



AVOTINŠ V. LATVIA. THE UNEASY BALANCE BETWEEN MUTUAL RECOGNITION OF JUDGMENTS AND PROTECTION OF FUNDAMENTAL RIGHTS

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ABSTRACT: The intersections between recognition and enforcement of foreign decisions in civil and commercial matters and protection of fundamental rights have been a subject of growing interest in the recent case-law of the European Court of Human Rights. The judgment of the Grand Chamber in *Avotiņš v. Latvia* is especially relevant, insofar as it concerns the system of mutual recognition of decisions established under EU law and its compatibility with Art. 6 of the European Convention. Even though the CJEU has recognised that mutual recognition of judgments between EU Member States cannot hamper the right to a fair trial, the judgment in *Avotiņš v. Latvia* calls for a greater attention to the observance of the rights of defence. The European Court points out the necessity of a control of the foreign judgment by the courts of the requested State in order to prevent violations of fundamental rights protected by the European Convention. The principles laid down in the judgment are thus likely to set some limits to the existing freedom of circulation of judgments enacted by EU acts adopted on the basis of Art. 81 TFEU.

KEYWORDS: European Convention on Human Rights – recognition of judgments – right to a fair trial – European judicial area – rights of defence – equivalent protection.

I. PRELIMINARY REMARKS

It is common ground that one of the objectives most successfully pursued by the European Union is the creation of a European judicial area in civil and commercial matters. In that field European integration has significantly progressed after the conclusion, between the Member States of the European Economic Community and in accordance with the *proviso* of Art. 220 of the EEC Treaty,¹ of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments.

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¹ Art. 220 of the EEC Treaty: “Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: [...] the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards”.

In that context, the principle of automatic recognition of judgments in other Contracting States and the prohibition of any review as to their substance were laid down,² while the traditional requirement for intermediate, *ad hoc* proceedings was retained only for the phase of enforcement. In accordance with these principles, the ECJ has consistently held that the grounds for non-recognition or for non-enforcement of judgments listed in Art. 27 of the Convention, being “an obstacle to the achievement of [...] the free movement of judgments”, have to be subject to strict interpretation.³

In the interpretation of the Brussels Convention the CJEU repeatedly highlighted the pivotal role of free circulation of judgments, based on the “mutual trust” between national judges.⁴ Unsurprisingly, Art. 81 TFEU, as amended by the Lisbon Treaty, now explicitly establishes the “principle of mutual recognition of judgments and of decisions in extrajudicial cases” as the very cornerstone of the European judicial area in civil matters.

However, in the implementation of that principle the European institutions did not follow a uniform approach, but moved from a sectoral perspective, adopting different rules on recognition and enforcement of judgments depending on the different matters concerned.

On the one hand, in some matters the enforcement of judicial decisions is still subject to the requirement of *exequatur*,⁵ even though under a simplified and expeditious procedure on the model of the now repealed Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. On the other hand, some EU acts removed completely the requirement of *exequatur*, replacing it with a certificate issued by the courts of the Member State of origin.⁶ That process received new impetus with the adoption of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 Decem-

² On these principles, see C. Tuo, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Padova: Cedam, 2012, p. 32 *et seq.*

³ Court of Justice, judgment of 2 June 1994, case C-414/92, *Solo Kleinmotoren*, para. 20.

⁴ See, e.g., Court of Justice, judgment of 9 December 2003, case C-116/02, *Gasser*, para. 72; judgment of 10 February 2009, case C-185/07, *Allianz*, para. 30. On the principle, K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *Il Diritto dell'Unione europea*, 2015, p. 525 *et seq.*

⁵ This is the case of the Regulation (EC) 2201/2003 of the Council 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) 1347/2000, with regard to decisions in matters of parental responsibility, and of the Regulation (EU) 650/12 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁶ See Arts 41 and 42 of Regulation 2201/2003, with regard to decisions in matters of right of access to a child and of return of an abducted child; Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations.

ber 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

While these measures share the principle of automatic enforcement of decisions emanating from other Member States and consequently aim at concentrating the litigation in the Member State of origin,⁷ they diverge as to the remedies available to the party against whom recognition or enforcement is sought. It is remarkable that in several instruments establishing the principle of the abolition of *exequatur* the traditional grounds for non-enforcement of judgments, including public policy clause, are completely or partially removed.

In particular, Arts 41 and 42 of the Regulation (EC) 2201/2003 of the Council 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) 1347/2000,⁸ do not provide any remedy against the certificate issued in the Member State of origin. Accordingly, in *Aguirre Zarraga* the CJEU denied that the courts of the Member State of enforcement possess an extraordinary power of review, even when a violation of fundamental rights is at stake.⁹

It is also worth noting that a case involving the application of those rules gave, for the first time, the occasion for a dialogue between the CJEU and the European Court of Human Rights with regard to mutual recognition of judgments. In the admissibility decision in *Povse v. Austria*¹⁰ the European Court of Human Rights accepted that under Regulation 2201/2003 it is primarily for the courts of the Member State of origin to make use of ordinary domestic remedies in order to avoid violations of fundamental human rights occurred in the course of proceedings before them.¹¹ In doing so, the European Court highlighted that in that case a preliminary ruling had been requested by Austrian courts; accordingly, it extensively referred to the interpretation of the Regulation 2201/2003, as provided by the CJEU.¹²

In other instruments, a different approach was followed. Thus, under Art. 10 of Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April

⁷ F. SALERNO, *Garanzie processuali*, in R. BARATTA (a cura di), *Diritto internazionale privato*, Milano: Giuffrè, 2010, p. 156 *et seq.*

⁸ See footnote 4, *supra*. See also U. MAGNUS, Art. 42, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, Munich: Sellier, 2012, p. 360 *et seq.*

⁹ Court of Justice, judgment of 22 December 2010, case C-491/10, *Aguirre Zarraga*, paras 46 and 70.

¹⁰ European Court of Human Rights, decision of 18 June 2013, no. 3890/11, *Avotiņš v. Latvia*. See P. McEAVY, *The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?*, in *Netherlands International Law Review*, 2015, p. 365 *et seq.*

¹¹ For a detailed analysis of these decisions, see also P. PIRODDI, *Armonia delle decisioni, riconoscimento reciproco e diritti fondamentali*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino: Giappichelli, 2015, p. 54 *et seq.*

¹² Court of Justice, judgment of 1 July 2010, case C-211/10 PPU, *Povse*.

2004 creating a European Enforcement Order for uncontested claims¹³ a special procedure of withdrawal of the certificate is available: it can be undertaken when the certificate was “clearly wrongly granted” and the requirements laid down in the Regulation, concerning especially service of the document instituting the proceedings but not including compatibility with public policy, were not met.¹⁴

Likewise, Regulation 4/2009 ensures the defendant the right to apply for review of the decision before the courts of the Member State of origin, when the ruling was made *in absentia* and the defendant was not served with the act instituting the proceedings.

On the contrary, Regulation 1215/2012 sticks to the traditional model, insofar as it provides for a list of grounds for refusal of recognition or enforcement of judgments which can be invoked in the Member State addressed; among such grounds are (a) the violation of the defendant’s right of defence in case of default judgments when the documents instituting the proceedings have not been served in sufficient time and in such a way as to enable the defendant to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so and (b) the manifest contrast of recognition with public policy in the Member State addressed.¹⁵

Accordingly, the process of abolition of *exequatur* proceedings in civil matters as between Member States shows a tendency of EU law to take into account the need for sufficient procedural guarantees for the defendant.

However, the judgment of the Grand Chamber of the European Court of Human Rights in *Avotiņš v. Latvia*¹⁶ seems to cast some doubts on the compatibility of this process with the protection granted by the European Convention. Even though the European Court found no violation of the right to a fair trial in the particular case, the extensive remarks on the key features of mutual recognition of civil decisions under EU law, im-

¹³ See footnote 6, *supra*.

¹⁴ F. SEATZU, *Le garanzie del diritto alla difesa del debitore nel regolamento n. 805/2004 istitutivo del titolo esecutivo europeo per i crediti non contestati*, in N. BOSCHIERO, P. DE CESARI (a cura di), *Verso un «ordine comunitario» del processo civile*, Napoli: Editoriale Scientifica, 2008, p. 45 *et seq.* On the issue of the compatibility of the Regulation 805/2004 with the protection of fundamental rights, see also L.R. KESTRA, *The Impact of European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 273.

¹⁵ On the debate about the proposal of the European Commission to abolish public policy defence, see P. BEAUMONT, E. JOHNSTON, *Can Exequatur Be Abolished in the Brussels I Regulation Whilst Retaining a Public Policy Defence?*, in *Journal of Private International Law*, 2010, p. 249 *et seq.*; G. CUNIBERTI, G. RUEDA, *Abolition of Exequatur. Addressing the Commission’s Concerns*, in *RebelsZ*, 2011, p. 286 *et seq.*; X.E. KRAMER, *Abolition of Exequatur under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area*, in *Netherlands Internationaal Privaatrecht*, 2011, p. 633 *et seq.*; P.F. SCHLOSSER, *The Abolition of Exequatur Proceedings Including Public Policy Review*, in *IPrax*, 2010, p. 101 *et seq.*

¹⁶ European Court of Human Rights, judgment of 25 February 2014, no. 17502/07, *Avotiņš v. Latvia* [GC]. See O. FERACI, *Mutuo riconoscimento e principio della protezione equivalente (Bosphorus): riflessioni a margine della sentenza della Grande Camera della Corte europea dei diritti dell’uomo nel caso Avotiņš c. Lettonia*, in *SIDIBlog*, 15 July 2016, www.sidiblog.org.

PLICITLY suggesting some adjustments, will certainly deserve consideration by the EU institutions. The Grand Chamber's assessment of the EU rules concerning the free circulation of judgments is worth of special attention since it is potentially conflicting with the approach of the CJEU as to the impact of the establishment of a European judicial area on the responsibility of Member States to protect individual fundamental rights.

II. AVOTIŅŠ V. LATVIA: THE FACTS OF THE CASE AND THE FINDINGS OF THE EUROPEAN COURT

The case originated in an application by a Latvian national complaining about the violation of Art. 6 of the European Convention on Human Rights, allegedly occurred in the course of proceedings for the declaration of enforceability of a Cypriot judicial decision before Latvian courts.¹⁷

The applicant had signed an acknowledgment of debt deed, promising to repay a sum of money he had borrowed from a Cypriot company; the deed was governed by Cypriot law, as a result of a choice-of-law clause, and contained a clause providing for the non-exclusive jurisdiction of Cypriot courts. On request of the creditor, the Limassol District Court had issued a judgment *in absentia* ordering Mr. Avotiņš to pay the claimant the principal amount of 100,000 US dollars, interest, costs and expenses.

Then, the claimant company sought recognition and enforcement of the decision of the Limassol District Court in Latvia. The request was granted under Regulation 44/2001, but Mr. Avotiņš lodged an appeal against the declaration of enforceability; in particular, he argued that recognition and enforcement of the decision were to be refused on the ground of Art. 34, para. 2, of the Regulation, as he had never been served with the application instituting proceedings before Cypriot courts, the summons having been sent to an address in Riga where he was not resident. The Latvian Supreme Court ultimately dismissed the appeal, stressing the fact that Mr. Avotiņš had failed to challenge the judgment before Cypriot courts.

Following the judgment whereby a Chamber of the European Court of Human Rights held that there had been no violation of Art. 6 of the European Convention,¹⁸ the case was referred to the Grand Chamber. The Grand Chamber upheld the judgment, but engaged in a very careful and detailed reasoning on some general issues.

¹⁷ The initial application was also directed against Cyprus, as Mr. Avotiņš maintained that Cypriot courts had also acted in violation of Art. 6 of the European Convention, ruling *in absentia* notwithstanding the fact that he had not been properly served with the act instituting the proceedings. The Chamber held that for this part the application was inadmissible, being time-barred according to the six-month rule established by Art. 35 of the Convention (see *Avotiņš v. Latvia* [GC], cit., para. 97).

¹⁸ European Court of Human Rights, judgment of 23 May 2007, no. 17502/07, *Avotiņš v. Latvia*. On the Chamber judgment, see O. FERACI, *La tutela 'indiretta' dell'art. 6, par. 1, CEDU in tema di processo contumacia-civile con riguardo all'efficacia delle decisioni straniere rese da giudici di Stati membri dell'Unione europea*, in *Diritti umani e diritto internazionale*, 2015, p. 188 et seq.

First, it reiterated, referring to its previous decision in *Pellegrini v. Italy*,¹⁹ that Art. 6 of the European Convention on Human Rights can come into play also when a domestic court is called upon to enforce a foreign final judgment in order to assess whether the guarantees of the right to a fair trial were afforded. In this regard, it did not seem to place a special emphasis on the distinction between the enforcement of judgments emanating from a Contracting Party of the European Convention or from a State which is not Party to the Convention.²⁰

Secondly, it held that the presumption of equivalent protection, as developed for the first time by the European Court itself in *Bosphorus v. Ireland*,²¹ was applicable in the instant case.²² It recalled that Latvian courts enjoyed no discretion in applying Regulation 44/2001 to the enforcement of a Cypriot judgment and held that the fact that the matter had not been referred for a preliminary ruling was not decisive,²³ as the applicant had neither submitted a request to that effect before domestic courts nor raised arguments requiring the interpretation by the CJEU.

Nonetheless, while reaffirming its commitment to the needs of European cooperation, the European Court of Human Rights expressed its general concern about the compatibility of mutual recognition mechanisms established under EU law with the European Convention, insofar as they are to be “applied automatically and mechanically”. In this regard, the European Court implicitly built its reasoning upon the previous case of *Šneerson and Kampanella v. Italy*, where it was held that, under the 1980 Hague Con-

¹⁹ European Court of Human Rights, judgment of 20 July 2001, no. 30882/96, *Pellegrini v. Italy*.

²⁰ See para. 98. In the same sense, C. FOCARELLI, *Equo processo e riconoscimento di sentenze straniere: il caso Pellegrini*, in *Rivista di diritto internazionale*, 2001, p. 955 et seq.; O. LOPES PEGNA, *L'incidenza dell'art. 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere*, *ivi*, 2011, p. 46 et seq. See, however, P. KINSCH, *Droits de l'homme, droits fondamentaux et droit international privé*, in *Recueil des cours de l'Académie de Droit International de la Haye*, 2005, p. 325 et seq.

²¹ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*. On the *Bosphorus* doctrine, see, among others, O. DE SCHUTTER, *Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention*, in V. KOSTA, N. SKOUTARIS, V.P. TZEVELEKOS, *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing, 2014, p. 177 et seq., and, with regard to the recognition of judgments, G. CUNIBERTI, *Abolition de l'exequatur et présomption de protection des droits fondamentaux. À propos de l'affaire Povse c/ Autriche*, in *Revue critique de droit international privé*, 2014, p. 303 et seq.

²² One can doubt whether in *Avotiņš v. Latvia* the approach should have been exactly the same as in *Bosphorus v. Ireland*. While in the latter case the presumption of equivalent protection concerned the application of substantive provisions of EU law, in the field of judicial cooperation the presumption is expected to come into play with regard to EU acts facilitating the circulation of decisions issued by Member States. In that framework the equivalence between the protection of fundamental rights as afforded not by the European Union, but by different Member States has to be taken into account.

²³ See, by contrast, European Court of Human Rights, judgment of 6 December 2012, no. 12323/11, *Michaud v. France*. In that case the presumption of equivalent protection was rejected as the national court had refused to apply to the CJEU for a preliminary ruling notwithstanding the fact that the CJEU had never had the opportunity to examine the question.

vention on the civil aspects of international child abduction and under Art. 11 of Regulation 2201/2003, the return of an abducted child cannot be ordered automatically and without assessing the child's best interests in each individual case.²⁴ In the European Court's view, the mutual trust between national courts of EU Member States cannot lead to a disproportionate limitation of the power of review of a domestic court called upon to rule on a request for recognition or enforcement of a foreign judgment.

Turning to the facts of the case, the Grand Chamber found that Mr. Avotiņš had not been notified of the summons to appear before the Limassol District Court and that, notwithstanding, Latvian courts made an automatic application of Art. 34, para. 2, of Regulation 44/2001. In doing so, they merely stated that the applicant had not challenged the Cypriot judgment and failed to examine whether a remedy was actually available to him under Cypriot law. However, the European Court also held that in fact Mr. Avotiņš had enjoyed "a perfectly realistic opportunity of appealing" the judgment of the Limassol District Court and that, having accepted the jurisdiction of Cypriot courts and having concurred in the choice of Cypriot law as the applicable law, he should have acquired appropriate information about the Cypriot legal framework, so that the damage incurred was a result of his negligence.

III.1. AUTOMATIC RECOGNITION AND OBSERVANCE OF THE RIGHTS OF DEFENCE: THE CASE-LAW OF THE CJEU

The judgment of the Grand Chamber moves from the assumption (apparently shared by all the parties in the case) that, as a general rule, a violation of Art. 6 of the Convention can take place in the course of proceedings for recognition or enforcement of a foreign judgment if the courts of the State of enforcement do not assess whether the proceedings in the State of origin complied with the requirements of the right to a fair trial. It is then for the State of enforcement to ensure that its courts are empowered to conduct a sufficient review in order to fulfil the obligation to protect fundamental rights. However, when domestic courts are requested to recognise or to enforce foreign judgments under EU instruments, the presumption of equivalent protection is applicable and they can confine themselves to ascertaining whether the protection of fundamental rights was manifestly lacking in the State of origin.

At first glance, the position taken by the European Court in *Avotiņš v. Latvia* does not seem to be at odds with that of the CJEU.

²⁴ European Court of Human Rights, judgment of 12 July 2011, no. 14737/09: see especially paras 84 and 93-96. On this case, see P. BEAUMONT, K. TRIMMINGS, L. WALKER, J. HOLLIDAY, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, in *International and Comparative Law Quarterly*, 2015, p. 39 *et seq.* Cf. also F. SALERNO, *Giurisdizione ed efficacia delle decisioni stranieri nel Regolamento (UE) n. 1215/2012 (rifusione)*, Padova: Cedam, 2015, p. 35.

In its case-law concerning the 1968 Brussels Convention the CJEU has often reiterated that “the Brussels Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals”. However, “it is settled case-law of the Court that it is not permissible to achieve that aim by undermining in any way the right to a fair hearing”.²⁵ Accordingly, the CJEU showed a clear deference to the protection of fundamental rights, admitting that a Contracting State can refuse to recognise and to enforce a judgment if a violation of those rights occurred in the proceedings in the Member State of origin.

In particular, in *Krombach*²⁶ the CJEU held that the public policy clause provided by Art. 27, para. 1, of the Brussels Convention could come into play also when the decision to be recognised or enforced had been delivered in violation of a fundamental principle in procedural matters.²⁷ Thus, the Court placed a stronger emphasis on the requirements of the right to a fair trial as enshrined in Art. 6 of the European Convention on Human Rights and attached special importance to the case-law of the European Court²⁸. Relying on some judgments of the European Court finding a violation of Art. 6 in similar cases,²⁹ the Court of Justice found on that basis that a manifest breach of the right of defence could amount to an infringement of procedural public policy under general principles of EU law.³⁰

After the entry into force of Regulation 44/2001 the CJEU repeatedly stressed, at least in principle, the relevance of Art. 6 of the European Convention, now reaffirmed by Art. 47

²⁵ See Court of Justice, judgment of 11 June 1985, case 49/84, *Debaecker*, para. 10; judgment of 3 July 1990, case C-305/88, *Lançray*, para. 21.

²⁶ Court of Justice, judgment of 28 March 2000, case C-7/98, para. 44. For an appraisal of the judgment see, among others, S. BARIATTI, *Diritti fondamentali e diritto internazionale privato*, in L.S. ROSSI (a cura di), *La protezione dei diritti fondamentali*, Napoli: Editoriale Scientifica, 2011, p. 422 *et seq.*; A. LOWENFELD, *Jurisdiction, Enforcement, Public Policy and Res Judicata. The Krombach Case*, in T. EINHORN, K. SIEHR (eds), *Essays in Memory of Peter Nygh*, The Hague: T.M.C. Asser Press, 2004, p. 229 *et seq.*

²⁷ In the same vein, Court of Justice, judgment of 2 May 2006, case C-341/04, *Eurofood*, paras 65-66. Cf. F. SALERNO, *L'ordine pubblico internazionale processuale e la tutela dei diritti fondamentali*, in P. PIRRONE (a cura di), Torino: Giappichelli, 2011, p. 142 *et seq.*

²⁸ See especially para. 39.

²⁹ European Court of Human Rights, judgment of 23 November 1993, no. 14032/88, *Poitrimol v. France*; judgment of 21 January 1999, no. 26103/95, *Van Geyselghem v. Belgium*. It is remarkable that, subsequently to the judgment of the CJEU, the European Court of Human Rights held, as well, that the right of Mr. Krombach to a fair trial had been breached by French courts: judgment of 13 February 2001, no. 29731/96, *Krombach v. France*.

³⁰ On the role of the general principles of EU law in the definition of the content of public policy, see A. BRIGGS, *Civil Jurisdiction and Judgments*, Abingdon: Informalaw, 2015, p. 649 *et seq.*; O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano: Giuffrè, 2012, p. 94 *et seq.*; C. TUO, *Armonia delle decisioni e ordine pubblico*, in G. BIAGIONI (a cura di), *Il principio di armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, cit., p. 171 *et seq.*

of the European Charter of Fundamental Rights,³¹ for the interpretation of the grounds for refusal of recognition or enforcement set forth in Art. 34 of the Regulation. However, the CJEU also underlined that, according to the principle of mutual trust, a presumption exists as to the compatibility of a judgment emanating from another EU State with the right to a fair trial and that only exceptionally can such a presumption be rebutted.³²

Consequently, in *Gambazzi*³³ and in *Trade Agency*³⁴ the Court recalled that inconsistencies with the right to a fair trial can lead the courts of the Member State in which recognition or enforcement is sought to consider the foreign decision as incompatible with public policy.³⁵ However, in the above mentioned cases the CJEU instructed the referring courts to take into consideration only “manifest and disproportionate” breaches of the rights of defence; moreover, unlike the judgment in *Krombach*, those judgments do not contain any reference to the case-law of the European Court of Human Rights, while, especially in *Trade Agency*, a great emphasis is placed on the principle of mutual trust between Member States.³⁶

The case-law concerning Art. 34, para. 2, of the Regulation also shows a commitment of the CJEU to the observance of rights of defence. That provision (as well as Art. 45, para. 1, let. b) of Regulation 1215/2012) is modelled on Art. 27, para. 2, of the 1968 Brussels Convention, but contains some amendments restricting the scope of application of the ground for non-recognition or non-enforcement: on the one hand, it is no longer required that service of the act instituting the proceedings be “duly” effected; on the other hand, an exception is provided to the applicability of such ground for refusal when the defendant failed to challenge the decision in the Member State of origin even though a remedy was actually available to that aim.³⁷

Notwithstanding, in *ASML Netherlands* and in *Trade Agency* the Court interpreted in broad terms the powers of domestic courts in the application of the ground of non-recognition or non-enforcement concerning default judgments. Accordingly, in *ASML Netherlands* the CJEU held that the court of the Member State in which recognition or

³¹ For a clear reference to Art. 47 of the European Charter in that context, see Court of Justice, judgment of 25 May 2016, case C-559/14, *Meroni*, paras 43-44.

³² See S. BARIATTI, *Diritti fondamentali e diritto internazionale privato*, cit., p. 407.

³³ Court of Justice, judgment of 2 April 2009, case C-394/07, *Gambazzi*. For a commentary on this decision, see G. CUNIBERTI, *La reconnaissance en France des jugements par défaut anglais (à propos de l'affaire Gambazzi-Stolzenberg)*, in *Revue critique de droit international privé*, 2009, p. 685 et seq.

³⁴ Court of Justice, judgment of 6 September 2012, case C-619/10.

³⁵ However, in those two judgments the CJEU took a more cautious approach, as it did not venture into actually determining whether the decision could be considered as incompatible with public policy or not. On the contrary, it confined itself to setting forth some criteria and left the actual determination of the issue to the referring courts: see *Gambazzi*, cit., paras 41-45, and *Trade Agency*, cit., para. 61.

³⁶ See *Trade Agency*, cit., paras 40 and 43.

³⁷ The CJEU emphasised the different wording of the provision in its judgment of 14 December 2006, case C-283/05, *ASML Netherlands*, paras 18-21.

enforcement is sought can refuse recognition or enforcement when the defendant did not challenge the decision in the Member State of origin because he was simply aware of the existence of the judgment, but was not acquainted with its contents. In *Trade Agency* the Court considered that the court of the Member State in which recognition or enforcement is sought is under the obligation to verify whether the defendant was actually served with the act instituting the proceedings in the Member State of origin, irrespective of the fact that the foreign judgment is, or not, accompanied by the certificate issued by the court of origin using the standard form of the Regulation.

The entry into force of Regulation 1215/2012 is not likely to affect the interpretation of the abovementioned grounds for refusal,³⁸ as the proposal of the European Commission to amend significantly their wording and to modify the set of remedies available to the defendant at the stage of the enforcement of the foreign decision was rejected.

In addition, the CJEU remarked that the rights of defence need to be protected also within the scope of application of Regulation 805/2004 as to the certification of a decision as a European Enforcement Order³⁹ and of Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure as to the declaration of enforceability of an order for payment.⁴⁰

III.2. THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS: HOW TO STRIKE A FAIR BALANCE BETWEEN MUTUAL TRUST AND RIGHTS OF DEFENCE?

As remarked also by the Grand Chamber, *Avotiņš v. Latvia* was actually the first case in which the European Court of Human Rights was confronted with the issue of recognition and enforcement of foreign judgments under the Regulation 44/2001.

Remarkably enough, unlike the Chamber, the Grand Chamber engaged in a thorough analysis of the functioning of the EU system of mutual recognition of judgments in civil and commercial matters. The case-law of the CJEU, attempting to strike a balance between the principle of mutual recognition and the observance of the rights of defence, was also extensively quoted. The idea that the courts of EU Member States should presume the effects of another EU State's judgment to be compatible with fundamental rights was accepted. Moreover, the Grand Chamber even discussed the interpretation of Art. 34, para. 2, of Regulation 44/2001, as enshrined in the above mentioned judgments of the CJEU, clarifying that the requirement to make use of every

³⁸ S.M. CARBONE, C. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Torino: Giappichelli, 2016, p. 350; A. NUYS, *La refonte du règlement Bruxelles 1*, in *Revue critique de droit international privé*, 2013, p. 30 *et seq.*

³⁹ See Court of Justice, judgment of 17 December 2015, case C-300/14, *Imtech Marine Belgium NV*, paras 37-38.

⁴⁰ Court of Justice, judgment of 4 September 2014, joined cases C-119/13 and C-120/13, *Eco cosmetics GmbH*, paras 41-42.

remedy available in the Member State of origin to challenge the decision is in itself compatible with Art. 6 of the European Convention.⁴¹

Nonetheless, the reasoning of the Grand Chamber is clearly intended to call for a revision of some of the legal features of the EU judicial cooperation in civil matters. This impression emerges from two passages: the first is the one in which the Court stated that “the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited”;⁴² in a second passage, the Court added that “if a serious and substantiated complaint is raised before [domestic courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law”.⁴³

These *dicta* do not necessarily refer to the facts of the case or to the applicable rules of Regulation 44/2001, but are framed in general terms. In the light of the ongoing process of simplification of the procedures for recognition and enforcement of judgments as between EU Member States, the Grand Chamber takes stock of the fact that EU judicial cooperation in civil matters is not based on a uniform model, but that recent EU instruments are clearly devised in such a way as to minimise the power of the courts of the Member State of enforcement with regard to the review of foreign judgments. In that context, the Grand Chamber aims to verify, from the perspective of the correct implementation of the European Convention on Human Rights by EU Member States, to what extent such a process is admissible.

The assessment of the Grand Chamber does not call into question the traditional principle of automatic recognition of judgments and the prohibition to review them as to the substance. Likewise, the European Court does not seem to criticise the abolition of *exequatur* proceedings in itself, provided that it is accompanied by the power of domestic courts to control and to remedy possible violations of fundamental rights. In fact, the total abolition of that power of control by the courts of the State of enforcement is not considered to be acceptable, as those courts cannot, even in the proceedings for the enforcement of a foreign decision under EU measures of judicial cooperation, abdicate their role to adjudicate complaints concerning serious breaches of fundamental rights protected by the European Convention.

⁴¹ See especially para. 118. The European Court seems to imply that, even when the defendant was able to challenge the decision in the Member State of origin, at the stage of recognition or enforcement of the decision he can still complain of the failure to serve him with the document instituting the proceedings (see, however, also para. 98). See, however, Court of Justice, judgment of 28 April 2009, case C-420/07, *Apostolides*, para. 80, in which it was held that the defendant cannot rely upon Art. 34, para. 2, of Regulation 44/2001 when he was actually able to challenge the decision in the Member State of origin.

⁴² *Avotiņš v. Latvia* [GC], cit., para. 114.

⁴³ *Ibid.*, para. 116.

This point seems to mark a crucial difference between the approaches of the CJEU and of the European Court of Human Rights to the protection of fundamental rights in the European judicial area.

According to the CJEU's case-law, the courts of EU Member States are required to assume, pursuant to the principle of mutual trust, that a sufficient protection of the fundamental rights of the parties to the proceedings was ensured in the Member State of origin of the judgment. Under the applicable EU instruments, that presumption can even lead domestic courts to enforce a foreign judgment without exercising any preliminary control. Such an approach can be described as "quasi-federalist", as it builds upon the idea that, given the degree of integration reached in the European judicial area, the judgments emanating from other EU Member States can be considered as potentially equivalent to domestic judgments.

On the contrary, according to the Grand Chamber, the Member State requested should retain an active role even when EU law impose the obligation to recognise automatically or to enforce a decision emanating from another Member State.⁴⁴ This approach is consistent with the principles traditionally governing recognition and enforcement of foreign judgments, but it does not take into account the deeper integration between national legal orders achieved within the European judicial area and shows a clear scepticism about the concentration of all the available remedies for challenging the decision in the Member State of origin.

In the European Court's view, should a Contracting State completely refrain from reviewing judgments emanating from other EU Member States, it could be held responsible for the recognition or for the enforcement of a judgment adopted in violation of fundamental rights. It remains unclear whether such a conduct amounts to an autonomous violation of Art. 6, para. 1, of the European Convention or whether it entails a concurring responsibility of the Member State of enforcement for the violation committed by the Member State of origin. Be it as it may, the Grand Chamber highlighted the concurring obligation of the requested Member State to verify, before the foreign judgment is enforced, that the recognition or the enforcement of the judgment in its legal order does not entail a violation of a right protected by the European Convention.

Thus, the principles recalled by the Grand Chamber appear to be incompatible with the position of the CJEU in the already mentioned *Aguirre Zarraga* case, where it was held that under Regulation 2201/2003 a domestic court cannot refuse enforcement of a decision ordering the return of the child, as the Regulation does not provide for such a remedy, even if a serious violation of a fundamental procedural right is said to have oc-

⁴⁴ On the necessity of having at least a "minimal standard" of control concerning the compliance with the essential guarantees of Art. 6 of the European Convention, see L.R. KIESTRA, *The Impact of European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 254 *et seq.*

curred in the Member State of origin.⁴⁵ On the contrary, the reasoning of the Grand Chamber clearly implies that the courts of the Member State of enforcement should always enjoy an extraordinary power of review, in order to ensure that the protection of Convention rights is not impaired, even when no provision to that effect is contained in the applicable EU act.

In matters of recognition of judgments, public policy has traditionally fulfilled the role of preventing foreign judgments conflicting with essential principles of the national legal order from being enforced.⁴⁶ Then, the principle of the abolition of *exequatur*, even though not in contrast with the European Convention in itself, seems to run counter to the necessity to preserve the power of review of the courts of the addressed State, insofar as it implies the abolition of the public policy control, as established by several EU acts.⁴⁷ Accordingly, the control of the respect for public policy can be necessary, even within the European judicial area, in order to allow the requested State to comply with its international obligations in matters of protection of fundamental rights.

Where the protection afforded by the European Convention on Human Rights is at stake, the public policy exception provides for a flexible tool, capable to cover possible violations of fundamental rights under the ECHR;⁴⁸ moreover, given its exceptional nature, such control is expected to come into play exactly when manifest and disproportionate violations are complained of.⁴⁹

Although the case decided concerned an alleged violation of the right to a fair trial, the general tone of the judgment conveys the impression that principles established by the Grand Chamber may have a wider scope and cover the entire set of the individual rights protected by the Convention. Accordingly, the control as to the effective protec-

⁴⁵ However, it must be borne in mind that in *Aguirre Zarraga* the CJEU remarked that it was still open to the defendant to challenge the decision in the Member State of origin and that appeal proceedings had already been brought.

⁴⁶ The function of the public policy clause in the implementation of the right to a fair trial at the stage of recognition and enforcement of foreign judgments is discussed in N. BOSCHIERO, *L'ordine pubblico processuale comunitario ed "europeo"*, in P. DE CESARI, M. FRIGESSI DI RATTALMA (a cura di), *La tutela transnazionale del credito*, Torino: Giappichelli, 2007, p. 188 *et seq.*, and in C. TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, cit., p. 94 *et seq.*

⁴⁷ See especially Arts 41 and 42 of the Regulation 2201/2003, cit.; Regulation 805/2004, cit.; Regulation 4/2009, cit.

⁴⁸ On the contribution of the European Convention on Human Rights to the establishment of a "European public policy", see J. BASEDOW, *Recherche sur la fonction de l'ordre public européen dans la jurisprudence*, in *Le droit international privé: esprit et methods*, Paris: Dalloz, 2005, p. 55 *et seq.*; S. CORNELOUP, *Le contrôle de l'ordre public par la Cour européenne des droits de l'homme*, in *Journal européen des droits de l'homme*, 2013, p. 381 *et seq.*

⁴⁹ On the idea of a "standard minimal" see also P. KINSCH, *Droits de l'homme, droits fondamentaux et droit international privé*, cit., p. 292 *et seq.* See also G. CUNIBERTI, *The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency*, in *International and Comparative Law Quarterly*, 2008, p. 33 *et seq.*

tion of fundamental rights through the public policy clause should cover possible breaches of either procedural or substantive rights (for instance, the right to respect for private and family life;⁵⁰ the right to marry; the right to property;⁵¹ the right to equality between spouses,⁵² etc.).⁵³

However, the European Court seems to accept that the scope of control of the respect for public policy, as a ground for non-recognition or non-enforcement of judgments, is subject to strict interpretation, as it is provided by several EU instruments, including Regulation 1215/2012. To this regard, the European Court of Human Rights did not set out a clear threshold, but the requirement of a “serious and substantiated complaint” of manifestly deficient protection of fundamental rights appears to be compatible with the functioning of the public policy clause as defined by the CJEU in *Krombach* and in *Gambazzi*.

Under this framework, the requirement of an initiative of the defendant before the power of review of domestic courts can be exercised is also certainly acceptable. As the case of Mr. Avotiņš clearly shows, it is for the interested party to make use of the remedies available, both in the Member State of origin and in the Member State of enforcement;⁵⁴ otherwise, such party will not be able to complain about a violation of his/her fundamental rights, as such a violation would be, at least partially, attributable to his/her omission.⁵⁵

⁵⁰ The relevance of Art. 8 of the European Convention as to the recognition of foreign judgments has thus far been emphasised especially in terms of the so-called “positive public policy”, obliging Contracting States to recognise judgments implementing the right to family life in specific cases: see European Court of Human Rights, judgment of 28 June 2007, no. 76240/01, *Wagner and J.M.W.L. v. Luxembourg*; judgment of 3 May 2011, no. 56759/08, *Negrepontis-Giannisis v. Greece*. On this issue, P. KINSCH, *La non-conformité du jugement étranger à l'ordre public international mise au diapason de la Convention européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2011, p. 812 et seq.

⁵¹ See European Court of Human Rights, judgment of 18 December 2008, no. 69917/01, *Saccoccia v. Austria*.

⁵² P. HAMMJE, *Droits fondamentaux et ordre public*, in *Revue critique de droit international privé*, 1997, p. 20 et seq.

⁵³ On the invocation of substantive rights protected by the European Convention against recognition and enforcement of foreign judgments, see L.R. KIESTRA, *The Impact of European Convention on Human Rights on Private International Law*, cit., p. 275 et seq.

⁵⁴ According to the Grand Chamber, Mr. Avotiņš should have challenged the decision before the Cypriot courts lodging, at the same time, an appeal against the declaration of enforceability of such decision before the Latvian Courts. As pointed out in the dissenting opinion of the President Sajó, this interpretation of Art. 34, para. 2, of Regulation 44/2001 (which is also in line with the Opinion of AG Kokott in *Trade Agency*, cit., paras 53-64) seems to place a disproportionate burden on the defendant, who is forced to bear the costs of litigation in two different Member States, at least when he is served with the decision only at the stage of the enforcement proceedings.

⁵⁵ That solution was already envisaged by O. LOPES PEGNA, *Concentrazione delle difese nello Stato di origine e sue conseguenze per il riconoscimento e l'esecuzione delle decisioni*, in N. BOSCHIERO, P. DE CESARI (a cura di), *Verso un «ordine comunitario» del processo civile*, cit., p. 105.

IV. THE CONSEQUENCES FOR THE EU SYSTEM OF MUTUAL RECOGNITION OF DECISIONS IN CIVIL AND COMMERCIAL MATTERS

It is now possible to briefly consider some implications of the principles set out in the *Avotiņš v. Latvia* judgment by the Grand Chamber.

In assessing the impact of those principles on EU law, account must be taken that the case *Avotiņš v. Latvia* concerned the peculiar field of the recognition and enforcement of decisions in civil and commercial matters within the European judicial area. In that context, the rules contained in EU instruments only provide the necessary framework in order to facilitate the circulation of judgments, but these judgments remain, at least at the present stage of the European integration, the output of a national legal order, as domestic proceedings in civil and commercial matters are governed by EU law only to a very limited extent. Thus, the solution here envisaged by the Grand Chamber, involving the instrumental role of Member States, rather than of the EU, in the implementation of the protection of fundamental rights, cannot be assumed as a general paradigm.

However, mutual recognition of judgments, both in civil and in criminal matters, constitutes the very cornerstone of the European judicial area under Arts 81 and 82 TFEU. Accordingly, the diverging views of the CJEU and of the European Court of Human Rights as to the application and to the limits of the principle of mutual recognition cannot but result in a different appraisal of the overall functioning of the European judicial area. The judgment in *Avotiņš v. Latvia* is certainly directed, according to the scheme of judicial dialogue,⁵⁶ to influence the attitude of the CJEU in defining the functioning of the EU system of mutual recognition of decisions.

As yet, the CJEU has placed a very strong emphasis on the effectiveness of the EU system of recognition and enforcement of decisions in civil and commercial matters, founded on the principles of free circulation and of mutual trust between national judges. Thus, the CJEU repeatedly stressed the autonomy of that system – or rather of the different regimes established by the various EU Regulations – insofar as it spells out the respective powers of the courts of the Member State of origin and of the requested Member State, entrusting principally the former with the task of ensuring the protection of fundamental rights in the proceedings before them. The process should ultimately lead to the establishment of a European judicial area without internal borders, in which “abolition, pure and simple, of any checks on the foreign judgment by courts in the requested country allows national judgments to move freely throughout the Union. Each requested State treats these national judgments as if they had been delivered by one of its own courts”, as it was proposed, for instance, in the 2000 draft programme of

⁵⁶ On the general issue, S. DOUGLAS-SCOTT, *The Court of Justice of the European Union and the European Court of Human Rights After Lisbon*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford and Portland: Hart Publishing, 2013, p. 153 *et seq.*

measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.⁵⁷

The judgment of the Grand Chamber seems to require a reconsideration of the overall idea. In fact, the obligation of the addressed Member State to perform a review of foreign judgments, in order to prevent cases of manifestly deficient protection of Convention rights, does not allow domestic courts to treat judgments delivered in other EU Member States as national judgments. The *dicta* of the Grand Chamber may thus hamper the integration process in the European judicial area, as they emphasise the individual responsibility of EU Member States in the protection of fundamental rights, while the role of the EU cooperation is limited to allowing the application of the presumption of equivalent protection.

However, it must be added that the CJEU still admits that the recognition of a judgment under the EU instruments leads to it being “incorporated into the legal order of the Member State in which enforcement is sought”.⁵⁸ In that context, the autonomous character of the EU system of mutual recognition of judgments cannot lead to overlook that it is for every Contracting State of the European Convention to ensure that fundamental rights be protected in its legal order.

Turning to the existing framework in civil and commercial matters, the instrument that can give rise to most difficulties is Regulation 2201/2003, as, in matters of right of access and return of abducted children, the principle of mutual recognition, entailing the presumption of observance of fundamental rights by the Member State of origin, requires the courts of the Member State of enforcement to recognise and to enforce *automatically and mechanically* foreign decisions.

For these reasons, the practical effect of the relevant provisions of Regulation 2201/2003, leading to the circulation of judgments in absence of any public policy control and of any evaluation as to the observance of the rights of defence, does not seem consistent with the requirements imposed by the European Convention on Human Rights.

But even EU instruments allowing to a certain extent a power of review of the judgment to be recognised or enforced only through the remedies available in the Member State of origin (namely Regulation 4/2009 and Regulation 805/2004) are likely to grant an insufficient degree of protection of fundamental human rights, as they leave the courts of other Member States no discretion whatsoever in deciding whether enforcement of the decision should be granted. In so doing, those instrument actually deprive the courts of the addressed State of the power to ascertain that in specific circumstances the guarantee of individual rights was manifestly deficient.

⁵⁷ Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (2001/C 12/01), section II.A, para. 2, let. b).

⁵⁸ Court of Justice, judgment of 13 October 2011, case C-139/10, *Prism Investments*, para. 40.

In addition, the unusually detailed reasoning on the interpretation of Art. 34, para. 2, of Regulation 44/2001 with regard to the very peculiar issue of the burden of proof⁵⁹ shows that in the European Court's view, when a ground of non-recognition or non-enforcement pertaining to the protection of fundamental rights is invoked, that complaint must be examined in full detail by the courts of the addressed State.

Obviously, it is still to be seen whether the EU institutions will take into account the judgment of the Grand Chamber in the revision of existing instruments⁶⁰ or in the enactment of new instruments in the field of judicial cooperation in civil matters. However, one may wonder whether the CJEU will be ready to align itself with the above summarised remarks of the European Court of Human Rights.

It would not be correct to jump to the conclusion that the CJEU is already familiar with that approach, as it was upheld in the recent judgment in *Aranyosi and Čaldararu*,⁶¹ concerning the interpretation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. In that case the CJEU accepted that the executing judicial authority can delay the execution of a European arrest warrant and request supplementary information, when in the issuing Member State there are systemic or generalised deficiencies with regard to detention conditions.

The rationale of that judgment cannot be transposed as such to the field of judicial cooperation in civil matters, as in *Aranyosi and Čaldararu* the CJEU referred to the absolute prohibition of inhuman or degrading treatments and to the fundamental value of human dignity, that must be protected in any circumstances. Moreover, in that context the CJEU was able to rely upon the existing case-law of the European Court of Human Rights concerning the violation of Convention rights with regard to detention conditions by Hungarian and Romanian authorities.

Now, the judgment in *Avotiņš v. Latvia* seems to call for a partial departure from the key principle of mutual trust between the judicial authorities of Member States even in civil and commercial matters. It is still to be seen whether the CJEU will accept the guidance of the Grand Chamber on that point or whether it will be reluctant to deviate from

⁵⁹ On this issue, see O. LOPES PEGNA, *Concentrazione delle difese nello Stato di origine e sue conseguenze per il riconoscimento e l'esecuzione delle decisioni*, cit., p. 107.

⁶⁰ Regulation 2201/2003 is currently under revision following the initiative of the European Commission: see the Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility and on international child abduction (recast), COM(2016) 190. In matters of recognition and enforcement of decisions concerning right of access or ordering the return of an abducted child, the proposal contains an amended Art. 54 providing for a procedure for rectification or withdrawal of the certificate annexed to the decision, modelled on Art. 10 of Regulation 805/2004.

⁶¹ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Čaldararu*. The judgment is mentioned in the dissenting opinion of President Sajó, para. 9.

its settled case-law and to abandon its own perspective on the core values of the European judicial area.