also play a role in the protection of the right to a fair trial.

[169] Article 42 (b) Bruseels II bis Regulation

However, this role can be considered to be limited compared to the default judgments, and especially to public policy exception.

CHAPTER III ECtHR AS AN INSTRUMENT OF PROTECTION OF THE RIGHT TO A FAIR TRIAL IN THE CONTEXT OF THE BOSPHORUS DOCTRINE

At this point of our research, we have established that it is possible to challenge the recognition of a foreign decision based on the violation of the right to a fair trial because the grounds for refusal of recognition that can be found in the Brussels I bis and Brussels II bis regulations allow such interpretation. Moreover, the case law that we have analyzed previously indicates that ECJ recognizes the great importance of the right to a fair trial for the EU legal order.

Nevertheless, despite the recognition of the importance of this right, the means of its protection are seriously limited due to the principle of mutual trust and further facilitation of the free movement of judgments. As a result of these developments, in certain abovementioned cases, the defendants could not even use instruments that we have established to be effective within the EU legal order in the sphere of the protection of the right to a fair trial.

Therefore, now we have to look more closely at the ECtHR and analyze whether it is possible to use ECHR to protect the right to a fair trial in cases where recognition is challenged within the EU.

The main problem with the usage of the ECtHR as an instrument of protection in such cases is the question of whether countries should be responsible under the ECHR in cases where they have little to no discretion in the application of the secondary law of the EU. The main cornerstone that defines this issue in the current legal order is the Bosphorus doctrine, and now we will discuss it in detail in order to understand the implications that this doctrine has in the context of the recognition of the civil judgments under Brussels I and Brussels II legal regimes, and how it can be used in fundamental rights protection.

The Bosphorus doctrine

The Bosphorus doctrine or the Bosphorus test was developed by the ECtHR in the case law[170] , and to better understand the application of this test let us start from the description of the case that gave rise to the whole doctrine.

The history of the case started when Ireland arrested an aircraft that was under the management of a Turkish company named Bosphorus (under a lease agreement), however, the actual owner of the aircraft was a company created in Yugoslavia[171]. The reason for the arrest of the aircraft was the sanctions adopted against Yugoslavia by the UN Security Council and implemented to the European legal order by the regulation[172][173]. Here it is important to mention that regulation had a direct effect, therefore Ireland had no possibility not to implement it in the domestic legislation. Coming back to the case, the Turkish company challenged the arrest of the aircraft and the case eventually get to the Supreme Court of Ireland. In its turn, the curt asked ECJ

[170] ECtHR Case BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND

[171] ECtHR case Bosphorus paras 11-12

[172] ECJ Case C-84/95. Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others. Para 1

[173] Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia

a preliminary question about whether the abovementioned regulation should be implemented on an aircraft that is leased to an undertaking in another country[174].

The ECJ response was that despite the lease of the aircraft the regulation should be nevertheless applied. Moreover, in the decision ECJ indicated that arrest of the aircraft is a proportionate measure and therefore it does not violate the right to the enjoyment of property[175].

Despite this decision of the ECJ, the claimant did not give up and brought the case to the ECtHR. The first thing that the court established and that is crucial for our research is that despite the fact that Ireland did not have any discretion whether to implement the regulation, bringing the case against Ireland is still justifiable.

Afterward, the ECtHR referred to the older Mathew case[176] , in which the court established that even in the case when countries transfer some of their powers to the international organization, they are still responsible for the violation under the ECHR. Also, the ECtHR noted that it can be justifiable for the states to restrict some rights in cases if it is required by the obligation to an international organization. However, at the same time, such restriction should not violate the proportionality principle[177].

In the next part of the decision, ECtHR formulated the doctrine. In the court's view the need to exercise obligations before an international organization could justify the restriction of human rights, in case this organization protects the fundamental rights to a degree that can be regarded as at minimum equal to the degree in which convention protects human rights[178].

Furthermore, the court established that if the abovementioned condition is met, it can be presumed that the state in case if it restricted a fundamental right in order to fulfill obligations before an organization, was acting in conformity with the ECHR[179]. However only if the state had no discretion over the subject matter.

And the last element of the test introduced by the ECtHR is that presumption that the state did not violate the convention would not work if there was a manifest deficiency of the right protected in the convention[180]. This deficiency should be established in a separate case and if it occurs the state would be held accountable even if it had no discretion in implementing the decision

[174] ECJ Case Bosphorus Para 6
[175] ECJ Case Bosphorus Paras 22-27
[176] ECtHR case Mathews
[177] ECtHR case Bosphorus para 149
[178] ECtHR case Bosphorus para 156
[179] ECtHR case Bosphorus paras 156-158
[180] ECtHR case Bosphorus para 156

of an international organization and an organization itself was considered to protect human rights equally to the convention[181]. It is also important to mention that all these three elements should be discussed step-by-step, meaning that if the court found that an organization provides equivalent protection to the convention it can move to analyze the issue of discretion of the state in this case.

Coming back to the factual background of the case, the ECtHR considered all three abovementioned parts of the test. Regarding the first part, ECtHR had little doubts about the degree to which the EU protects human rights. The court mentioned the use of its case law by the ECJ and the introduction of article 6 to the constituting treaties of the union. Also, the court mentioned the adoption of the EU CFR[182]. It is also important to mention that afterward such an approach of the ECtHR was a point of discussion. Especially in light of the limited access of persons before the ECJ[183].

Considering the second element of the Bosphorus test, the ECtHR found that Ireland had no discretion in the matters of the regulation in question the country could only implement it. Therefore, the second element was also satisfied. Furthermore, any manifest violations of the convention were not found so the court decided that the convention, in this case, was not violated[184].

The introduction of the Bosphorus doctrine had a huge impact on the development of legal relations in Europe. Obviously, the main thing that the doctrine introduced is the fact that now it can be presumed that when an EU member state acts in a way that was prescribed by the EU secondary law, it acts in accordance with the convention.

Despite the fact that the decision was unanimous, it still started debates about the positivity of its impact on the protection of human rights in Europe, as well as about the implications of practical use of this test in subsequent cases. Regarding the second issue, the main problem is the question of whether this decision stated that EU law is equal to the convention in the sphere of protection of human rights in general, or it should be established in any single case that challenges the conformity of an act to the convention because in the decision it was not stated clearly.

Here, it was said that despite the fact that the abovementioned issue was not addressed directly, in the decision ECtHR stated that the finding of the court was acceptable “for the relevant

[181] ECtHR case Bosphorus para 156
[182] ECtHR case Bosphorus paras 159-165
[183] Kathrin Kuhnert, 177-179
[184] ECtHR case Bosphorus paras 159-165

time" and that any such findings could not be final, and should be reexamined in case if there was the change in fundamental rights protection[185].

Also, the general assumption about the equal protection of the EU law and ECHR would not work in light of the ECJ's role in the EU legal system. As we mentioned above, during the proceeding ECtHR noted that the instrument of preliminary ruling that is used by the ECJ cannot be considered equal to the ECtHR because of the limited standing that individuals have before this court. Therefore, a general presumption that the EU protects fundamental rights equally to the ECtHR cannot be made and ECtHR has to perform the abovementioned test in every single case where there is a question of whether an EU member state violated the convention while exercising obligations before the EU[186].

Also, from the text of the decision is not entirely understandable what "manifest deficiency" means in that context. The answer could be found in the opinion of judge Ress, who stated that the situation of manifest deficiency could occur either when ECJ did not have jurisdiction over the issue in question. Alternatively, if the ECJ interpreted the rights listed in the convention in an obviously wrongful way[187]. Also, another example of manifest deficiency could be misuse by the ECJ of the existing case law developed by the ECtHR[188]. However, even with this explanation, not everything is clear, because the notion of an obviously wrong interpretation of the convention can be applied in different ways, the court can be more restrictive and consider as a violation of even the slightest difference between its approach and the ECJ's, or on the contrary, ECtHR could consider as an infringement only the most obvious violations of the fundamental rights.

Another important question that has been raised after the introduction of the Bosphorus test is the absence of an understanding of the situation where a member state does not have any discretion in implementing the secondary legislation. The absence of such understanding does not allow to clearly define when the state could be held accountable under the convention, and when it is impossible due to the abovementioned presumption[189]. Moreover, such a situation poses some danger to the EU law, because ECtHR is able to review it while the EU as an organization has no standings in the court.

[185] Costello, C. (2006). 95

[186] Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para. 3

[187] Judge Ross opinion

[188] Bosphorus – Double standards in European human rights protection? P-185

[189] Costello, C. (2006). 99

To summarize the ECtHR approach toward the issue of alleged violations of human rights that could arise from the EU secondary legislation. We can say that in the case of applying the Bosphorus test toward the Brussels I and II legal regimes, the standards would be definitely other than those applied in cases where the EU was not involved (for example Pellegrini). In such a case ECtHR would look at whether the EU protects human rights to the same degree as the convention, and regarding the protection of the right to a fair trial, we can expect that ECtHR could recognize equal protection, due to the existence of the article 47 of the EU CFR, and the ECJ case law that recognizes the importance of the fundamental right in general and of the right to a fair trial separately. Regarding the second and third parts of the test we cannot be sure, because it would depend on the factual background of a separate case.

Moreover, to avoid possible misunderstandings in the further text it would be beneficial to make clear some aspects that we use regarding the legal consequences that we established by the Bosphorus decision. Firstly, the Bosphorus doctrine refers to the whole legal construction that deals with the cases concerning EU secondary legislation, while the Bosphorus test refers to the practical instrument that consists of three layers and that is used in each separate case by the ECtHR when the question regarding the violation of the fundamental rights in the context of EU legislation occurs. Also, the Bosphorus presumption is the same as the presumption of equal protection, which can be applied if all three parts of the Bosphorus test were satisfied.

Case Povse and the protection of the right to a fair trial

Above, we have mentioned a plethora of cases involving the free movement of judgments within the EU. Furthermore, we have established that the ECtHR would not apply the Pellegrini case if an alleged violation concern EU legislation but the Bosphorus tests, also we have discussed that the conclusions of any separate case involving EU legislation would depend on the factual background. Now, we will analyze how ECtHR uses the Bosphorus test not in our assumptions but in real case law using the example of a relatively recent Povse decision[190].

The Povse case concerns the Brussels II legal regime, and more precisely the issue of the child return orders. We have already discussed the limitations of fundamental rights protection under Brussels II while talking about the Zarraga decision where we established that the current legal regime on the returning of the children in Brussels II bis can be considered the most dangerous to the protection of the right to a fair trial. So, now we will be able to assess the ECtHR standing on this issue.

[190] ECJ Case Povse

The factual details of the case were the next. Ms. Doris Povse (the applicant) and the Austrian national and her daughter we living in Italy with the father of the child. However, at some moment the father of the child (an Italian national) decided that he wants sole custody over his daughter and applied to the court. To prevent this from happening the applicant took her daughter to Austria where they settled with her parents. Regarding the proceeding in the Italian court, it ended with establishing joint custody, and the daughter was allowed to settle with her mother in Austria while the father was granted the right to access[191].

After some time, the father stopped visiting his daughter and applied to the Italian court for the return of the child, while at the same time the applicant was granted an injunction order from the Austrian court against the father of the child[192].

The Italian court decided in favor of the father and issued the return order. Furthermore, the father also received the certificate for the enforcement of the decision in Italy according to the Brussels II bis Regulation. The applicant tried to block the enforcement of the decision in Austria which as we know from Zarraga is impossible. Nevertheless, the case eventually made it to the Austrian Supreme Court which asked the ECJ for a preliminary ruling[193].

Among five questions that were asked by the Austrian Supreme Court two of them are the subject of our interest because they are closely connected to the topic of our research. The first of those questions asked whether it is possible to refuse the enforcement based on the change of circumstances that could violate human rights. And the second question was whether the enforcement could be refused if there is a decision in the country of enforcement that gives custody rights to another person, in Povse, to the mother that lives in Austria[194].

The answers to these questions provided by the ECJ are very similar to those that we have discussed in Zarraga. ECJ once again noted that under the Brussels II regulation, especially issues on the child return orders are based on the principle of mutual trust meaning that application of the grounds for refusal should be applied very restrictively. Therefore, the decision of the Italian court could not be refused to be enforced on the abovementioned grounds[195]. Consequently, the Austrian Supreme Court refused to block the enforcement of the decision[196] Afterward, the father of the child obtained sole custody over his daughter. Moreover, the Italian court granted one more order of return of the child. The applicant tried to appeal the enforcement once again but the Austrian

[191] ECJ Case C-211/10 PPU Doris Povse v Mauro Alpago, para 23
[192] Hazelhorst, 190
[193] ECJ Case Povse, paras 30-33
[194] ECJ Case Povse, para 34
[195] ECJ Case Povse, paras 37-83
[196] Hazelhorst, 191

Court ordered her to return the child to the father. Here it is important to mention that the last decision of the Austrian court was challenged in the ECtHR.[197]

Despite the fact that in this case discussion was about alleged violation not of the article 6 but the article 8, the decision is still valuable for the purposes of our discussion because here we can find ECtHR's attitude toward the Brussels II and if we would apply the decision more broadly to the free movement of judgment within the EU.

The main argument of the applicant was that the recognition and enforcement of the Italian decision by the Austrian court would violate article 8 of the convention because as a result of the enforcement mother and daughter would be in fact separated. Also, in the applicant's view, there was a threat to the welfare of the child[198].

The ECtHR in the decision noted that there was indeed a restriction of article 8 of the convention. However, at the same time in the court's opinion, this restriction had a legitimate aim. Also, the court mentioned that the enforcement would protect the rights of the father. When considering the question of whether this restriction of the rights described in article 8 of the convention was necessary and in view of Austrian membership in the EU which obliged the country to use article 42 of the Brussels II bis Regulation. The ECtHR used the abovementioned Bosphorus test[199].

Regarding the first question of the test which should establish whether the EU protects the fundamental rights at least equal to the protection offered by the convention, ECtHR using previous case law[200] answered it in the affirmative recognizing EU efforts in the human rights protection.

Moreover, as we have discussed above, the ECtHR decided to assess the equality of the offered protection in the EU not only in general but also regarding separate legal instruments. Quite obviously, in this case, the level of protection offered by the Brussels II bis regulation was assessed which was also confirmed to provide sufficient protection for human rights. It is also important to mention that ECtHR noted that the Austrian Supreme Court used the possibility to ask the ECJ for a preliminary ruling, in the court's view it is very important because only in cases

[197] ECtHR Case Povse v. Austria
[198] ECtHR Case Povse paras 22-28
[199] ECtHR Case Povse paras 29-31
[200] ECtHR Case Michaud

where ECJ was involved ECtHR could make a conclusion that the control mechanism was used. Therefore, the ECtHR decided that the first element of Bosphorus was fulfilled[201].

The second element of the test, which deals with the discretion that the state has over the obligation in question, was also found by the court to be fulfilled. It is very hard to argue with this position because indeed Austrian courts have no discretion when it comes to the Brussels II regulation.

Therefore, the violation of article 8 could be found only if there was a manifest deficiency in the protection of fundamental rights. Regarding this, ECtHR found that the argument of the applicant about the fact that such deficiency could consist of the refusal of the ECJ to check whether a violation of fundamental rights took place could not be accepted. Because under the Brussels II legal regime every question to a decision in question should be regarded in the courts of a country of origin of a decision, and not in the country of enforcement, therefore in the court's view the applicant should have challenged the decision before the court of appeal in Italy. Moreover, in such a case the applicant could be able to sue Italy if she would think that there was a violation of article 8[202].

Consequently, the ECtHR found that there were no violations of article 8. Moreover, the court even found the application to be manifestly ill-founded.

So, as we can see, in this case, the ECtHR applied the Bosphorus test to the case involving free movement of judgments within the EU. Moreover, despite the fact that the alleged violation concerned article 8, we still can find many useful points in this decision that can impact our research.

The first issue, which we would like to discuss regarding this case, is the issue of "manifest deficiency". As we have discussed while analyzing the Bosphorus case, the issue of manifest deficiency was not entirely clear from the text of the decision. Even separate opinions of judges gave little light on this issue. Moreover, it was even harder to define manifest deficiency in cases involving free movement of judgments, due to the fact that such cases are much more complex because unlike in Bosphorus where the state merely implemented the EU regulation, here the state of enforcement should include a foreign decision to its legal order.

From the Bosphorus we can came up with an argument that manifest deficiency can be found only in EU's instruments, however, in Povse we have two countries involved. Therefore,

[201] ECtHR Case Povse para 82
[202] ECtHR case Povse, para 84

we could argue that because the decision of another country is involved, and manifest deficiency could be found in this decision, recognition and enforcement of such decision could be amount to implementation of an act of secondary EU legislation that also contains such deficiency, which would lead to the violation of the convention. Moreover, we can say that procedural protection of fundamental rights that exist in a member state is a part of the EU system of fundamental rights protection[203]. In addition, it is important to mention that ECtHR considers Italian and EU systems of protection to be a part of one system (at least in the context of Brussels II). Such a conclusion could be derived from the fact that ECtHR mentioned that there was availability for the applicant to use procedural protection in Italy. To elaborate more, the Brussels II regulation established such a system of movement of judgments and of procedural protection for persons involved in these decisions that delegates the issue of protection of the fundamental rights to the country of origin of the decision. Therefore, in this case, the judicial organs of a country of enforcement are part of the system of procedural protections that exist within the EU.

Consequently, a conclusion can be made that in case of a very strict attitude toward the Bosphorus test by the ECJ in case of enforcement of foreign judgments, states that enforce decisions could be held accountable for the procedural violations in the state that adopted the original decision, despite the fact that there is no possibility to refuse enforcement of such a decision. This shows us that there are some problems in the application of the Bosphorus test to cases involving the recognition of foreign decisions. Probably, it can explain why the ECtHR insists on the EU member state to apply for preliminary rulings to the ECJ because the court of justice would be able to check whether there is some ground to refuse enforcement of a decision, and also in such a case, ECJ would act as the main part of the system of procedural protection.

However, regarding the role of the ECJ in this case there is another opinion, which implies that in *Povse* ECJ was less strict regarding the requests of member states for a preliminary ruling to the ECJ. And this easier attitude could be explained by the fact that the ECJ wanted to show that there is no possibility that enforcing states could be held accountable in such a case[204].

Another aspect of the Povse decision that explains the ECtHR attitude toward the Brussels II legal regime is the local remedy rule that was indirectly applied in this case. According to this rule, a person who seeks protection of his or her right that could have been violated should firstly exhaust all the local remedies in the jurisdiction where the alleged violation happened[205].

[203] Hazelhorst, 195
[204] Hazelhorst p.-196
[205] Borchard, Edwin M. "The Local Remedy Rule." American Journal of International Law 28, no. 4 (1934): 731.

Therefore, the fact that the applicant could not challenge the enforcement of the decision in Austria does not endanger her rights under article 8 of the convention, as long as she had all the possibilities to challenge the decision in the country of origin. Moreover, in the case law of the ECtHR, we can find a case where the state of origin of a decision was held accountable for issuing a wrongful decision on the return of a child[206]. Consequently, in Povse the applicant also could use all the available remedies under Italian law and then apply to the ECtHR.

Therefore, one of the conclusions that we can make after analyzing Povse, is the fact that in the context of the return orders under the Brussels II regime, it is still possible to protect the right to a fair trial. However, it would be not possible to challenge enforcement on this ground. In case there is a possibility that the right to a fair trial was violated, the defendant should use only the remedies available in the country of origin of the decision.

Usage of Bosphorus doctrine and Povse in the context of Brussels I bis

In the previous part of the thesis we have established that according to the ECtHR case law, countries may avoid responsibility under the convention if they were acting under the acts of EU secondary legislation. And what is most important is that they should not have any discretion regarding this legislation. In Povse we have seen that in the case of child return orders, member states indeed do not have any discretion, therefore they could not be responsible for the enforcement of such decisions. The same could be observed in Bosphorus where Ireland did not have any discretion regarding the sanctions implemented in secondary EU legislation.

However, it remains unclear how we can use Bosphorus in cases where member states have at least some level of discretion, for example, under the Brussels I bis where a decision could be refused to be enforced on several grounds. Therefore, the countries that would enforce a decision that violates a fundamental right in cases where they had the discretion to refuse enforcement could be held accountable before the ECtHR.

The example of the ECtHR decision on the piece of EU legislation where a member state has a certain level of discretion is already mentioned case M.S.S v Belgium and Greece. Previously, we have mentioned that this case limits the principle of mutual trust however, it has other implications that will help us to understand how the Bosphorus doctrine would be applied to the Brussels I Regulation.

In this case, the ECtHR was deciding whether an EU member state can be liable under convention if it transferred an asylum seeker to another member state where the rights of asylum

[206] ECtHR Case Šneersone and Kampanella v. Italy

seekers are not sufficiently protected[207]. What is the most important regarding this case, is the fact that the Dublin II regulation allows member states not to fulfill their obligations if the conditions of the sovereignty close are met[208], which means that the issue of discretion could be decided differently.

Regarding the factual background of the case, it is important to say that the applicant applied for asylum in Belgium, however, he entered the EU territory in Greece, and under the Dublin II regulation, he should have been transferred to Greece. The applicant appealed this decision stating that the rights of asylum seekers in Greece are constantly violated. Nevertheless, Belgium decided not to use the sovereignty close, so the case eventually get to the ECtHR with the applicant claiming violation of articles 2 and 3 of the convention[209].

In this case, ECtHR once more resorted to the Bosphorus doctrine. Firstly, the court decided that regarding the issues of fundamental rights EU system of asylum protection is at least equivalent to the convention, therefore the first element of the test was fulfilled. However, as we have already mentioned, the issue of discretion, in this case, was solved differently than in Povse.

The court found that the sovereignty close allowed Belgium not to transfer the applicant to Greece if there was concern that the country where the applicant should be transferred does not fully abide by the obligation. Therefore, in the court's view, Belgium had the discretion in this case and could be liable for the alleged violations of the fundamental rights[210].

Then the ECtHR established that the situation with the ensuring of fundamental rights of asylum seekers in Greece raises concerns, and Belgium knew about these issues. Consequently, the Court found that Belgium violated article 3 of the convention.

From the ECtHR findings in the M.S.S, we can conclude that member states might avoid responsibility only in cases where the act of EU secondary legislation does not give any discretion to the state of enforcement. For example, in the case of the child return orders under the Brussels II bis. However, if the state can exercise at least some discretion it can be held responsible. Moreover, as we can see in this case for the ECtHR it does not matter whether the discretion was exercised in a separate case, mere availability of discretion to protect fundamental rights would suffice.

[207] ECtHR CASE OF M.S.S. v. BELGIUM AND GREECE paras 324-325

[208] Article 3 of the Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

[209] ECtHR CASE OF M.S.S. v. BELGIUM AND GREECE paras 2-32

[210] ECtHR CASE OF M.S.S. v. BELGIUM AND GREECE paras 306-308

Therefore, we can make a conclusion that cases under the Brussels I bis directive would not enjoy the equivalent protection clause, as long as they would also fail the second part of the Bosphorus test, and the member states that would recognize a decision that violates a fundamental right could be responsible under the ECtHR.

However, such a conclusion still left some questions regarding its practical application. Firstly, we have to mention that a member state would not be held liable for the enforcement of a decision on the judgment import stage, because after the abolishment of the exequatur member states do not have any discretion on this stage[211]. However, the second stage of judgment recognition situation is different because in this stage of the recognition the court where enforcement is sought definitely has the discretion to refuse enforcement if one of the grounds is met. Also, here it is important to establish that for the ECtHR discretion means that a member state has a right to autonomously decide on issues within the boundaries of a piece of EU secondary legislation[212]. For example, in Bosphorus Ireland have no room to autonomously decide on sanctions against Yugoslavia, while under the Brussels I a member state might not enforce a decision therefore it has at least some discretion. Moreover, as we have already established member states could refuse recognition on the ground of violation of public order, and as long as public order is different in each member state, the room for discretion would be relatively wide.

However, it is important to mention that failure of a member state to exercise discretion would not mean automatically that a right to a fair trial or any other right was violated in each case ECtHR would investigate the impact of such failure on the rights of a person[213].

Therefore, we can make a conclusion that the ECtHR cases concerning the recognition of judgments under the Brussels I would not have the same result as Povse, or other cases where the main issue concerned the return of a child, because cases under Brussels I would fail the second part of the test as long as courts in countries of enforcement still have the discretion to refuse enforcement. Moreover, we can also conclude that from the point of the ECHR abolishment of the exequatur did not change much in the protection of the right to a fair trial.

The case Avotiņš v Latvia as the development of the ECtHR attitude

Above, we have discussed ECtHR case law that established the court's attitude towards the obligations that EU member states have according to the secondary EU legislation in general, furthermore, in Povse we have seen how this attitude is applied toward a separate case under the

[211] Hazelhorst, p-209
[212] ECtHR case Cantoni v France
[213] Hazelhorst, p-211

Brussels II regulation. Now, it is the time to discuss the case Avotiņš v Latvia, which is very important for our research, because in this case, the court reviewed the member state's obligations under Brussels I. Moreover, as the court stressed in the decision it was the first case in which the ECtHR dealt with the question of a possible violation of article 6 of the convention in the context of mutual recognition and free movement of judgments within the EU[214].

Before analyzing the reasoning of the ECtHR in this decision, let us briefly mention the factual background of the case. The history of the proceeding started with Mr. Avotiņš, a Latvian national taking a loan from a company whose place of registration is located in Cyprus. The loan was concluded under the Cyprus law and jurisdiction also belonged to the Cyprus courts. Furthermore, the applicant failed to repay the debt and the creditor decided to start a proceeding in a Cyprus court[215]. Here, it is important to mention that there was a disagreement about whether the debtor received the notice about the start of the proceedings because the signature on the document does not fully correspond to the debtor[216].

Nevertheless, the court decided in the default of appearance of the defendant that he ought to repay debts to the lender. Consequently, the creditor applied to a Latvian court for the recognition and enforcement of the decision under the Brussels I procedure, and eventually the recognition and enforcement were granted[217]. At this stage of the procedure, the defendant declared that he was aware of the proceedings only after the decision on the enforcement was taken, and only then he was able to know about the substance of both decisions. It is also important that later Latvian government did not argue with this fact.

Upon being acquainted with the decision the applicant decided to challenge the enforcement in Latvia and launched an appeal against the decision granting enforcement, he claimed that the enforcement of the decision was not possible due to the fact that the rules of judgments on the default of appearance were violated. Speaking more precisely, the defendant was not served with a document that started the proceeding[218].

Afterward, the regional court of appeal accepted the arguments of the debtor and canceled the decision on the enforcement. However, the creditor challenged this decision in the Latvian

[214] Gragl, Paul. "An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case: ECtHR 23 May 2016, Case No. 17502/07, Avotiņš v Latvia." European Constitutional Law Review 13, no. 3 (2017): 553

[215] ECtHR CASE OF AVOTIŅŠ v. LATVIA. paras 14-20

[216] Gragl, Paul. 554

[217] ECtHR CASE OF AVOTIŅŠ v. LATVIA. paras 17-25

[218] Gragl, Paul. 555

Supreme Court, which, in turn, canceled the decision of the regional court and authorized the enforcement of the original decision[219].

Consequently, Mr. Avotiņš launched an application to the ECtHR claiming that Cyprus and Latvia violated his rights under Article 6 of the convention. The complaint against Cyprus goes beyond the purposes of our research, moreover, it was declared inadmissible due to violations of *ratione temporis*[220]. Nevertheless, the complaint against Latvia was admissible, and in the complaint, the applicant claimed the enforcing of a foreign decision that violated his right to defense is contrary to article 6 of the convention. What is the most interesting in this complaint is the fact that the applicant also claimed that the Bosphorus presumption should not be applied in this case[221].

Such assertion reasoned on the fact that contrary to the original Bosphorus decision the respondent state under the Brussels I has much more discretion and was able not to recognize the decision. Secondly, in the applicant's view, the Bosphorus doctrine could be applied only in cases where there was a preliminary ruling of the ECJ[222].

At the same time, the Latvian government thought that the Bosphorus test should be applied because national courts do not exercise any "margin" discretion under the Brussels I Regulation. Moreover, in view of the government applying for a preliminary ruling to the ECJ is not a compulsory part of the Bosphorus doctrine, therefore the absence of an ECJ decision should not be an obstacle to applying the presumption[223].

In the decision, ECtHR firstly stated that according to the general rule, recognizing and enforcement of a foreign decision requires at least some form of control on the guarantees embodied in article 6 of the convention[224]. Then the Court went into consideration whether the Bosphorus doctrine should be applied in this case. To decide this issue the ECtHR used the older case Michaud[225] and concluded that the Bosphorus doctrine still can be applied in this case as long as the level of protection that exists under the article 52 of the EU CFR is at least equivalent to the level of protection that exist under the convention[226].

[219] ECtHR CASE OF AVOTIŅŠ v. LATVIA. para 25
[220] Gragl, Paul. 555
[221] Gragk, Paul 556
[222] ECtHR CASE OF AVOTIŅŠ v. LATVIA, paras 73-79
[223] ECtHR CASE OF AVOTIŅŠ v. LATVIA, paras 80-85
[224] ECtHR CASE OF AVOTIŅŠ v. LATVIA, para 98
[225] ECtHR Case No. 12323/11, Michaud v France
[226] ECtHR CASE OF AVOTIŅŠ v. LATVIA, para 112

Upon establishing that the use of the Bosphorus doctrine, in this case, is, possible ECtHR started to consider whether the Latvian court did not has enough discretion under the Brussels I. And here the ECtHR was considering not the fact that under the regulation in question it is possible to refuse enforcement of a decision, but rather the legal nature of the document, which in the court's view is the main indicator of the margin of discretion. According to this, the court noted that the Brussels I is a regulation, not a directive, which means that member states should implement it without any flexibility. Moreover, the ECtHR used the ECJ case ASML and established that even the courts in member states do not have a huge margin regarding the cases that concern default of appearance.[227] Therefore, the conditions of the discretion were also fulfilled[228].

Furthermore, the court answered the issue of the usage of preliminary rulings of the ECJ as a condition of the Bosphorus test. In this regard, the ECtHR firstly mentioned that the mere fact of refusing of a court in a member state to request a preliminary ruling from ECJ cannot lead to the refusal in application in Bosphorus, because the institute of preliminary rulings is complex and each case requires separate investigation in a specific context. Moreover, the ECtHR notes that in many cases application to the ECJ would be unnecessary because there already were decisions in similar cases on the same subject matter. Also, the court noted that there was no request from the debtor to the court to refer the case to the ECJ. Therefore, the ECtHR decided that the fact that in this case, the Supreme Court of Latvia did not ask the ECJ for a preliminary decision does not preclude the implication of the Bosphorus test[229].

In the next part of the decision, the court considered the third part of the Bosphorus test and decided whether in this case, a manifest deficiency of fundamental rights protection had a place. The answer to this question court started by emphasizing once again the fact that the creation of a common area of justice should not endanger fundamental rights. Furthermore, the ECtHR stated that the current focus on the effectiveness of the legal instruments in the area of movement of judgments can limit the function of control on the observance of fundamental rights[230].

Moreover, what is probably the most interesting in this decision, is the fact that the ECtHR used ECJ opinion 2/13, where ECJ stated that in certain cases member states shall presume that other member states observed their obligations in human rights protection without a possibility to review it. In ECtHR opinion, such an attitude could be not only dangerous but in certain cases

[227] ECJ Case ASML Netherlands BV v SEMIS;
[228] ECtHR CASE OF AVOTIŅŠ v. LATVIA, para 112
[229] ECtHR CASE OF AVOTIŅŠ v. LATVIA, paras 105-112
[230] ECtHR CASE OF AVOTIŅŠ v. LATVIA, paras 113-122

even contrary to obligations under the convention according to which the courts in the country of enforcement should have a possibility to assess whether the fundamental rights were violated. Without such a possibility, it would be impossible to ensure the protection of fundamental rights. Then the ECtHR continues to criticize the modern architecture of the protection of human rights in the EU within the context of the mutual trust principle. In ECtHR opinion, the current system creates a situation where national courts are restricted from the protection of fundamental rights while enforcing foreign decisions not only by the mutual trust principle, as indicated above. But also by the Bosphorus doctrine, because where a high level of development of mutual trust exists, the application of Bosphorus is highly possible[231].

In light of the abovementioned arguments, the ECtHR concludes that the application of the mutual trust principle by national courts should not be automatic, and if there are risks that the fundamental rights were violated the courts should not simply refer to the application of the EU secondary law, especially in cases where protection of a right could be considered to be manifestly deficient[232].

Afterward, the court stated that mostly, the system of mutual trust that currently exists among EU member states is considered to be in compliance with the main obligation that can be found under article 6 of the ECHR. Nevertheless, in the court's view in this specific case, the applicant raised questions that could be considered to be a procedural violation that is contrary to article 6 of the convention. Moreover, the ECtHR noted that in this case application of the mutual trust principle was automatic, and could lead to the violation of the right to a fair trial. However, this finding did not lead to the court admitting that there was a violation of the right to a fair trial by Latvia. The reason for such a decision is the fact that despite all the questions about the protection of the fundamental rights that exist under the current process of recognition and enforcement of the decisions under the Brussels II regulation. The applicant could have challenged the original decision before the Cyprus courts, however, he himself contributed to the situation by his actions.[233]

Now, when we have discussed the factual background of the case, and when we get acquainted with the reasoning of the ECtHR, we can discuss the impact that this decision has on the protection of the right to a fair trial in the context of cross-border enforcement within the EU.

[231] ECtHR CASE OF AVOTIŅŠ v. LATVIA, para 114
[232] ECtHR CASE OF AVOTIŅŠ v. LATVIA, para 116
[233] ECtHR CASE OF AVOTIŅŠ v. LATVIA, paras 124-127

Firstly, when speaking about the impact of this decision, we have to mention a broader context in which it was taken. In the text above, we have mentioned that ECtHR criticized the mutual trust principle using the text from the ECJ opinion 2/13, in which ECJ opposed the EU accession to the convention, which had a negative response from the ECtHR[234]. It is important because some have even argued that ECtHR may retaliate against this decision by abolishing the Bosphorus test[235], which would obviously endanger the mutual trust and the free movement of judgments within the EU.

Nevertheless, as we can see in this decision, despite the criticism that ECtHR used toward the current application of mutual trust and Brussels I, it used the Bosphorus doctrine in full scope and did not find any violations of article 6. Moreover, despite the criticism ECtHR in this decision again referred to the ECJ case law and to the primary and secondary EU legislation as well.

However, it has to be mentioned that unlike in previous cases that we have discussed in this research, in Avotiņš the ECtHR was very close to finding that manifest deficiency in fundamental right protection had a place. Probably the only reason why such a decision was not made is the specific attributes of this case, namely the actions of the applicant[236]. Furthermore, such a critical approach of the ECtHR could mean that in the future the application of Bosphorus would be stricter, however, it remains to be only an assumption as long as we do not have other cases involving the Bosphorus doctrine heard at the ECtHR since Avotiņš.

Besides the criticism, this decision has some other points that are valuable for our research, firstly in this decision the court clearly established that the application for the preliminary rulings by the highest court of member states is not a prerequisite to the application of Bosphorus. Moreover, while deciding this issue ECtHR referred to the position of the ECJ in this regard. It is also important to mention that the court indicated that it is important for the application of Bosphorus whether parties to a proceeding requested a court to refer to ECJ. This approach makes it clearer that the debtors should be more active in seeking remedies within the EU law, however, at the same time it is important to mention that the existence of such a request from the parties is definitely irrelevant to the ECJ itself[237].

Another point of discussion regarding the Avotiņš decision is the issue of discretion because it was the first time when ECtHR addressed the issue of discretion regarding the Brussels

[234]European Court of Human Rights, 2014 Annual Report, Foreword by President Spielmann, 6.

[235]X. Groussot et al., 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?', in O.M. Arnardóttir and A. Buyse (eds.), Shifting Centres of Gravity in Human Rights Protection (Routledge 2016) 24

[236] S. Øby Johansen, 'EU Law and the ECHR: The Bosphorus Presumption is Still Alive and Kicking – The Case of Avotiņš v. Latvia', EU Law Analysis, 24 May 2016

[237] Article 267 TFEU

I Regulation. The court established that the Latvian Supreme Court did not have enough discretion in this case to refuse enforcement of the judgment. The argument for this decision was that despite the ability of the court either to recognize or not to recognize a foreign decision, it could not be considered as the same level of discretion as exist under the Dublin regulation (M.S.S case). Such a position faced some criticism. Critics point out that even after the abolishment of the exequatur the recognition of the decision does not become automatic, and defendants can challenge the enforcement on the judgment inspection stage where the court has the power to refuse enforcement within the limits established by the convention[238].

Lastly, we have to mention that in the Avotiņš the ECtHR once again addressed the issue of mutual trust, like in the previous decision, the court appears to respect the principle and does not consider the fact that member states must presume that other member states do not violate fundamental rights as an infringement of the convention. However, at the same time, the court believes that member states should have the power to review decisions in cases of recognition of foreign judgment, which is impossible under certain regimes of movement of judgment. It can be said that in the future, such a dubious position of the ECtHR could strike an age between the convention and the EU if eventually, the conditions of a separate case would allow ECtHR to find a violation in the actions of an EU member state while this states was acting under the EU secondary legislation in the field of cross-border enforcement.

Conclusions to the III part

In the third and the final part of the thesis, we have looked at the case law of the ECtHR that establishes the court's attitude toward the cases where the alleged violation of the convention arises from the member states using EU secondary legislation. As we have shown, the key case in this area is Bosphorus where the court established the test that the court uses to decide whether the state should benefit from the presumption that the EU protects fundamental rights on the same level as does the convention. However, the case in which the Bosphorus test was introduced concerned the issue of the protection of asylum seekers. Therefore, we have to look at the Povse and Avotiņš cases, which showed how this test would work in the context of the movement of civil judgments within the EU.

As we have seen, the application of this test in case of cross-border enforcement would mostly depend on the issue of discretion, and it is not always clear, if in cases concerning certain issues under Brussels II regulation and other EU instruments under which courts in countries of

[238] Hazelhorst, 217

enforcement do not have any possibility to refuse the enforcement of the decision, the situation remains simple, ECtHR would without many deliberations recognize the absence of the necessary discretion. In cases regarding the Brussels I, the situation is more complicated, because it remains unclear which level of discretion in the ECtHR views member states have, especially in regards to the issues of public policy exception, because we have not yet seen such cases.

From the abovementioned cases, we can make a conclusion that in general, it is possible to use ECtHR as a remedy in cases of protection of the right to a fair trial in the context of Brussels I and Brussels II regulations. However, it must be done only in cases where such violation is flagrant and where before challenging the enforcement the applicant has applied all the remedies in the country of origin of the decision. Moreover, it would be beneficial to ask the highest court in the country of enforcement to refer the issue to the ECJ before seeking redress at the ECtHR.

CONCLUSIONS AND RECOMMENDATIONS

1. While considering the main objectives of this thesis we have firstly established that the dichotomy between the free movement of judgments and the need to protect the right to a fair trial within the EU exist since the treaty of Rome and the adoption of the first version of Brussels I.

Since then the European institutions as well as the member states have tried to balance the economical need for enhanced freedom of movement of judgments and the need to protect the right to a fair trial that arises from the values of the community.

2. Then we have further analyzed the historical development of the right to a fair trial in the context of cross-border civil judgments within the EU. We have shown that with the gradual development of the legal instruments that create the European system of movement of judgments, the requirements for the transfer of judgments were gradually simplified which created risks for the usage of the right to a fair trial as a ground for non-enforcement of a decision. Furthermore, we have briefly considered the issue of the clash of rights between the right of the judgment creditor to enforce a decision (which is also a part of the right to a fair trial), and the necessity to protect the rights of defense, as a part of the context of the development of the respective legal instruments. Analysis of this issue showed us that the protection of the right to a fair trial in cases of the cross-border enforcement should not be one sided and we have to consider the rights of judgment creditors as well.

3. Among those developments, we have separately highlighted the introduction of the Brussels I Regulation, which was created from the Brussels Convention. As we have established, it was an important step in the development of the current legal doctrine on the movement of judgments because it created a coherent system with the rules common for all the member states. The next development whose importance is hard to overestimate was the abolition of the exequatur. The decision to exclude this procedure from the scope of the Brussels I regulation was also dictated by the desire to further enhance the freedom of movement of civil judgments, at the same time, it could also pose risks to the protection of the rights to a fair trial. However, as we have concluded, the abolition of the exequatur did not create any new risks for the usage of the right to a fair trial as a ground for refusal of recognition.

4. Another important step in the development of the regime on the movement of civil judgments was the recast of the Brussels II regulation under which, in certain cases, the court in member states where enforcement is sought does not have any discretion to check whether the right to a fair trial was fulfilled. As we have shown, these developments could be considered to be dangerous because they create certain risks for the defendants, and their right to a fair trial could be violated by the enforcement of a wrongful decision.

5. Upon analyzing the historical development of the European legal framework, we have also briefly discussed the notion of the EU law in the context of which exists the cross-border enforcement of civil judgments. Among these elements of EU law, we have highlighted the

principle of mutual trust, which requires gradual simplification of cross-border enforcement. However, based on the relevant case law we have also established that the principle is not absolute and member states can derogate from it, including the situation when fundamental rights need to be protected. Therefore, we conclude that the principle of mutual trust is not an obstacle in using a violation of the right to a fair trial as a ground for non-recognition. Nevertheless, the most extreme interpretations of the mutual trust could be regarded as dangerous to the right to a fair trial. Also, in this regard, we have discussed the Melloni doctrine which in our opinion seriously limits the possibility to use the violation of the right to a fair trial as the ground for non-enforcement of a decision.

6. As the last step in establishing the theoretical framework of the discussion, we have mentioned the most basic elements of the right to a fair trial as well as the ECtHR attitude toward violations of these rights and which action can constitute it. This analysis helped us to establish the most frequent types of violations that happen in cases of enforcement of foreign decisions, as well as whether those violations could be considered to be grave enough to trigger non-enforcement of a decision.

7. In The second chapter of this research we have started from the theoretical framing of the issue of public policy exception. This theoretical information as well as the relevant case law helped us to establish that the public policy exception can be considered the most useful ground of refusal that exists in current legal instruments due to its wide scope which allows it to fit in violation of most elements of the right to a fair trial. However, in the respective part of the research, we have also shown that public policy exception is being targeted because it interferes with the mutual trust principle. Also, we have to speak about the restrictive attitude of the ECJ toward the public policy exception and how it limits the possibilities to protect the right to a fair trial. Furthermore, the idea of abolishing public policy exception was discussed. We have concluded that abolition of the public order exception would seriously endanger the possibility to protect the right to a fair trial by refusing recognition and enforcement of a foreign decision. Another important part of the discussion about the public policy exception is the fact that all the member states have their discretion in deciding what constitutes their respective public policies, as we have concluded, those differences can be vital for the usage of an alleged violation of the right to a fair trial for the challenge of enforcement in a separate case.

8. Also, we have established that great implications for the protection of the right to a fair trial have grounds for refusal connected with the default of appearance of the defendant. While this ground is not as wide as the public policy exception, still it can be used in violations of the

elements of the right to a fair trial that is connected with the judgments in default of appearance. Moreover, the analysis of other grounds of refusal, including the specific grounds that exist under the Brussels II bis regulations can be also used in the protection of the right to a fair trial, but their possibilities in this regard are limited compering to the public policy exception.

9. After analyzing the grounds for refusal that exist under the EU law as means of protection of the right to a fair trial. In the third part of the thesis, we started to analyze the possibility to use ECHR as an instrument of protection of the right to a fair trial in cases of cross-border enforcement within the EU. As we have discussed, the involvement of the ECtHR in the cases that concerns secondary EU legislation is a very complex legal issue. We have established that all the cases involving secondary EU legislation should be solved using three stages of the Bosphorus test. Moreover, we established that if we speak about legal regimes with high levels of mutual trust the usage of presumption of equivalent protection would be almost certain. But if we speak about the legal regimes where the member states have a certain level of discretion, the issue becomes much more complicated.

10. The analysis of the last cases of ECtHR that involved the application of the Bosphorus test in the context of cross-border enforcement of civil judgments (Povse, Avotiņš) has shown us that the attitude of the ECtHR to the Bosphorus test is gradually changing. For this moment these changes did not result in the ECtHR adopting a decision where it recognizes that a member state violated the convention while using the secondary EU legislation, it can happen in the future. Such a conclusion we could extract from the criticism that the ECtHR used toward the extreme application of the mutual trust principles in those cases. Nevertheless, we have to mention that for the current moment ECtHR considers EU legislation in the sphere of cross-border enforcement of civil judgments as at least equivalent to the convention, in terms of protection of the rights under article 6. But, here we have to wait for the next decisions of the ECtHR in this regard, as long as we have indicated while discussing Avotiņš, the final outcome of the ECtHR decision strongly depends on the background of each case.

11. The general conclusion that we can make from all the abovementioned points, is that it is still possible to use the right to a fair trial as the ground for non-recognition of a foreign decision under either Brussels I bis or Brussels II bis regulations. However, at the same time, we have to mention that over time such a possibility has deteriorated, and now it is much harder to refuse a recognition even if the fundamental rights (including the right to a fair trial) were allegedly violated. Moreover, the ideas about the abolishment of the ground of refusal do not indicate that

the situation would change for the better soon. However, the abovementioned changes in ECtHR attitude toward the Bosphorus test could influence those developments.

12. In our view, the best way to protect the right to a fair trial in the context of the cross border enforcement of foreign judgments would be to implement the ECtHR position that it established in the Avotiņš case and to give a possibility to courts in countries of enforcement to check judicial decisions on the subject of a violation of the rights to a fair trial. Moreover, the abolition of the grounds for refusal, especially the public policy exception would have a devastating effect on the protection of the right to a fair trial, which means that such an idea should be abandoned despite all the possible economic benefits of the enhanced free movement of judgments.

13. Moreover, in our opinion the necessity to protect the right to a fair trial should not be lost in the discussions about the benefits of the free movement of judgments for the economic development or for the closest cooperation within the union. While paying due attention to all those benefits, we should not forget about the EU as an international organization that is built on values, including respect for fundamental rights.

14. Moreover, in our opinion even more enhanced usage of the principle of mutual trust would be problematic from the point of the current development of the relations between the member states. Nowadays the EU faced several problems with the member states that are not as devoted to the fundamental values as the majority would expect, therefore to enforce all the decisions that circulate within the EU without the possibility of prior check on the violations of the fundamental rights would be questionable and can eventually have dire consequences with the ECtHR which could eventually abandon the presumption of equal protection.

15. Therefore, we can conclude that the discussion on the cross-border enforcement of the foreign judgments and mutual trust should concentrate on the protection of the right to a fair trial as well as the protection of fundamental rights more than on the economic benefits. However, at the same time, it has to be said that heavier emphasis on the right to a fair trial in the context of enforcement of foreign judgments within the EU, should not throw the legal framework back to the situation where the enforcement of judgments takes years and hugely harms rights of the judgment creditors. From the practical side, our conclusions might mean that for Brussels I, the regime should stay at least the same, however, the change in the ECJ's attitude toward the public policy would help to protect the right to a fair trial better. As for the Brussels II, giving the court of enforcement powers not to enforce a decision would be hugely beneficial, especially considering the subtle nature of the issues connected with the child abduction cases.

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ABSTRACT

Striebul Y. Infringement of the right to a fair trial as a ground for non-recognition of a foreign judgment under the Brussels Ibis Regulation. Master thesis in International Law. Supervisor – Prof. dr. Katažyna Bogdzevič– Vilnius: Mykolas Romeris University, Mykolas Romeris Law School, Institute of International and European Union Law, 2022.

The development of the free movement of judgments under the Brussels I bis and Brussels II bis regulations created certain risks for the protection of the right to a fair trial. Understanding the current possibilities to use violations of the right to a fair trial and how it could be affected by the risks of further development n simplification of the current framework on movement of civil judgment will help us to create new approaches to the balancing of the benefits of enhanced free movement of judgments and the need to protect the right to a fair trial.

Achieving the abovementioned objectives is possible through the method of analyzing of the relevant legislation as well the case law and recent literature related to the topic. To assess all the possible implications of using the right to a fair trial in order to block the enforcement of foreign decisions, the wide context of the movement of civil judgments within the EU is used.

Keywords: *free movement of judgments, Brussels regulation, public policy, mutual trust, the right to a fair trial*

SUMMARY

INFRINGEMENT OF THE RIGHT TO A FAIR TRIAL AS A GROUND FOR NON-RECOGNITION OF A FOREIGN JUDGMENT UNDER THE BRUSSELS Ibis REGULATION

Yevhen Striebul

This research is dedicated to the analysis of the possibility to use the infringement of the right to a fair trial as a ground for non-recognition of a foreign judgment under the Brussels Ibis and Brussels IIbis Regulations in the context of the current legal framework, moreover the huge part of the thesis is dedicated toward the issue of balancing of protection of the right to a fair trial and the benefits of the enhanced freedom of movement of judgment in the context of the historical development of the legal framework and possible future changes.

The thesis is written in a classic structure with an introduction, the first chapter discusses mainly theoretical issues and historical development. The second chapter concentrates on the ground for refusal (especially on the public policy exception). The third chapter discusses the ECtHR attitude toward the EU secondary legislation.

To achieve the aim the research had a few objectives such as an analysis of the existing case-law of the ECJ and ECtHR on this subject matter that helps us to understand the practical side of theoretical findings. Moreover, another objective of the research was to analyze how the principle of mutual trust is applied in the context of the free movement of judgments. Furthermore, we have analyzed the current implications of the ground for refusal and how they can be used in order to protect the right to a fair trial.

The main results of the thesis are that currently it is possible to use the right to a fair trial as a ground for non-recognition of judgments under the Brussels Ibis and Brussels II bis legal frameworks. However, at the same time, we have established that the possibilities of such usage are limited due to the positions of ECJ and ECtHR. Moreover, the results of the research show that future simplification of the enforcement process might complicate the protection of the right to a fair trial even more.