

PROCEDURAL HARMONIZATION, MUTUAL RECOGNITION AND MULTI-LEVEL PROTECTION OF FUNDAMENTAL PROCEDURAL RIGHTS*

ARMONIZACIÓN DE PROCEDIMIENTOS,
RECONOCIMIENTO MUTUO Y PROTECCIÓN
MULTINIVEL DE LOS DERECHOS PROCESALES
FUNDAMENTALES

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Abstract

The present work seeks to highlight the evident “links” between the aims pursued by the european legislator and the methods used, the intensity of the level of approximation and the aspects of european procedural law harmonized through mutual recognition and the principle of effectiveness. The aim is to carry out a discussion on the state of approximation and harmonization of the procedural rules within the european civil judicial area, but also a conclusive analysis on the perspectives of the evolution of the subject, about an overview of the various modalities and tools used in the harmonization process.

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The possibility of a transition from a strictly sectoral process harmonization model to a structural one will be assessed, by defining, at Union level, a set of fundamental principles by bringing together and examining a wide jurisprudence both by the Court of Justice of the European Union. To determine not only if this is possible in the current approach of the Treaties, but also if such an evolution is desirable and actually achievable.

Key words: mutual trust, principio di effettività, ECtHR, CJEU, recognition of foreign sentences, european procedural law, harmonization, european integration.

Resumen

El presente trabajo busca resaltar los “vínculos” evidentes entre los objetivos perseguidos por el legislador europeo y los métodos utilizados, la intensidad del nivel de aproximación y los aspectos del derecho procesal europeo armonizados a través del reconocimiento mutuo y el principio de efectividad. El objetivo es llevar a cabo una discusión sobre el estado de aproximación y armonización de las normas procesales dentro del área judicial civil europea, pero también un análisis concluyente sobre las perspectivas de la evolución del tema, sobre una visión general de las diversas modalidades y herramientas. Utilizado en el proceso de armonización. La posibilidad de una transición de un modelo de armonización de procesos estrictamente sectorial a uno estructural se evaluará, definiendo, a nivel de la Unión, un conjunto de principios fundamentales al reunir y examinar una amplia jurisprudencia tanto por el Tribunal de Justicia de la Unión Europea. Para determinar no solo si esto es posible en el enfoque actual de los Tratados, sino también si tal evolución es deseable y realmente alcanzable

Palabras claves: confianza mutua, principio de efectividad, TEDH, TJUE, reconocimiento de sentencias extranjeras, derecho procesal europeo, armonización, integración europea.

Introduction

The construction of a european civil justice area is one of the most successfully pursued objectives of the European Union in recent decades¹. The main purpose

¹ See ex multis, L. GLAS, G. KROMMENDIJK, From opinion 2/13 to Avotjns: Recent developments on the relationship between the Luxembourg and Strasbourg Courts, in *Human Rights Law Review*, 17 (2), 2017, pp. 568ss. M. HORSPOOL, M. HUMPHREYS,

of such a common space is to provide citizens and businesses with easy and effective access to cross-border justice, also in order to facilitate the complete realization of a barrier-free market by removing legal obstacles to free movement of people, goods and capital.

Especially with regard to the free circulation of foreign judgments, it has been shown that the process of procedural harmonization² has evolved asymmetrically with respect to the principle of mutual recognition³, in the sense that an ever greater ease of circulation of such decisions has not corresponded an equally profound harmonization of the legal systems of the Member States. More specifically, following the transfer from the Member States to the EU of the jurisdiction relating to the recognition and enforcement of foreign legal measures⁴, the EU legislator has not in parallel developed a set of common provisions to “infuse”, to within the legal systems of the Member States, an adequate level of protection of fundamental rights⁵, but rather preferred to build an area of free movement of decisions based on the principle of mutual trust⁶.

In particular, according to the writer the Court of Justice of the European Union (CJEU) is concerned with fundamental rights only as part of that (i.e. EU) order. This means solicitude for international human rights agreements comes

European Union law, Oxford University Press, Oxford, 2016. D. LIAKOPOULOS, *Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile*, in *Juris Gradibus*-working paper, 20. D. HALBERSTRAM, “It’s the autonomy, stupid!” A modest defense of opinion 2/13 on EU accession to the ECHR, and the way forward, (2015) in *German Law Journal*, 16, 2015, pp. 114ss. P. E. ECKHOUT, *Opinion 2713 on european union accession to the ECHR and judicial dialogue. Autonomy or autarky*, in *Fordham International Law Journal*, 38 (4), 2015, pp. 964ss.

² D. LIAKOPOULOS, *European integration and its relation with the jurisprudence of European Court of Human Rights and private international law of European Union*, in *Homa Publica. Revista Internacional de Direitos Humanos e Imprensa*, 2 (2), 2018.

³ N. ANDREWS, *Fundamental principles of civil procedure: Order out of chaos*, in X.E. KRAMER, C.H. VAN RHEE (eds.), *Civil litigation in a globalising world*, T.M.C. Asser Press, The Hague, 2012.

⁴ D. LIAKOPOULOS, *Recognition and enforcement of foreign sentences in European Union context: The italian and german private international law cases*, in *International and European Union Legal Matters*-working paper series, 2010.

⁵ S. DOUGLAS-SCOTT, N. HATZIS, *Research handbook on European Union law and human rights*, Edward Elgar Publishers, Cheltenham, 2017, p. 511ss.

⁶ M. FALLON, T. KRUGER, *The spatial scope of the EU’s rules on jurisdiction and enforcement of judgments: From bilateral modus to unilateral universality?*, in *Yearbook of Private International Law, 2012-2013*, pp. 6ss.

with a caveat⁷. The CJEU will show solicitude for international human rights agreements only in so far as these international agreements do not undermine the legal and constitutional architecture of the European Union. This is indeed seems to be the attitude of the CJEU, and it is quite extraordinary. Surely a commitment to human rights is of little value if it cannot apply even in those cases in which the enforcement of a right may undermine the participant state's constitutional architecture? The issue of prisoners' votes in the UK has proved controversial, partly because the decision of the European Court of Human Rights (ECtHR) in *Hirst v. United Kingdom* of 6 October 2005 collides with the UK constitutional principle of Parliamentary sovereignty, given that primary legislation disenfranchises sentenced prisoners in the UK⁸.

It does mean that the principle of trust interpreted through the role of the CJEU and dropped in the context of judicial cooperation, implies a presumption of a quite absolute respect for fundamental rights within the legal system of origin, of the fact that in every State of Union are available remedies capable of rectifying any violations of these rights⁹. Therefore, such a transfer of powers-combined with the latter principle-necessarily postulates that the limitations of sovereignty over the procedures for the control, recognition and enforcement of foreign court documents, and consequently of the judgments of the courts of other Member States, invest also the sphere of protection of fundamental rights¹⁰.

1. Mutual recognition and protection of fundamental rights within the Union

The CJEU in Opinion 2/13¹¹ on the European Convention of Human Rights (ECHR) project has specified how mutual trust between Member States

⁷ D. LIAKOPOULOS, First considerations and discussion of the proposed reform of litigation competences of the Court of Justice of the European Union, in International and European Union Legal Matters-working paper series, 2018.

⁸ D. LIAKOPOULOS, Protection of human rights between European Court of Human Rights and Court of European Union, in International and European Union Legal Matters, 2015

⁹ D. LIAKOPOULOS, La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux, in International and European Union Legal Matters-working paper series, 2012.

¹⁰ T. TRIDIMAS, Bifurcated justice: The dual character of judicial protection in EU law, in A. ROSAS, E. LEVITS, Y. BOT, The Court of Justice and the construction of Europe: Analyses and perspectives on sixty years of case-law, ed. Springer, The Hague, 2013, pp. 368ss.

¹¹ Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECJ, 18 December 2014, ECLI:EU:C:2014:2454.

presupposes a prohibition for the latter to “demand from another Member State a level national protection of fundamental rights higher than that guaranteed by EU law “which,” except in exceptional cases (...) to verify whether that other Member State has effectively respected, in a specific case, the fundamental rights guaranteed by Union”¹². According to the writer: Opinion 2/13 confirms

¹² CJEU, opinion of 18 December 2014, P-2/13. L. HALLESLOV STORGAARD, European Union law autonomy versus european fundamental rights protection. On opinion 2/13 on EU accession to the ECHR, in *Human Rights Law Review*, 15 (3), 2015, pp. 487ss. On the one hand, the art. 53 does not oblige the States to guarantee a higher level of protection than that of the ECHR, on the other the same CFREU must guarantee the same level of protection of the ECHR so that there is no conflict between the two provisions. Moreover, the CJEU has evoked the specificity of the Union’s control system on respect for fundamental rights, in particular the principle of mutual trust in the areas of civil and criminal judicial cooperation, visa, asylum and immigration, namely the area of freedom, security and justice that obliges each member state to presume respect for fundamental rights by the other member states and the absence of their jurisdictional powers in the field of foreign and security policy. See also in case: C-168/13 PPU, *Jeremy F.* of 30 May 2013, ECLI:EU:C:2013:358, published in the electronic Reports of the cases. The CJEU affirmed that: “(...) the absence of the necessary provisions of the Framework it frameworks, it must be that the framework for the implementation of the objectives of the framework to a European Arrest Warrant (...)”. In the same spirit see also. CJEU, C-399/11, *Stefano Melloni* of 26 February 2013, ECLI:EU:C:2013:107; C-396/11, *Ministerul Public-Parchetul de pe lângă Curtea de Apel Constanța v. Radu* of 29 January 2013, ECLI:EU:C:2013:39, both of them published in the electronic Reports of the cases. F.M.W. BILLING, *The right to silence in transnational criminal proceedings. Comparative law perspectives*, ed. Springer, Berlin, 2016, pp. 323ss. C. JANSSENS, *The principle of mutual recognition in European Union law*, Oxford University Press, Oxford, 2013, pp. 208ss. F. KORENICA, *The EU accession to the ECHR: Between Luxembourg’s search for autonomy and Strasbourg’s credibility on human rights protection*, ed. Springer, Berlin, 2015, pp. 282ss. S. MORANO-FOADI, L. VICKERS (eds.), *Fundamental Rights in the EU-A matter for two Courts*, Oxford University Press, Oxford, 2015. T. LOCK, *The future of EU accession to the ECHR after Opinion 2/13: Is it still possible and is it still desirable?*, in *Edinburgh School of Law Research Paper Series*, 2015. F. PICOD, *La Cour de justice a dit non à l’adhésion de l’Union européenne à la Convention EDH*, in *La Semaine Juridique, Édition Générale*, 2015, pp. 230, 234. J.P. JACQUÉ, *The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, in *Common Market Law Review*, 48 (4), 2011, pp. 995, 1005. S. PEERS, *The EU’s Accession to the ECHR: The dream becomes a nightmare*, in *German Law Journal*, 16, 2015, pp. 213, 222. E. SPAVENTA, *A very fearful Court? The protection of fundamental rights in the European Union after Opinion 2/13*, in *Maastricht Journal of European and Comparative Law*, 22, 2015, pp. 51ss. M. KUIJER, *The accession of the European Union to the ECHR: A gift for ECHR’s 60th anniversary or an unwelcome intruder at the party?*, in *Amsterdam Law Forum*, 4 (3), 2011, pp. 17-32. C. LADENBURGER, *Vers l’adhésion de l’Union européenne à la Convention européenne des droits de l’homme*, in *Revue Trimestrielle de Droit Européen*, 47 (1), 2011, pp. 20-26. T. LOCK,

a pluralist conception of the relationship between EU law and the ECHR. On the pluralism spectrum it is a conception that is closer to radical pluralism than to the softer versions of constitutional pluralism. The CJEU emphasizes its exclusive jurisdiction in EU law, and does not accept the kind of interference with EU law that the accession agreement would entail by allowing the ECtHR to look into matters of EU law. It emphasizes the autonomy of EU law, confirming its own position as the ultimate and, at least formally, unfettered authority on all EU law matters. It insists on having the last word. The protection of fundamental rights is a central pillar of the EU law edifice, and the CJEU cannot accept that in such a core area of EU law it is formally and fully bound by ECtHR case law, and

The ECJ and the ECtHR: The Future Relationship between the Two European Courts, in *The Law and Practice of International Courts and Tribunals*, 8, 2010, pp. 375-398. D. ASHIAGBOR, N. COUNTOURIS, I. LIANOS, *The European Union after the Treaty of Lisbon*, Cambridge University Press, Cambridge, 2012, pp. 109-135. N. O'MEARA, A more secure Europe of rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR, in *German Law Journal*, 12, 2011, pp. 1813-1832. J. POLAKIEWICZ, EU law and the ECHR: Will the European Union's accession square the circle?, in *European Human Rights Law Review*, 6, 2013, pp. 592-605. A. POTTEAU, Quelle adhésion de l'Union Européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?, in *Revue Générale Droit International Public*, 115, 2011, pp. 77-111. A. TORRES PEREZ, Too many voices? The prior involvement of the Court of Justice of the European Union? in *European Journal of Human Rights*, 40, 2013, pp. 565-583. L. BESSELINK, M. CLAES, J.H. REESTMAN, A Constitutional moment: Acceding to the ECHR (or not), in *European Constitutional Law Review*, 11, 2015, pp. 2ss. D. HABELSTAM, It's autonomy stupid. A modest defense of Opinion 2/13 on EU accession to the ECHR, and a way forward, in *Michigan Law Paper* 105, 2015. L.H. HALLESKOV STORGAARD, EU law autonomy versus european fundamental rights protection-On Opinion 2/13 on EU accession to the ECHR, in *Human Rights Law Review*, 15, 2015, pp. 485. J.P. JACQUÉ, CJUE-CEDH: 2-0, in *Revue Trimestrielle de Droit Européen*, 40 (4), 2014 pp. 823ss. C. KRENN, Autonomy and effectiveness as common concerns: A path to ECHR accession after Opinion 2/13, in *German Law Journal*, 16 (1), 2015, pp. 147ss. S. LAMBRECHT, The sting is in the Tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights, in *European Human Rights Law Review*, 15 (1), 2015, pp. 185ss. M. PETITE, The battle over Strasbourg: The protection of human rights across Europe has suffered a setback, thanks to the Court of Justice of the European Union, in *Competition Law Insight*, 2015, pp. 10ss. R.A. WESSEL, A. ŁAZOWSKI, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR, in *German Law Journal*, 16, 2015, pp. 179ss. B. DE WITTE, Article 53, in S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 1523-1538. J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014, pp. 813-826. J.P. JACQUÉ, La Cour de Justice de l'Union et l'application de la Charte dans les Etats membres: "Mehr Licht", in *European Yearbook on Human Rights*, 14, 2014 pp. 125-147.

therefore subservient to a non-EU court. It is obvious that after Opinion 2/13 the relationship between the CJEU and the ECtHR is unlikely to return to the past golden years of mutual respect and cooperation. It will be difficult for Strasbourg not to look at the Opinion as a rejection of its core judicial function: to serve as an external control organ for human rights violations in Europe. It will also be difficult for the CJEU not to travel further along the path of developing its own, autonomous system of human rights protection, focused on the Charter FREU rather than the ECHR. Some commentators draw an analogy with how constitutional and supreme courts in some EU Member States deal with the effects of Strasbourg case law: as an obligation to do no more than to “take account” of that case law. The CJEU would continue to take the ECtHR judgments into account when interpreting corresponding Charter of Fundamental Rights of the European Union (CFREU) provisions, as indeed it did in judgments delivered on the same date as Opinion 2/13. Even if that were the case, the general constellation is very different. The EU Member States are all formally bound by the ECHR, and are therefore under an international law obligation to comply with the ECtHR’s rulings. Against such a background of international obligation, there may be good reasons for leaving some space for judicial debate by rejecting slavish incorporation of ECtHR case law—even if it involves threading a fine line between constructive dialogue and respect for the ECHR. But the EU is not bound by the ECHR, and the ECtHR cannot issue judgments against the EU. That is a fundamentally different stage on which the two courts interact. A mere “taking account” of ECtHR case law by the CJEU will effectively send the message that, in the sphere of human rights protection, the two courts are equal, and that the ECHR and the CFREU are equivalent documents. Coupled with the expansion of EU law, and with its claims to supremacy and direct effect, this equality message risks being read as undermining the ECtHR’s core judicial function. It would be unfortunate for the Opinion 2/13 and the EU’s non-accession to contribute to a general split in conceptions of human rights protection across the European continent. In theoretical terms, it has opted for a version of radical legal pluralism, which enables it to confirm its supreme authority, unhindered by the integration of the ECHR system¹³. Whilst there are clearly difficulties and disadvantages associated with a formalized relationship between the two European courts, the conversion of EU law into a Fortress Europe risks becoming self-destructive. There is, in this respect, not only the relationship with the ECtHR or other international courts and tribunals, but also, much more vitally, with national constitutional and supreme courts.

¹³ D. LIAKOPOULOS, Interactions between European Court of Human Rights and private international law of European Union, in *Cuadernos de Derecho Transnacional*, 10 (1), 2018.

And indeed, the whole system of free circulation of decisions would inevitably be frustrated if a national judge could, even on the basis of an alleged violation of apical rights, go to re-examine the content of the provision issued by a court or a court of a different State Member¹⁴. Certainly, the intensity and the declination of the principle of mutual trust can vary according to the sector involved: from the execution and the automatic recognition imposed by articles 41-42 (1) and 43 (2) of Regulation 2201/2003 (Brussels II-bis¹⁵, to the classical scheme of the grounds for refusal of execution contemplated by Regulation 1215/2012¹⁶. Nevertheless, except of particular cases it always presupposes that the respective national legal systems “are capable of providing equivalent and effective protection of fundamental rights, recognized at the level of the Union, in particular in the CFREU”¹⁷ and that the moment of guaranteeing

¹⁴ D. LIAKOPOULOS, The influence of EU law on national civil procedural law: Towards the adoption of common minimum standards?-La influencia de la legislación de la UE en el derecho procesal civil nacional: ¿hacia la adopción de normas mínimas comunes?, in *Revista General de Derecho Europeo*, 46, 2018.

¹⁵ 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. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final. See in argument: M. STORME, Harmonisation of civil procedure and the interaction with substantive private law, in X.E. KRAMER, C.H. VAN RHEE, *Civil litigation in a globalizing World*, T.M.C. Asser Press, The Hague, 2012, pp. 142ss. W. VAN BALLEGOOI, The nature of mutual recognition in european law, ed. Intersentia, Antwerp & Oxford, 2015. C.M. CAAMIÑA DOMÍNGUEZ, La “supresión” del exequatur en el R 2201/2003, in *Cuadernos de Derecho Transnacional*, 3, 2011, pp. 66ss. G. CUNIBERTI, Abolition de l'exequatur et présomption de protection des droits fondamentaux, in *Revue Critique de Droit International Privé*, 103 (1), 2014, pp. 304ss. T. PFEIFFER, The abolition of exequatur and the free circulation of judgments, in F. FERRARI, F. RAGNO (eds) *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, ed. Wolters Kluwer/Cedam, The Hague, 2016, pp. 188ss. M. THÖNE, Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht, ed. Mohr Siebeck, Tübingen, 2016. A. HAMED, K. TATSIANA, A step forward in the harmonization of european jurisdiction: Regulation Brussels I Recast, in *Baltic Journal of Law & Politics*, 9, 2016, pp. 162ss.

¹⁶ F. GASCÓN-INCHAUSTI, La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis, in E. GUINCHARD (eds), *Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, ed. Larcier, Bruxelles, 2014, pp. 210ss.

¹⁷ CJEU, C-491/10 PPU, *A. Zarraga v. Pelz* of 22 December 2010, ECLI:EU:C:2010:828, I-14247, par. 70. N. TRAVERS, A. WHELAN, *Of courts and constitutions. Liber*

fundamental rights is firmly established in the origin of the dispute, and cannot resurface in any other Member State in which the execution or recognition of the foreign pronouncement is required.

For the time being, a structured action by the legislator aimed at infusing into national law effective judicial protection of a European nature, through the definition of common procedural rules, clearly emerges from the examination of the adopted acts on the basis of the main procedural competence pursuant to art. 81 TFEU¹⁸. In fact, like many of the measures adopted, regardless of their defensive or proactive nature, they have gone to influence the procedural legislation not so much to guarantee a higher level of protection to the procedural rights, but rather to ensure a better level of effectiveness Union¹⁹, or to pursue the objectives of completing the internal market of pre-Lisbon civil judicial cooperation. We refer, among the most important, to the minimum standards of free legal aid in cross-border disputes established by Directive 2003/08/EC²⁰ and to the special procedures outlined by the so-called optional instruments that do not “harmonize”-excluding the effects deriving from a possible reverse discrimination-national legislation in the strict sense, but rather offer the citizen the possibility of opting for an alternative procedure (that is, harmonized) with respect to that provided for under national law.

More specifically, Directive 2003/08/EC, as well as optional instruments, may be included in the context of cross-border disputes. In contrast, the system of free circulation of intra-European judgments includes any judicial measure issued by a Member State, regardless of whether it concerns a purely internal

amicorum in honour of Nial Fennelly, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 40ss. D. ACOST ARCARAZO, C.C. MURPHY, European Union security and justice law. After Lisbon and Stockholm, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 25ss. A. BRIGGS, The conflict of laws, Oxford University Press, Oxford, 2013, pp. 362ss.

¹⁸ R. BIEBER, F. MAIANI, Précis de droit européen, ed. Stämpfli, Berne, 2011. C. BLUMANN, L. DUBOIS, Droit institutionnel de l'Union européenne, LexisNexis, Paris, 2013, pp. 478ss. C. BOUTAYEB, Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux, LGDJ, Paris, 2014, pp. 119-125. J.L. CLERGERIE, A. GRUBER, P. RAMBAUD, L'Union européenne, ed. Dalloz, Paris, 2014, pp. 543-545. M. DONY, Droit de l'Union européenne, Bruxelles, Editions de l'Université de Bruxelles, 2014. J.C. GAUTRON, Droit européen, Dalloz, Paris, 2012, pp. 24ss.

¹⁹ J.M. SÁNCHEZ GARCÍA (2017a), El principio de efectividad en la jurisprudencia del TJUE en materia de consumidores y su repercusión sobre los efectos de la cosa juzgada regulada en la LEC, in Revista Jurídica de Catalunya, 116 (1), 2017, pp. 14ss.

²⁰ Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC, L 52/50.

or cross-border dispute, and regardless of whether the merits of the latter are governed by Union or national rules. However, such an inaction of the legislature to intervene directly on the question of the protection of fundamental procedural rights seems to be based mainly on two reasons.

Firstly, there must be a certain slowness of the institutions of the Union, especially of Council, in transiting from a merely “recognition” perspective of the fundamental rights inherent in the constitutional arrangements of the Member States—anchored to an outdated conception of a Europe of markets—to a more “proactive”, aimed not only at recognizing, but also at instilling and promoting these rights within national laws by means of Union legislation. Vision, the latter, which would lend itself more to the idea of a Europe of rights, laboriously built by the Treaty of Amsterdam before, and then by the Treaties of Nice and Lisbon. In fact, what transpires from the lack of legislative acts aimed at realizing the dictates of article 47 CFREU²¹, even within areas in which the Union enjoys the widest possible competence, is in fact still probably the idea that—although the EU law recognizes and protects fundamental rights—it is primarily up to the Member States to ensure that these rights receive adequate protection. Although the rights guaranteed by CFREU have a substantially universal scope, this does not extend the competences of the Union beyond what is defined in the Treaties. Therefore, even if a low level of procedural harmonization in the areas covered by articles 81 and 114–115 TFEU²² can partly be attributed to an inertia of the

²¹ See in particular: P. GILLIAUX, *Droit(s) européenne(s) à un procès équitable*, ed. Bruylant, Bruxelles, 2012. C. PICHERAL, *Le droit à un procès équitable au sens du droit de l'Union européenne*, ed. Anthemis/Nemesis/Limal, Bruxelles, 2012. M. SILVEIRA, A. CANOTILHO, *Carta dos direitos fundamentais da União Europeia*, ed. Almedina, Coimbra, 2013, pp. 537ss. S. CIMAMONTI, L. TRANCHANT, J.Y. CHÉROT, J. TREMEAVU, *Le droit entre autonomie et ouverture. Mièlanges en l'honneur de Jean-Louis Bergel*, ed. Larcier, Bruxelles, 2013, pp. 920ss. T. KERIKMÄE, *Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights*, ed. Springer, Berlin/Heidelberg, 2014, pp. 80ss. M. SAFFIAN, D. DÜSTERHAU, *A Union of effective judicial protection: Addressing a multi-level challenge through the lens of article 47 CFREU*, in *Yearbook of European Law*, 33 (1), 2014, pp. 3ss. G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, in *Revue Trimestrielle des Droits de l'Homme*, 106, 2016, pp. 433ss. C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in european private law matters*, in *Amsterdam Law School Research Paper No. 2012-88. Centre for the Study of European Contract Law Working Paper Series No. 2012-11*.

²² R. BIEBER, F. MAIANI, *Précis de droit européen*, op. cit., C. BLUMANN, L. DUBOIS, *Droit institutionnel de l'Union européenne*, op. cit., N.N. SHUIBHNE, L.W. GORMLEY (a cura di), *From single market to Economic Union. Essays in memory of John A. Usher*, Oxford University Press, Oxford, 2012, pp. 176ss. A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), *A constitutional order of States. Essays in*

European legislator, or to a lack of agreement between the Member States, this cannot be said for the whole of civil matters, although it does not seem possible to find in the Treaties any article capable of conferring on the Union a general competence in the procedural matter.

This lack constitutes, together with a possible restrictive interpretation of article 19 TUE²³, a significant obstacle to any structural and generalized intervention of harmonization in the field of civil procedural law-a prerequisite for a common protection of fundamental procedural rights-which arises well before the formation of a political will of the institutions of the Union, or of reaching an agreement between the Member States. On the legislative level, therefore, the protection of fundamental procedural rights enshrined in the CFREU is entrusted-with the exclusion of some limited acts or provisions scattered- to the individual legal systems of the Member States.

A system is therefore created in which the protection of fundamental rights is mainly centralized in the Member State of origin of the dispute and is realized on the basis and within the limits imposed by the rules of national law. The suitability of such rules to offer adequate guarantees to fundamental rights is then recognized, by means of the principle of mutual recognition²⁴, within the legal systems of all the other countries of the Union. However, this does not mean that the Union completely abdicates its role as guarantor of compliance with CFREU. Specifically, there are basically three mechanisms through which the Union can ensure that fundamental procedural rights are properly respected.

The first two refer to a local dimension, in the sense that-in accordance with the provisions of article 52 CFREU²⁵ and article 19 (1) TEU-these mechanisms

European Union law in honour of Alan Dashwood, Oxford University Press, Oxford, 2011, pp. 7ss.

²³ J.L. CLERGERIE, A. GRUBER, P. RAMBAUD, *L'Union européenne*, op. cit.

²⁴ T. WISHMEYER, *Generating trust through law? Judicial cooperation in the European Union and the "principle of mutual trust"*, in *German Law Journal*, 17, 2016, pp. 342ss.

²⁵ According to our opinion: The question arises as to how this standard test for justification of limitations of fundamental rights sits with Article 52(1) CFREU which is indeed increasingly applied in cases governed by the Charter provisions. That article comprises a number of elements: the limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected. As to the grounds of general interest that may serve to limit Article 47 CFREU such as overriding considerations pertaining to the security of the EU or of its Member States when the disclosure of information is at issue or the existence of swift, effective and less costly dispute settlement or certain judicial proceedings, it would not seem that Article 52(1) brings about important

ensure compliance with the rights established by the latter exclusively in the implementation of Union law²⁶. This refers, in particular, to the protection offered by the CJEU by means of the preliminary reference system, or by the European Commission (EC) through the possible activation of an infringement procedure, in terms of their primary objective, both under their mandatory nature²⁷. The principle of effectiveness, intended to safeguard the effective application of EU law, is in fact a naturally negative obligation²⁸. In essence, it postulates an obligation not to make substantive in not making the protection of legal positions guaranteed by EU law impossible or excessively difficult. Otherwise, the right to effective judicial protection, which guarantees the prerogatives of the individual, also contains an intrinsic positive component, which may require, for example, the creation of a new jurisdictional remedy previously unknown to the legal system of the Member State, or the granting of legal aid²⁹, exemption from court fees, the obligation to raise a particular procedural exception *ex officio*³⁰.

changes compared to the pre-Charter regime. The same is true in relation to the proportionality test. For the analysis of the above article see: K. LENAERTS, Exploring the limits of the EU Charter of Fundamental Rights, in *European Constitutional Law Review*, 2012, pp. 375ss. N. LAZZERINI, (Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS, in *Common Market Law Review*, 51 (4), 2014, pp. 908ss. J. KROMMENDIJK, Principled silence or mere silence on principles? The role of the EU Charter's principles in the case law of the court of Justice, in *European Constitutional Law Review*, 11 (2), 2015, pp. 322ss.

²⁶ S. PRECHAL, R. WIDDERSHOVEN, Redefining the relationship between “Rewe-effectiveness” and effective judicial protection, in *Review of European Administrative Law*, 6 (1), 2011, pp. 31-32, 38ss.

²⁷ A.F.M. BRENNINKMEIJER, The influence of Court of Justice case law on the procedural law of the Member States, in J.A.E. VERVAELE (a cura di), *Administrative law application and enforcement of community law in the Netherlands*, Kluwer Law International, 1994, pp. 104ss.

²⁸ CJEU, C-226/99, *Siples Srl.* of 11 January 2001, ECLI:EU:C:2001:14, I-00277. P. CRAIG, G. DE BÚRCA, *European union law. Text, cases and materials*, Oxford University Press, Oxford, 2011.

²⁹ That the fundamental rights of the person were part of the general principles of EU law had in fact already been established for some time CJEU, case C-11/70, *Stauder* of 12 November 1969, ECLI:EU:C:1969:114, I-01125, par. 7; Case C-617/10, *Fransson* of 26 February 2013, ECLI:EU:C:2013:10, published in electronic reports of the cases, par. 19ss. It is no coincidence that references to the most prominent court rulings are aimed solely at enhancing the binding nature of the general EU principles (CJEU, C-4/73, *Nold* of 14 May 1974, ECLI:EU:C:1974:51, I.00491, par. 13; case C-44/79, *Hauer* of 13 December 1979, ECLI:EU:C:1979:290, I-03727, parr. 15-16; case C-5/88, *Wachauf* of 13 July 1989, ECLI:EU:C:1989:321, I-02669, par. 17) although, constant references to the content of the Convention as a parameter to determine the content of these principles are not lacking (see also the case: C-260/89, *ERT* of 18 June 1991, ECLI:EU:C:1991:254, I-02925, par. 41).

It is not by chance that in the two pilot decisions *Johnston*³¹ and *Heylens*³² the violation of the fundamental right to effective judicial protection coincided, inevitably, with a loss of effectiveness of Union law³³. Such a general principle was hardly compressible within the framework of the principle of effectiveness, as a mere component of the compatibility test set out in *Rewe*³⁴ and *Comet*³⁵ was soon evident from the same jurisprudence of the CJEU. The CJEU has had occasion, in the sentences *San Giorgio* of 9 November 1983³⁶, *Fantask* of 22 December 1997³⁷, *Peterbroeck* of 14 December 1995³⁸ and *European Commission v. Italy* of 24 March 1998³⁹ to clarify how it is the task of national courts to ensure the judicial protection of the rights of individuals according to the Union's rules

³⁰ CJEU, C-11/70, *Handelsgesellschaft* of 17 December 1970, ECLI:EU:C:1970:114, I-01125. In particular stated that: "the fact that they are impaired or the fundamental rights enshrined in the constitution of a Member State (...) cannot diminish the validity of a Community measure or its effectiveness in the territory of the same State (...) it is however appropriate to ascertain whether it has not been violated no similar guarantee, inherent in Community law (...) the protection of these rights, while being informed of the constitutional traditions common to the Member States, must be guaranteed within the framework of the structure and the objectives of the Community (...)"

³¹ CJEU, C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* of 15 May 1986, ECLI:EU:C:1986:206, I-01651

³² CJEU, C-222/86, *Unectef v. Heylens* of 15 October 1987, ECLI:EU:C:1987:442, I-04097.

³³ D.LECZYKIEWICZ, Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability, D. CHALMERS, A. ARNULL, The oxford handbook of European Union law, Oxford University Press, Oxford, 2015.

³⁴ CJEU, 38/73, *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex and Feitelijke Vereniging De Belder* of 11 October 1973, ECLI:EU:C:1973:188, I-01989.

³⁵ CJEU, C- 45/76, *Comet* of 16 December 1976, ECLI:EU:C:1976:191, I-01043, parr. 5, 13 and 16. See also: M. CREMONA, Compliance and the enforcement of European Union law, Oxford University Press, Oxford, 2012.

³⁶ CJEU, C-199/82, *S. Giorgio* of 9 November 1983, ECLI:EU:C:1983:318, I-04595. For details see: T. TORY, A. PIMOR, Unlocking European Union law, ed. Routledge, London & New York, 2018. A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.

³⁷ CJEU, C-188/95, *Fantask A/S v. Industriministeriet and others* of 22 December 1997, ECLI:EU:C:1997:580, I-06783. A. BARAV, Judicial enforcement and implementation of European Union law, ed. Bruylant, Bruxelles, 2017.

³⁸ CJEU, C-312/93, *Peterbroeck, Van Campenhout & Cie v. Belgian State* of 14 December 1995, ECLI:EU:C:1995:437, I-04599.

³⁹ CJEU, C-104/86, *Commission of the European Communities v. Italian Republic* of 24 March 1998, ECLI:EU:C:1998:171, I-01799.

and how, in the absence of discipline in the matter, it is up to the domestic legal system of each Member State to designate the competent courts and establish the procedural arrangements for appeals to ensure the protection of these rights (the principle of procedural autonomy of Member States)⁴⁰.

The principle of effectiveness, in determining when a national provision makes impossible or excessively difficult the protection of the rights conferred on individuals by the European legislation, the interpreter must not, and cannot, substitute the national legislator in carrying out all value choices necessary to identify the right balance between the different principles and interests at stake, which is the basis of every provision of the legal system involved. Rather, it must show the right level of respect for these assessments, which are rooted in the political legitimacy of the legislator and in the many-sided legal traditions of Member States, refraining from “forcing” an adaptation of national law, if not in the case where this is not capable of allowing even a minimum degree of effectiveness to EU law. The principle of effectiveness is basically constituted as a result obligation, aimed at ensuring the implementation of the substantive European rules, both through the preparation of jurisdictional remedies to guarantee compliance with EU law, and with the duty of abstention from any which could compromise the objectives of the Treaty or the prerogatives of the Union. The minimum standard of effectiveness of EU law will therefore be particularly strict in the event that the EU legislation sets as its ultimate goal the achievement of highly harmonized solutions and uniform application within the Union, and not so much the mere definition of some general principles on the subject. An equally rigid approach by the CJEU can also take place in the event that certain national procedural provisions undermine the full effectiveness of EU law in its so-called “hard core”, at a level that we could define as “constitutional”, impeding both the exercise of the competences of the Union and the prerogatives of its institutions. In such circumstances the specificity of the result pursued by the EU legislation is maximum, since the only acceptable eventuality will be that in which full compliance with the provisions in question is ensured and, therefore, the minimum standard of effectiveness of Union law it can only be that which fully ensures such a result⁴¹.

Another parameter of evaluation, which is also useful for determining when we are concretely faced with a violation of the principle of effectiveness, is constituted by the reasonableness and proportionality of the obstacle posed by

⁴⁰ B. DE WITTE, H.W. MICKLITZ (a cura di), *The ECJ and the autonomy of Member States*, ed. Intersentia, Antwerp, Oxford, 2011, p. 281 e ss.

⁴¹ CJEU, C-166/73, *Rheinmühlen Düsseldorf v. Einhur-und Vorratstelle für Getreide und Futtermittel* of 16 January 1974, ECLI:EU:C:1974:3, I-00033, par. 39.

internal procedural law to the application of the Union law. A first mention of the fact that the effectiveness of EU law was not an absolute value, to be protected at all costs even at the expense of the various interests or values at stake, is found in the *Van Schijndel* of 14 December 1995, in which the CJEU had to underline how in “each case in which the question arises whether a national procedural law makes the application of the law impossible or excessively difficult (...) must be considered, if necessary, the principles that underlie the national judicial system, such as the protection of the rights of the defense, the principle of legal certainty and the smooth conduct of the procedure”⁴². Yes, so it was to describe a “procedural rule of reason”⁴³ with the aim of balancing the interest in the application of EU law with the interests advanced by national procedural rules. Therefore, not every obstacle to the application of EU law, nor any limitation to the protection of the individual, will automatically constitute a breach of EU law but, rather, the underlying reasons for such a restriction on the effectiveness of EU legislation will have to be judged proportionality, aimed at evaluating its reasonableness.

Thus, EU law cannot require national courts to raise a plea based on an infringement of European provisions *ex officio* if the examination of this plea obliges them to renounce the device principle, since its compliance constitutes a limitation reasonable to the effectiveness of this right, since “it implements concepts shared by most of the Member States with regard to the relationship between the State and the individual, protects the rights of the defense and guarantees the regular progress of the procedure, in particular by preserving it from the delays due to the evaluation of new reasons”⁴⁴. Likewise, it will not be incompatible with EU law for national legislation to deal with disputes arising between consumers and suppliers in the field of telephone services to a mandatory attempt at conciliation, since “the imposition of an out-of-court resolution procedure such as that envisaged the national legislation in question (...) is not disproportionate to the objectives pursued”⁴⁵ by having “a more rapid and less burdensome definition of electronic communications disputes, as well as a decongestion of the courts, and thus pursuing legitimate objectives

⁴² CJEU, C-43/93, *Van Schijndel v. Stifting Pensioenfondsvoor Fysiotherapeuten* of 14 December 1995, ECLI:EU:C:1995:441, I-04703, par. 21.

⁴³ K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, Oxford, 2014, pp. 133ss.

⁴⁴ CJEU, C-43/93, *Van Schijndel v. Stifting Pensioenfondsvoor Fysiotherapeuten*, op. cit. For details see: K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, op. cit.

⁴⁵ CJEU, C-317/08, *Alassini and others* of 18 March 2010, ECLI:EU:2010:146, I-02213

of general interest (...)”⁴⁶, without causing a manifest disproportion between these objectives and any disadvantages caused by the compulsory nature of the out-of-court settlement procedure. Likewise, national legislation which imposes on the individual, who requires compensation for damages deriving from the circulation of unidentified vehicles, to turn to an arbitral tribunal, with the subsequent right to appeal, must not be considered incompatible with EU law award⁴⁷, considering that these limitations on judicial action, and consequently on the effectiveness of EU law, are adequately justified by the desire to allow a simple mechanism for compensating victims and appreciable “advantages of speed and economy” of judicial expenses, on the other hand, give the victims of damage caused by unidentified or insufficiently insured vehicles a level of protection corresponding to that minimum required by EU law⁴⁸.

Finally, it cannot be considered incompatible with EU law that a Member State objects to the expiry of a reasonable limitation period, which is in the interests of legal certainty, for a court action brought by an individual to obtain the protection of the rights conferred by a directive, even if it has not correctly transposed it, provided that its behavior did not lead to the delay in the appeal. Specifically, in the ruling made in the *Iaia* case of 19 March 2011⁴⁹ the CJEU stressed that setting the period of effect of the limitation period prior to the judicial finding of the infringement of EU law does not automatically make practically impossible or excessively difficult the safeguarding of the rights deriving Union law, in particular the right to compensation for damages. This especially in the case where the beneficiaries were able to recognize the violation of this right (and consequently their prerogatives), even in the absence of a previous court ruling ascertaining such violation. Furthermore, national legislation will not be incompatible with EU law which provides for the collection of multiple court fees against a person administering different jurisdictional appeals relating to the same award of public contracts, or to be able to deduce additional reasons relating to the same award, in the context of an ongoing judicial proceeding. And this, because such a perception is proportionate and contributes to the attainment of a legitimate aim: that of “the proper functioning of the judicial system, as it constitutes a source of funding for the judicial

⁴⁶ CJEU, C-317/08, *Alassini and others* of 18 March 2010, op. cit.

⁴⁷ CJEU, C-63/01, *Evans* of 4 December 2003, ECLI:EU:C:2003:650, I-14447. For details see: B. THORSON, *Individual rights in European Union law*, ed. Springer, Berlin, 2016, pp. 22ss.

⁴⁸ B. THORSON, *Individual rights in European Union law*, op. cit.,

⁴⁹ CJEU, C-452/09, *Tonina Enza Iaia* of 19 March 2011, ECLI:EU:C:2011:323, I-04043, parr. 20, 21 and 23.

activity of the Member States and dissuades the introduction of questions are manifestly unfounded or are intended solely to delay the proceeding (...)”⁵⁰.

Naturally, both the evaluation criteria will become all the more stringent the greater the protected interest will be and, consequently, the higher minimum standard of effectiveness required by EU law will be higher. Therefore, in general, the greater level of harmonization achieved in a particular area of law will be the higher the judicial protection granted to the EU provisions should be in order to meet the minimum standards required. At the same time, more pressing will be the need to ensure respect for EU law, such as the protection of the Union’s competences and the prerogatives of its institutions, the more complex it will be to justify, on the basis of reasons of national interest, a limitation of the effectiveness of EU law. Likewise, just as there is an obligation to reconcile the effectiveness of EU law with the interests advanced by national legislation, there is a similar balancing obligation in relation to respect for the right to effective judicial protection, where is exceptionally at odds with the effectiveness of EU law.

A general statement in this regard with relation to the duty for the national court to balance the full implementation of Union law with the effective judicial protection of the rights of individuals by virtue of the same right, as guaranteed by article 47 of the CFREU- including the so-called principles of fair and just process-can be found in the pronouncement *Banif Plus* of 21 February 2013⁵¹ and in the sentence *Ognyanov* of 5 July 2016⁵².

Otherwise, if you leave to the national judge the task of evaluating concretely the respect of the principles of equivalence and effectiveness, this will most likely go to “survive” the scrutiny imposed by EU law. In conclusion, it is important

⁵⁰ CJEU, C-452/09, *Tonina Enza Iaia* of 19 March 2011, op. cit.

⁵¹ CJEU, C-472/11, *Banif Plus Bank Zrt* of 21 February 2013, ECLI:EU:C:2013:88, published in the electronic Reports of the cases, par. 29; C-240/09, *Lesoochránárske Zoskupenie (LZ I)* of 8 March 2011, ECLI:EU:C:2011:125, I-01255, par. 47; joined cases C-439/14 and C-488/14, *Star Storage SA and others* of 15 September 2016, ECL:EU:C.2016:688, published in the electronic Reports of the cases, par. 46.

⁵² CJEU, C-614/14, *Ognyanov* of 5 July 2016, ECLI:EU:C:2016:514, published in the electronic Reports of the cases. For details see: F. PEREIRA COUTINHO, *Protecting the jewel of the crown. The Ognyonov case and the preliminary reference procedure*, in *European Forum*, 2017, pp. 4ss. G. VERMUELEN, W. DE BONDT, *Justice, home affairs and security european and international institutional and policy development*, ed. Maklu, Antwerp, Apeldoorn, 2017, pp. 96ss. D. ADAMSKY, *Redefining european economic integration*, Cambridge University Press, Cambridge, 2018. a. ROSAS, L. ARMATI, *European Union constitutional law. An introduction*, Hart Publishing, Oxford & Oregon, Portland, 2018.

to note that the application of the principle of effectiveness is configured as cumulative with respect to equivalence. Indeed, it may well happen that a national law validly applicable to all disputes of the same type is not capable of achieving the minimum level of effectiveness required by EU law.

In this case, we are dealing with a situation in which the protection offered by the national legal system is “equally bad”, both in relation to the legal positions conferred by domestic law and by the European law. In that case, the CJEU ruled that the mere fact that the application of the national procedural provision contrary to the principle of effectiveness, is extended by the legal system to all similar actions under domestic law (and thus respects the principle of equivalence), does not constitute sufficient grounds to consider it compatible with EU law. This is very clear in the case of *St. George*, where the Kirchberg judges went on to point out that “the fact that a recognized test regime incompatible with European law is extended by the law to a large part of taxes, national duties and taxes or even as a whole, it is therefore not a reason to refuse the reimbursement of taxes levied contrary to European law (...)”⁵³.

According to our opinion, the conceptual autonomy of the right to effective judicial protection can also form the basis of the *Oreficio Borelli SpA*⁵⁴ and *Kraus*⁵⁵ rulings, in which the possibility of overcoming that limit of the effectiveness principle identified by the CJEU seems to be suggested. The impossibility “of establishing remedies available to national courts in order to safeguard EU law, other than those already covered by national law”⁵⁶. In fact, in such situations, the creative function of the remedy does not derive so much from the principle of effectiveness, but rather from the autonomous general principle to effective judicial protection, capable of producing also different effects, and possibly more incisive, than the first. An express statement to this effect can be found in the *Unibet*⁵⁷, ruling, in which the CJEU has clearly emphasized that it is the responsibility of the Member States, as well as respecting the *Rewe* principles, also to guarantee full protection of the right to effective judicial protection⁵⁸. Actually, autonomy is clearly a significant concept in EU law—but how should we understand it? How does the CJEU interpret it? This proves to be somewhat

⁵³ CJEU, C-199/82, *S. Giorgio* of 9 November 1983, op. cit.

⁵⁴ CJEU, C-97/91, *Oreficio Borelli SpA* of 3 December 1992, ECLI:EU:C:1992:491, I-06313.

⁵⁵ CJEU, C-19/92, *D. Kraus* of 31 March 1993, ECLI:EU:C:1993:125, I-01663, par. 40ss.

⁵⁶ CJEU, C-158/80, *Rewe* of 7 July 1981, ECLI:EU:C:1981:163, I-1805, par. 44.

⁵⁷ CJEU, C-432/05, *Unibet* of 13 March 2007, ECLI:EU:C:2007:163, I-02271, par. 66-77.

⁵⁸ CJEU, C-432/05, *Unibet* of 13 March 2007, op. cit. L. GRUSZCZYNSKI, W. WERNER, *Deference in international courts and tribunals. Standard of review and margin of appreciation*, Oxford University Press, Oxford, 2014.

elusive. In spite of its apparent importance, the CJEU has only infrequently in its past caselaw explicitly mentioned the concept of autonomy-in around 10 cases by my reckoning. Of course, we can trace its earliest uses back to 1964 and the *Costa v. ENEL* case⁵⁹. In *Costa*, the CJEU used the concept of autonomy to argue for the primacy of (then) EC law over national law, stressing also the EEC as “an independent source of law“, which did not derive from national law. It went to no great lengths to define what it meant by autonomy. Beyond this, in the external field, the CJEU has used autonomy to define the EU’s relationship with international law. In Opinion 1/91, on the first EEA agreement, the CJEU proclaimed the constitutional character of the EU, asserting that this constitutional nature distinguished it from international law. In Opinion 1/00 the CJEU stated more specifically: “(...) preservation of the autonomy of the Union legal order⁶⁰ requires therefore, first, that the essential character of the powers of the (Union) and its institutions as conceived in the Treaty remain unaltered (...) it requires that the procedures for ensuring uniform interpretation of the rules of the (...) Agreement and for resolving disputes will not have the effect of binding the (Union) and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of (Union) law referred to in that agreement (...)”⁶¹. from the perspective of the autonomy of EU law, it is not clear at all that the principle of mutual trust, as a “specific characteristic” of EU law⁶², trumps the protection of fundamental rights. It is true that the

⁵⁹ CJEU, 6/64, *F. Costa v. ENEL* of 15 July 1964, ECLI:EU:C:1964:66, ECR 585.

⁶⁰ In particular see the analysis of B. DE WITTE, *European Union law: How autonomous is its order?*, in *Zeitschrift für Öffentliches Recht*, 65, 2010, pp. 162ss.

⁶¹ Opinion 1/00, Opinion pursuant to Article 300(6) EC-Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area) of 18 April 2002, ECLI:EU:C:2002:231, I-03493, par. 12-13. P. JAN KUIJPER, J. WOUFERS, F. HOFFMEISTER, *The law of European Union external relations: Cases, materials and commentary on the European Union as an international legal actor*, Oxford University Press, Oxford, 2018, pp. 520ss. M. DERLÉN, J. LINDOLM, *The Court of Justice of the European Union: Multidisciplinary perspectives*, Oxford University Press, Oxford, 2018. F. CASTILLO DE LA TORRE, *Opinion 1/00, Proposed agreement on the establishment of a European Common Aviation Area*, in *Common Market Law Review*, 39 (6), 2002, pp. 1373-1393 pp. 1392ss.

⁶² M. WELLER, *Mutual trust in search of the future of European Union private international law*, in *Journal of Private International Law*, 11 (1), 2015, pp. 66ss. M. ZILINSKY, *Mutual trust and cross-border enforcement of judgments in civil matters in the European Union. Does the step-by-step approach work?*, in *Netherlands International Law Review*, 64 (1), 2017, pp. 117ss. A. BAKARDJIEVA ENGELBREKT, N. BREMBER, A. MICHALSKI, *Trust in the European Union in challenges time. Interdisciplinary european studies*, Palgrave Macmillan, London, 2018, pp. 179ss.

principle is a cornerstone of the Area of Freedom Security and Justice, and that the relevant TFEU provisions make several references to mutual recognition. But the protection of fundamental rights is a foundational EU value, and the TFEU's opening provision on the Area of Freedom Security and Justice predicates the area on respect for fundamental rights—such respect is also a “specific characteristic” of EU law. Surely, that means that in the event of a conflict between mutual trust and human rights, the latter must prevail, as a matter of EU law?

The practice of the CJEU is indeed to carry out a compatibility examination of the national double test procedure, and not to examine the principle of effective judicial protection as a component of the *Rewe* test as previously⁶³. In doing so, the particularities of each of the concepts will be safeguarded, avoiding that these are dispersed when one of them is forcibly contextualized as a mere component of the other and therefore results limited in its effects. The result is a cumulative, non-exclusive scrutiny system⁶⁴, which tends to strengthen the control of the CJEU on the compatibility of national procedural legislation with EU law, both with regard to effectiveness and effective judicial protection.

The effectiveness of Union law and the better protection of the individual coincide, it may exceptionally happen that the application of the principle of effectiveness will guarantee greater legal protection than the minimum

⁶³ CJEU: C-418/11, *Texdata* of 26 September 2013, ECLI:EU:C:2013:588, published in the electronic reports of the cases; C-199/11, *Otis and others* of 6 November 2012, ECLI:EU:C:2012:684, published in the electronic Reports of the cases.; C-93/12, *Agro-konsulting-04* of 27 June 2013, ECLI:EU:C:2013:432, published in the electronic Reports of the cases; C-279/12, *DEB* of 22 December 2010, ECLI:EU:C:2010:811, I-13849; C-472/11, *Banif Plus Bank* of 21 February 2013, ECLI:EU:C:2013:88, published in the electronic Reports of the cases; C-169/14, *S. Morcillo and Abriul Garcia* of 17 July 2014, ECLI:EU:C:2014:2099, published in the electronic Reports of the cases.; C-61/14, *Orizzonte Salute* of 6 October 2015, ECLI:EU:C:2015:655, published in the electronic Reports of the cases. H. MICKLITZ, *Constitutionalization of european private law*, Oxford University Press, Oxford, 2014. J. MENDES, I. VENZKE, *Allocating authority. Who should do what in european and international law?*, Hart Publishing, Oxford & Oregon, Portland, 2018.

⁶⁴ CJEU, C-12/98, *Amengual Far* of 16 July 2000, ECLI:EU:C:62, I-00527. C-12/08, *Mono Car Styling* of 16 July 2009, ECLI:EU:C:466, I-06653, par. 49, where the Court has shown that “Community law requires (...) in addition to compliance with the principles of equivalence and effectiveness (...) that national legislation does not prejudice the right to effective judicial protection (...)”. E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, *Complete European Union law. Texts, cases and materislas*, Oxford University Press, Oxford, 2013.

required by the principle for effective judicial protection⁶⁵, and vice versa⁶⁶. The hypothesis in a situation of conflict is different. In this case it will be up to the CJEU to make a balance between the different opposing interests, balancing the effectiveness of EU law with the right to effective judicial protection. Of course, in no case may the former be able to override the latter in an unjustified and disproportionate manner.

Nonetheless, the burdensome procedural and substantive requirements related to its use, including the systematic nature, the gravity and the continuing character of the violation, make it very ineffective in order to repress isolated or occasional violations. Moreover, the political nature of this procedure removes it from the availability of the individual, so that it can hardly be considered a suitable remedy to protect the procedural rights of the person within individual disputes. Finally, its purely sanctioning nature, devoid of the automatic adjustment effects of the direct effect linked to the principle of effectiveness and article 47 CFREU⁶⁷, does not offer any amnesty of the violation, but only exerts a political pressure. This supervisory work (in particular from the EC) is limited only to the procedural legislation enforced by Union law (or rather, as part of its implementation) and does not therefore extend to those purely formal situations. Internal, without any connection to the EU system. In this context, the only control mechanism foreseen by the Treaties can be found in the suspension procedure set out in article 7 TEU. The scope of such trust is not, however, unlimited, but has been declined by the legislator under different levels of intensity depending on the sector involved, highlighting how confidence can be recalled in exceptional cases.

The questions that arise are: Can these last limitations on the principle of mutual trust counterbalance the lack -in cases where those outlined above are not applicable- of a control mechanism at Union level on respect for fundamental rights? And where such limitations are not present -and therefore the principle of mutual trust is expressed in a quasi-absolute declination, as in the case of articles 41 and 42 of Regulation 2201/2003⁶⁸- the obligation imposed

⁶⁵ CJEU, C-93/12, *Agrokonsulting-04* of 27 June 2013, ECLI:EU:C:2013:432, published in electronic Reports of the cases. S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The European Union Charter of fundamental rights. A Commentary*, C.H. Beck, Hart Publishing & Nomos, 2014.

⁶⁶ CJEU, C-268/06, *Impact*, 15 April 2008, ECLI:EU:C:2008:223, I-02483. Case C-406/08, *Uniplex* of 28 January 2010, ECLI:EUC:2010:45, I-00817.

⁶⁷ M. SAFFIAN, D. DÜSTERHAU, *A Union of effective judicial protection: Addressing a multi-level challenge through the lens of article 47 CFREU*, op. cit.

⁶⁸ As we can noticed in the next cases from CJEU: C-393/10 PPU, *VD* of 17 October 2018, ECLI:EU:C:2018:835; C-478/17, *HR* of 4 October 2018, ECLI:EU:C:2018:812; C-565/17,

on the ECHR system could be considered compatible with the ECHR Member States to recognize and execute a suspicious decision contrary to fundamental rights? What could be the consequences on the point of indirect responsibility for the violation of the ECHR in the event that the interpretation of the rights referred to in article 47 CFREU and 6 of ECHR would be inconsistent between the CJEU and the ECtHR? This especially following a different assessment of the balance between the effectiveness of EU law and the fundamental right to effective judicial protection? Finally, can the harmonization of procedural law constitute a valid response to these problems?

2. The principle of mutual trust and the ECHR system. A difficult and/or incomplete relationship?

The system of circulation of judgments in civil matters within the Union and the approach of the legislator in consolidating the principle of mutual recognition did not have a unitary character, but was rather closely linked to the nature of the foreign provision to which the circulation is required.

As regards the Regulation 1215/2012 (Brussels I-bis)⁶⁹ it was decided to adopt an automatic recognition and enforcement system, in which the intermediate

Saponaro and Xylina of 19 April 2018, ECLI:EU:C:2018:265; *C-372/16, Sahyouni* of 14 September 2017, ECLI:E:C:2017:686, all the above cases published in the electronic Reports of the cases.

⁶⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, entry in force from 10 January 2015. See in argument: P.A. NIELSEN, *The New Brussels I Regulation*, in *Common Market Law Review*, 50 (3), 2013, pp. 503ss. P. HAY, *Notes on the European Union's Brussels-I "Recast" Regulation*, in *The European Legal Forum*, 2013, pp. 2ss. M. POHL, *Die Neufassung der EuGVVO-im Spannungsfeld zwischen Vertrauen und Kontrolle*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 33, 2013, pp. 109ss. A. NUYTS, *La refonte du règlement Bruxelles I*, in *Revue Critique de Droit International Privé*, 2013, pp. 3ss. I.P. BERAUDO, *Regards sur le nouveau Règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Journal du Droit International*, 2013, pp. 742ss. A. STAUDINGER, *Schiedsspruch und Urteil mit vereinbarten Wortlaut*, in *Festschrift für Friedrich Graf von Westfalen*, Dr. Otto Schmidt Verlag, Köln, 2010, pp. 662ss. V. RIJAVEC, W. JELINEK, W. BREHM, *Die Erleichterung der Zwangsvollstreckung in Europa*, ed. Nomos, Baden-Baden, 2012, pp. 214ss. V. PULJKO, *Regulation (EU) n. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with special reference to the relationship between the Regulation and arbitration*, in *Interdisciplinary Management Research*, 17, 2015, pp. 4ss. F. GASCÓN-INCHAUSTI, *La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis*, in E. GUINCHARD (eds), *Le nouveau*

exequatur procedure is replaced by an executability certificate issued in the State of origin, and in which the possibility of blocking the circulation of the provision is linked to the ascertainment of the grounds for refusal that are exhaustively listed in article 45 of the same. For what concerns the so-called optional instruments-that is, those Regulations aimed at establishing common and optional procedures in particular areas of transactional litigation-alongside an abolition of the intermediate procedures as well as in the case of Regulation

règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, ed. Larcier, Bruxelles, 2014, pp. 210ss. See in argument the next cases from the CJEU: C-368/16, *Assnes Havn v. Navigatos Management (UK) limited* of 13 July 2017, ECLI:EU:C:2017:546; C-341/16, *Hanssen Beleggingen v. Tanja Prast-Knippin* of 5 October 2017, ECLI:EU:C:2017:738; C-230/15, *Brite Strike Techonologies v. Strike Strike Tecnologies SA* of 13 July 2016, ECLI:EU:C:2016:560; C-350/14, *Lazar v. Allianz SpA* of 10 December 2015, ECLI:EU:C:2015:802; C-536/13, *Gazprom v. Lietuvos Respublika* of 4 December 2014, ECLI:EU:C:2014:316, all the above cited cases published in the electronic reports of the cases. G. PAYAN, *Droit européen de l'exécution en matière civile et commerciale*, ed. Bruylant, Bruxelles, 2012. B. KÖHLER, *Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation*, in *Praxis des Internationalen Privat-und Verfahrensrecht*, 37, 2017, n. 6 and in particular the next cases from the CJEU: C-70/15, *Emmanuel Lebek v. Janusz Domino* of 7 July 2016, ECLI:EU:C:2016:524; C-12/15, *Universal Music International Holding BV v. Michael Tètreault Shilling* of 16 June 2016, ECLI:EU:C:2016:449; C-605/14, *Virpi Kom v. Pekka Komu and Jelena Komu* of 17 December 2015, ECLI:EU:C:2015:833; C-438/12, *Irmengard Weber v. Mecthilde Weber* of 3 April 2014, ECLI:EU:C:2014:212, the just cited cases published in the electronic Reports of the cases. In particular in this ultimate case the Court has declared that: "(...) Since the "jurisdiction of the Court first seized (could not be) be formally established (...) the Advocate General confirmed (...) that there was no *lis pendens* in operation in this case and proceedings in the Court second seized need not be stayed. He relied on dicta (...) to justify that it was inappropriate for it to stay proceedings pending before it (...) the justification for the "reliable assessment" this was premised on the fact that the Court first seized did not have jurisdiction and could not therefore either determine the question of *lis pendens* nor issue a judgment capable of recognition under Articles 35(1) and 45(1) (...)". We continue with the next cases: C-218/02, *Lokman Emrek v. Vlado Sabranovic* of 17 October 2013, ECLI:EU:C:2013:62, I-01241; C-190/11, *Daniela Mühlleitner v. Ahmad Yusufi* of 6 September 2012, ECLI:EU:C:2012:542, published in the electronic Reports of the cases. See, J.P. BERAUDO, *Regards sur le nouveau règlement Bruxelles I sul la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Journal de Droit International*, 2013, pp. 742ss. L. GRARD, *La communautarisation de "Bruxelles I"*, in *Revue Générale de Droit International Public*, 117 (4), 2013, pp. 530ss. P. BEAUMONT, M. DANON, K. TRIMMINGS, B. YÜKSEL, *Cross-border litigation in Europe*, Hart Publishing, Oxford & Oregon, Portland, 2017.

1215/2012, there was also a reduction⁷⁰ of the reasons for refusal of the recognition and enforcement-in particular with the elimination of the public order clause-replaced by some jurisdictional remedies that can be brought before the court of the State of origin and linked to the specificities of each of the measures.

In Regulation 2201/2003, on the other hand, there are even different regimes within the same act, since decisions in matrimonial matters, parental responsibility, or visit and return of the child⁷¹ are subject to three different disciplines⁷². This is also the case for Regulation 4/2009 which subordinates the recognition and automatic execution of decisions in the food sector not so much because of their object, as happens in Regulation 2201/2003⁷³, but rather in relation to the fact that they were made in a Member State bound by the 2007 Hague Protocol on the applicable law⁷⁴. If not, the necessity of the intermediate exequatur procedure is restored, as well as the classic grounds for refusal as per Regulation 1215/2012⁷⁵.

⁷⁰ It should be noted, however, that the reasons for refusal to protect the right to be heard as well as to avoid the conflict between judges remain in the articles. 21 of Regulation 805/2004; 22 of Regulation 1896/2006 and Regulation 861/2007. Otherwise, the new Regulation 655/2014 does not provide any grounds for refusing recognition or execution of the sequestration order, probably due to the considerable specificity of the guarantees offered by the common procedure laid down in the same Regulation.

⁷¹ D. LIAKOPOULOS, *The best interests of the child between european and international private law rules: Unification and evolution of child protection*, in *Juris Gradibus*-working paper series, 2014.

⁷² More specifically, both the execution of judgments in matrimonial and parental matters can be refused, albeit on the basis of various reasons indicated in art. 22 and 23 of Regulation 2201/2003. Nonetheless, while decisions in matrimonial matters will be recognized and implemented automatically according to the mechanism of Regulation 1215/2012, decisions concerning parental matters must be previously submitted to the exequatur procedure pursuant to art. 28 of Regulation 2201/2003. Otherwise, the measures (certificates) of visitation and return of the child will not only be executable and recognizable automatically, without having to resort to any intermediate procedure, but also, differently from the aforementioned decisions, will not be subjected to any reason for refusal.

⁷³ G. CUNIBERTI, *Abolition de l'exequatur et présomption de protection des droits fondamentaux*, in *Revue Critique de Droit International Privé*, 103 (1), 2014, pp. 304ss.

⁷⁴ D. LIAKOPOULOS, *The best interests of the child between european and international private law rules: Unification and evolution of child protection*, op. cit.

⁷⁵ According to the next cases from the CJEU: C-337/17, *Feniks* of 4 October 2018, ECLI:EU:C:2018:805; C-306/17, *Nothartová* of 31 May 2018, ECLI:EU:C:2018:360; C-106/17, *Hofsoe* of 31 January 2018, ECLI:EU:C:2018:50 all of them published in the electronic Reports of the cases.

The smaller the possibility of hindering the circulation of the decision, the greater the mutual trust must be in the different Member States. This indifferently from the fact that such mutual trust is presumed, and therefore based on the supposition of a respect, by all Member States, of those fundamental values referred to in article 2 TEU, or “concrete”, and therefore based on supranational normative elements-not related to the only order of the State of origin-able to concretely hypothesize the same respect. If we look to art. 2 TEU⁷⁶, we see that the values of the EU include human rights and the rule of law. Article 2 does not mention the autonomy of EU law, nor its primacy, nor the principle of mutual trust. On the other hand, art. 67(1) TFEU declares that the EU must “constitute an area of freedom, security and justice with respect for fundamental rights”⁷⁷. Yet it is the autonomy of EU law and the presumption of mutual trust on which the CJEU prefers to focus, omitting any mention of article 67(1) TFEU from Opinion 2/13. While this is the case, the Strasbourg Court has an important role to play in underlining that the EU principle of mutual recognition, although a lynchpin of European integration, must not threaten fundamental rights and subvert the very values of the EU.

It follows that the intensity of the declination of the principle of mutual trust within the various measures will be indirectly proportional to the procedures to be followed to obtain recognition and enforcement of the foreign provision, together with the quality and quantity of the grounds for refusal that it can be opposed to it to block its circulation. The greater the intensity of the principle of mutual trust, the greater will be the concentration of the protection of fundamental rights within the legal system of the State of origin of the provision. This is, for example, the case of Regulations 805/2004⁷⁸, 1896/2006⁷⁹, 861/2007⁸⁰ and 655/2014⁸¹, whose cross-border vocation has allowed the legislator to dictate

⁷⁶ G. CONWAY, *European Union law*, ed. Routledge, London & New York, 2015.

⁷⁷ F. NICOLA, B. DAVIES, *European Union law stories*, Cambridge University Press, Cambridge, 2017.

⁷⁸ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. CJEU: joined cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber* of 18 December 2014, ECLI:EU:C:2014:2361, published in the electronic Reports of the cases. See in argument also: H. PÉROZ, *Le règlement CE n. 805/2004 del 21 avril 2004 portant création d'un titre exécutoire européen pour les créances contestées*, in *Clunet*, 2005, pp. 638ss. L. D'AVOUT, *La circulation automatique des titres exécutoires imposée par le règlement 805/2004 du 21 avril 2004*, in *Revue Critique de Droit International Privé*, 95, 2006, pp. 2ss. A. SADLER, *From the Brussels Convention to Regulation 44/2001. Cornerstones of a European law of civil procedure*, in *Common Market Law Review*, 42 2005, pp. 1638ss.

common procedural rules on the basis of the competence referred to in article 81 TFUE⁸² is, in doing so, to subject these provisions, as well as any other

⁷⁹ Regulation (EC) No 1896/2006-creating a european order for payment procedure. See from the ECJ the next cases: C-508/12, *Walter Vapenik v. Josef Thurner* of 5 December 2013m ECLI:EU:C:2013:790, published in the electronic Reports of the cases; C-300/13, *Imtech Marine Belgium NV v. Hellenic Radio SA* of 17 December 2015, ECLI:EU:C:2015:188, published in the electronic Reports of the cases, which the CJEU has declared that: "(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the european enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)". C-511/14, *Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd* of 16 June 2016, ECLI:EU:C:2016:448, published in the electronic Reports of the cases , which the CJEU has stated that: "(...) the default judgment was to be counted among the executive title that were to be certified as a european enforcement order, even if it could not, in fact, to be certified as a european enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)". And in case of monitor process see: C-133/12, *Goldbet Sportwetten v. Massimo Sperindeo* of 13 June 2013, ECLI:EU:C:2013:105; C-215/11, *Iwona Szyrocka v. SiGer Technologie GmbH* of 13 December 2012, ECLI:EU:C:2012:794; joined cases C-119/13 and C-120/13, *Eco Cosmetics GmH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchyk* of 4 September 2014, ECLI:EU:C:2014:2144; C-245/14, *Thomas Cook Belgium NV v. Thurner Hotel GmbH* of 22 October 2015, ECLI:EU:C:2015:715; C-94/14, *Flight Refund Ltd vs. Deutsche Lufthansa AG* of 10 March 2016, ECLI:EU:C:2016:148, the above cited cases published in the electronic Reports of the cases. For the analysis of the above cases see: M. DUROVIC, European law on unfair commercial practices and contract law, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 106ss. M. HAZELHORST, Free movement of civil judgments in the European Union and the right of fair trial, T.M.C. Asser Press, The Hague, 2017, pp. 438ss. T. RAUSCHER, Internationales Privatrecht mit internationalem Verfahrensrecht, C.H. Beck, München, 2017, pp. 686ss. F. EICHEL, Keine rügelose Einlassung in Europäischen Mahverfahren, in *Revue de Droit Privé de L'Union Européenne*, 24, 2014. M. BOBEK, Central european judges under the european influence. The transformative power of the EU revisited, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 234ss. P. GRUBER, Die Nichtgerklärung eines europäischen Zahlungsbefehls, in *Zeitschrift für das Privatrecht der Europäischen Union*, 13 (1), 2016, pp. 153ss. W. JELINEK, S. ZANGL, Insolvenzordnung, Manz Verlag, Wien, 2017.

⁸⁰ Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24 December 2015, p. 1-13. P. CORTÉS, Does the proposed european procedure enhance the resolution of small claims?, in *Civil Justice Quarterly*, 27 (1), 2008, pp. 94ss. F. WILMAN, Private enforcement of European Union law before national courts. The European Union legislative framework, Edward Elgar Publishers, Cheltenham, 2015. E. MŠĆENIĆ, A. RACCAH, legal risks in European Union law. Interdisciplinary studies on legal risk management and better regulation in Europe, ed. Springer, Berlin, 2016, pp. 80ss.

national act adopted in implementation thereof, to the scrutiny of the CHEU. The validity of such a conclusion is confirmed by the same dual regime referred to in Regulation 4/2009⁸³, in which the rationale that underlies the applicability of a more favorable circulation regime obviously resides in a “concrete” mutual trust that it derives from the constraint, for some Member States, to apply those common conflict rules⁸⁴ defined by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations⁸⁵.

The situation is very different for Regulations 2201/2003, 4/2009⁸⁶ and 1215/2012, whose scope greatly extends the express procedural competence

⁸¹ This refers to the already examined Regulations establishing: the European enforcement order, the European order for payment, the procedure for small claims and the European order for attachment. See from the CJEU: C-379/19, *Società Immobiliare Al Bosco* of 4 October 2018, ECLI:EU:C:2018:806, published in the electronic Reports of the cases. J.C. FERNÁNDEZ ROZAS, *Un hito más en la comunitarización del Derecho internacional privado: regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas*, in *La Ley Unión Europea*, n° 40, 2016. L.M. MULEIRO PARADA, *La cooperación reforzada en el impuesto sobre transacciones financieras*, in *La Ley Unión Europea*, n° 22, 2015. G. PALAO MORENO, G. ALONSO LANDETA, I. BUÍGUES (dirs.), *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012*, Marcial Pons, Valencia, 2015, pp. 58ss.

⁸² C. BOUTAYEB, *Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux*, op. cit.

⁸³ Council Regulation n. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This Regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J. (L 3069) 1, (EC). See from the CJEU: joined cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber* of 18 December 2014, ECLI:EU:C:2014:2461, published in the electronic Reports of the cases. In argument: N. BAUGUIET, M. DECHAMPS, J. MARY, *Actualités en droit de la famille*, ed. Larcier, Bruxelles, 2016.

⁸⁴ D. LIAKOPOULOS, *Conflicts of law in the European Union Law*, in *International and European Union Legal Matters*, 2010. H.MUIR WATT, *The role of the conflict of laws in european private law*, in C. TWIGG-FLESNER (ed.), *The cambridge companion to European Union private law*, Cambridge University Press, Cambridge, 2010.

⁸⁵ For the analysis of the Protocol, see: G. LUPŞAN, *Reflections on the maintenance obligations from the perspective of the european law enforcement*, in *Acta Unviersitatis Danubius. Juridica*, 10 (2), 2014. M. CREMONA, H.W. MICKLITZ, *Private law in the external elations of the European Union*, Oxford University Press, Oxford, 2016.

⁸⁶ In particular see the next cases from the CJEU: C-214/17, *Mölk* of 2 May 2018, ECLI:EU:C:2018:297; C-558/16, *Mahnkopf* of 1st March 2018, ECLI:EU:C:2018:138; C-467/16, *Schlömp* of 20 December 2017, ECLI:EU:C:2017:993, all of them published in the electronic Reports of the cases.

referred to in article 81⁸⁷. Of course, it is clear that in the absence of legislation of the common procedure, both the legislative guarantee deriving from the adoption of a supranational norm⁸⁸, is missing, and-where the Union also lacks substantial competence (as in most cases, given the extent of civil and commercial matters)-the control of the CJEU and the EC-even incidental⁸⁹-on the respect of the substantive and internal procedural rule of fundamental rights, as this can only be achieved within the framework of Union law.

The application of the provisions of articles 41 and 42 of Regulation 2201/2003⁹⁰-which do not provide any remedy against the automatic recognition and execution of the provision (certificate) of visit and return of the child-have for the first time brought to the attention of the ECtHR the possible contradiction between application of the principle of mutual trust and the protection of rights guaranteed by the ECHR. In particular, the configurability of a responsibility to be borne by the ECHR States Parties for violation of fundamental rights, following the recognition and enforcement of a foreign provision in the context of compliance with its obligations under Union law, has been examined for the first time by ECHR in the *Povse*⁹¹, case, where it was considered, a return order of the minor, certified in accordance with article 42 of Regulation 2201/2003⁹².

⁸⁷ D. LIAKOPOULOS, *Conflicts of law in the European Union Law*, op. cit.

⁸⁸ If this lack does not come, as in the case of Regulation 4/2009, covered by different supranational instruments, such as an ad hoc protocol or protocol, which, even if they are outside the EU system, still constitute an adequate basis for trust mutual “concrete”.

⁸⁹ And indeed, by virtue of the principles of effectiveness, equivalence and effective judicial protection, even the exercise of substantive jurisdiction would guarantee a scrutiny of the procedural norm, even indirectly

⁹⁰ M. THÖNE, *Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht*, op. cit. A. HAMED, K. TATSIANA, *A step forward in the harmonization of european jurisdiction: Regulation Brussels I Recast*, op. cit.

⁹¹ Thus, the ECtHR in the case of *Povse v. Austria* of 18 June 2013 found that the action brought by the Austrian Court on the return of a minor issued by the Italian judicial authorities pursuant to Regulation n. 2201/2003 “on jurisdiction, recognition and enforcement”. VAN BALLEGOOI, *The nature of mutual recognition in European law*, ed. Intersentia, Antwerp/Oxford, 2015. V. LAZIC, *Family private international law issues before the European Court of Human Rights: Lessons to be learned from Povse v. Austria in revising the Brussels IIa Regulation and its relevance for future abolition of exequatur in the European Union*, in CH. PAULUSSEN, T. TAKACS, V. LAZIC, B. ROMPUY (eds.), *Fundamental rights in international and European law*, T.M.C. Asser Press & Springer, The Hague, 2016, pp. 172ss.

⁹² M. THÖNE, *Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht*, op. cit. A. HAMED, K. TATSIANA, *A step forward in the harmonization of European jurisdiction: Regulation Brussels I Recast*, op. cit.

The relevance of the articles of the ECHR can also be expressed by way of the so-called “indirect”, requiring the judges of the Contracting States, for the recognition or execution of a foreign decision, to verify whether the provision does not violate the rights guaranteed by the ECHR, or that the procedure in which it was issued took place in compliance with the procedural protection standards set by the ECHR⁹³.

The latter indirect responsibility constitutes, however, an autonomous and distinct violation with respect to the direct one committed by the State of origin of the provision. In particular, the articles of the ECHR have a reduced effect⁹⁴ in their indirect application, so that the States Parties will not be required to carry out a detailed examination, from time to time, on respect for fundamental rights by the other States, both this would exacerbate the obligations imposed on them by the ECHR, and because such oversight would overstretch the development of international cooperation, including on the protection of fundamental rights. They are however bound to refuse their collaboration in executing and enforcing a foreign provision in the event that this has been enacted in a context of flagrant violation of fundamental procedural rights⁹⁵, or its effective execution provokes a manifest and disproportionate violation of the rights guaranteed by ECHR⁹⁶. It should be noted in the Avotins case that it does not seem to place particular emphasis on whether the measure recognized or executed comes from a State party to the ECHR. This indirect responsibility can validly be configured also between two States Parties.

In the decision on admissibility of the *Povse* case, the ECtHR is based mainly on two main points: the applicability to the concrete case of the presumption of equivalence of the protection offered to fundamental rights within the Union, so-called Bosphorus presumption⁹⁷, assisted by the appellant’s inertia in

⁹³ ECtHR, *Soering v. United Kingdom* of 7 July 1989

⁹⁴ ECtHR, *Drozd and Janousek v. France and Spain* of 26 June 1992, par. 33.

⁹⁵ ECtHR, *Pellegrini v. Italy* of 20 July 2001. L.R. KIESTRA, *The impact of the European Convention on Human Rights on private international law*, T.M.C. Asser Press & Springer, The Hague, 2014, pp. 204 ss. M. HAZELHORST, *Free movement of civil judgments in the EU and the right to a fair trial*, ed. Springer, Berlin, 2017, pp. 433ss.

⁹⁶ ECtHR, *Drozd and Janousek v. France and Spain*, op. cit., and ECtHR, *Soering v. United Kingdom* of 7 July 1989

⁹⁷ ECtHR, *Bosphorus* case of 30 June 2005 and in the case of *Michaud v. France* of 6 December 2012. See in argument: A. JAKUBOWSKI, K. WIECZYŃSKA, *Fragmentation vs the constitutionalisation of international law: A practical inquiry*, ed. Routledge, London & New York, 2016. C. LACCHI, *The ECtHR’s interference in the dialogue between National Courts and the Court of Justice of the EU: Implications for the preliminary reference procedure*, in *Review of European Administrative Law*, 9 (1),

challenging the measure brought before the authorities of the State of origin. The fact that “a contracting party is responsible under art. 1 of the ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”, in fact, it is a well-established principle, referred to in the same pronouncement *Bosphorus*, as it is a well-established principle of law enforcement. Indeed: “(...) absolving contracting states completely from their Convention responsibility in (...) areas covered (from any transfer of sovereignty)⁹⁸ would be incompatible with the purpose and object of the Convention; the guarantee of the existence of the Convention and the practical nature of its safeguards (...)”⁹⁹. In an attempt to alleviate this dilemma¹⁰⁰ the ECtHR has developed in the decision made in the *Bosphorus* case a presumption of

2015, pp. 96ss. D. SPIELMANN, L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, (Réunion conjointe de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme-Réseau des présidents des Cours suprêmes judiciaires de l'Union européenne, Helsinki 6 septembre 2013). A. TIZZANO, Les Cours européennes et l'adhésion de l'Union à la CEDH, in *Il Diritto dell'Unione Europea*, 2011, pp. 12ss. X. GROUSSOT, T. LOCK, L. PECH, Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2001, in *Fondation Robert Schuman/Question d'Europe*, n. 218 (7 novembre 2011), pp. 5ss. T. LOCK, Beyond *Bosphorus*: The European Court of Human Rights case law in the responsibility of Member States of international organizations under the European Convention on Human Rights, in *Human Rights Law Review*, 10 (4), 2010, pp. 530ss. C. COSTELLO, The *Bosphorus* ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe, in *Human Rights Law Review*, 6 (1), 2006, pp. 88ss. S. DE VRIES, U. BERNITZ, S. WEATHERILL, The EU Charter of fundamental rights as a binding instrument: Five years old and grooming, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 32ss. J. NEGRELIIUS, E. KRISTOFFERSSON, Human rights in contemporary European law, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 17ss. C. BÜYÜKBAY, D. ERTIN, EU-Skeptizismus am Bosphorus?, in *Zeitschrift für Internationale Beziehungen*, 2017, n. 2.

⁹⁸ A. JAKUBOWSKI, K. WIECZYŃSKA, Fragmentation vs the constitutionalisation of international law: A practical inquiry, op. cit.,

⁹⁹ J.L. DA CRUZ VILAÇA, *European Union law and integration. Twenty years of judicial application of European Union law*, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, *Principles of European Union law, including Brexit*, West Academic, Minesotta, 2017, pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, *EUV/AEUV*, C.H. Beck, München, 2016. M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 586ss. A. KACZOROWSKA-IRELAND, *European Union Law*, Routledge, London & New York, 2016.

¹⁰⁰ ECtHR, *Michaud v. France* of 6 Dicembre 2012, par. 104.

equivalent protection, which postulates that a State party which acts, without any margin of discretion, in fulfilling the obligations arising from its participation in an international organization-which offers protection equivalent to fundamental rights compared to that guaranteed by the ECHR-can be considered exempt from any liability, since it is presumed that the protection mechanisms existing within that organization have already been able to offer individuals an adequate level of protection to fundamental rights and that, therefore, the State has done nothing more than behave in conformity with these rights, underlining that such a presumption can always be defeated if “in the circumstances of a particular case, it is considered that the protection of the Convention rights was manifestly deficient”¹⁰¹.

As in *Povse* the ECtJR first verified the applicability of the presumption *Bosphorus*. As regards the first question¹⁰², the ECtHR briefly referred to the previous rulings in *Bosphorus* and *Michaud*¹⁰³ where the issue concerning the equivalent protection granted by the Union to the rights protected by the ECHR had already been taken into consideration. The judges of Strasbourg have made extensive reference to the jurisprudence of the CJEU, which has long recognized fundamental rights as general principles of the Union, as well as their respect as an indispensable condition for the legality of the acts of the institutions. The judges have also highlighted the system of protection of EU law is based on a composite structure CJEU/national jurisdictions, however it has its own mechanisms, adequate for the purpose of repressing any violation of fundamental rights by the Member States, or the Union itself, this is through the referral system for a preliminary ruling, or through an action for infringement or annulment. No reference has been reserved to the “political” mechanism referred to in article 7 TEU¹⁰⁴, probably due to its already inability to offer the individual adequate protection in the specific case¹⁰⁵.

¹⁰¹ A. JAKUBOWSKI, K. WIECZYŃSKA, Fragmentation vs the constitutionalisation of international law: A practical inquiry, op. cit.

¹⁰² V. LAZIC, Family private international law issues before the European Court of Human Rights: Lessons to be learned from *Povse v. Austria* in revising the Brussels IIa Regulation and its relevance for future abolition of exequatur in the European Union, in CH. PAULUSSEN, T. TAKACS, V. LAZIC, B. ROMPUY (eds.), *Fundamental rights in international and european law*, op. cit.

¹⁰³ ECtHR, *Michaud v. France* of 6 Dicembre 2012, par. 109.

¹⁰⁴ S. PEERS, Protecting the rule of law in the EU: Should it be the Commission’s task, in *EU Law Analysis*, 12 March 2014.

¹⁰⁵ See in argument: K. NIKLEWICZ, Safeguarding the rule of law within the European Union: Lessons from the polish experience, in *European View*, 16 (2), 2017, pp. 284ss. L. F. M. BESSELINK, The bite, the bark and the howl. Art. 7 TEU and the rule of law

The ECtHR is not satisfied with a verification carried out solely at the national level, in relation to the restrictive interpretation of the rules set forth in articles 41 and 42 of Regulation 2201/2003¹⁰⁶. It requires, in fact, that the composite system of protection referred to previously, of which the institute of preliminary reference is also part, is activated in its entirety. It will therefore not suffice for the courts of the State party to consider that they cannot escape from carrying out a specific obligation under EU law, but they should, if they suspect that such enforcement could lead to a violation of fundamental rights, put the question back on to the CJEU so that it can clarify the content of this obligation and verify its compatibility with fundamental rights in their equivalent meaning¹⁰⁷.

We have seen how the intermediate *exequatur* procedures and the grounds for refusal constitute a limit to the principle of mutual recognition and their presence expresses, in essence, a lower level of mutual trust between states. Similarly we have noted, where such procedures or grounds for refusal are not present, the level of trust between States should be considered extremely high. However, again in this regard, it has been clarified how such trust can be of two types “presumed” or “concrete”. However, the ECtHR’s reference to the minimum requirements referred to in article 42 of Regulation 2201/2003—which is part of the decision-making part concerning the examination of the existence of circumstances capable of highlighting a serious and manifest violation of fundamental rights—seems to allude to the suitability of these requirements to guarantee, also to an automatic recognition and enforcement system, an adequate level of protection to the rights guaranteed by the ECHR, because only a system based on a mutual trust of a concrete nature, and therefore built

initiatives, in Amsterdam Law School Research Paper No. 2016-02, pp. 6ss. C. CLOSA, D. KOCHENOV, J.H.H. WEILER, Reinforcing rule of law Oversight in the European Union, RSCAS 2014/25, Global Governance Programme, n. 87. D. KOCHENOV, L. PECH, From bad to worse? On the Commission and the Council’s rule of law initiatives, in *EU Law Analysis*, 19 January 2015. S. PEERS, Protecting the rule of law in the EU: Should it be the Commission’s task, *op. cit.*

¹⁰⁶ G. CUNIBERTI, Abolition de l’*exequatur* et présomption de protection des droits fondamentaux, *op. cit.*

¹⁰⁷ CJEU, C-211/10 PPU, *D. Povse v. M. Alpaço* of 1st July 2010, ECLI:EU:C:2010:400, I-06675 and especially the par. 64. The interpretation of reserve of judge of origin is founded in the next case, too: C-491/10 PPU, *Aguirre Zarraga v. Pelz* of 22 December 2010, ECLI:EU:C:2010:828, I-14247. See in argument: G. BIAGIONI, The Aguirre Zarraga case: Freedom of circulation of judgments goes one step further, in J. DIEZ HOCHLEITNER, C. MARTINEZ CAPODEVILA, Y. FRANTOS MIRANDA, *Recent trends in the case law of the Court of Justice of the European Union*, ed. Wolters & Kluwer, The Hague, 2012, pp. 606ss.

on the obligation by the law of Member State to guarantee certain standards¹⁰⁸ of protection to the fundamental right in question-embodied in a series of clear and precise minimum requirements-it can offer adequate protection to fundamental rights where this is exclusively concentrated in the State of origin. Indeed, the ECtHR does not appear to be incompatible with the ECHR that the Austrian court is deprived of any discretion in recognizing and enforcing the measure, as long as the court of the State of origin is subject to EU law-to comply with the minimum standards of protection of fundamental rights, and always that compliance with these obligations can be asserted, through appropriate means of appeal, before the jurisdictions of the same State¹⁰⁹.

As we can understand a question of balance between the “trust” and “control” arises regarding the enforcement of responsibility decisions in the EU. If we look at the approach taken by the EU regarding the abolition of exequatur in Brussels Ibis Regulation, certain safeguards were kept. So total “trust” was not achieved but rather the approach of limited “control” was postponed to a later stage. “Control” was taken in the form that the ex ante control by the state now is transformed to ex post control initiated by the parties. So the abolition of the exequatur in the Brussels regime represents moving the coordination to a later stage of the implementation of recognition and enforcement. It is very realistic to assume that the Brussel Ibis Regulation will follow these new tendencies in the Brussels regime. Again the question of balance regarding the Brussels Ibis Regulation translates to the answer of the question whether removing the requirement of exequatur could mean abandonment of certain “control” and with that introducing new problems. As much as the political will of the EU is understandable, there must be some kind of realistic expectations for the modalities of building “actual trust“. This cannot be achieved by imposing an obligation that Member States have to “trust” other authorities. “Trust” is not something which can be built by theoretical or political will. The persons who are implementing the Regulation have to have confidence in the other person’s behavior in the application of the Regulation. In addition, they have to understand the regulation and the values it protects. When they have understood these values and when they are certain that the other persons have

¹⁰⁸ Naturally, the obligation must be sufficiently clear and precise, so as to realize respect for the fundamental right. The mere obligation to respect fundamental rights will certainly not be enough. It is indeed evident that, in this case, we would find ourselves before a merely tautological affirmation, since the Convention itself imposes a general obligation on States to respect fundamental rights.

¹⁰⁹ M. HAZELHORST, *The ECtHR’s Decision in Povse: Guidance for the future of the abolition of exequatur for civil judgments in the European Union*, in *Nederlands Internationaal Privaatrecht 2014*, pp. 30ss.

also understood the values, then the “actual trust” would emerge. Without “trust” all that would be left are ineffective rules, as much as they are flawlessly drafted or constructed.

3. Indirect protection of fundamental procedural rights: The *Avotinš* case

The same problem, this time more specifically relating to the protection of procedural rights, has recently been brought before the ECHR in the *Avotinš* case¹¹⁰, concerning recognition and enforcement in Latvia, pursuant to Regulation 44/2001. That circumstance was expressly recognized in the Pellegrini and others case¹¹¹, where the appellant complained of an indirect breach by Italy of the rights she recognized under article 6 (1) of the ECHR¹¹² during a procedure for the deliberation of an ecclesiastical dissolution judgment of marriage¹¹³. In *Avotinš v. Latvia's* complaints concerned, specifically, the violation of his right to the adversarial hearing. However, despite art. 6 of ECHR¹¹⁴ does not contain any

¹¹⁰ ECtHR, *Avotinš v. Latvia* of 23 May 2016.

¹¹¹ CJEU, 23/76, *L. Pellegrini & C. s.a.s. v. Commission of the European Communities and Flexon Italia* of 7 December 1976, ECLI:EU:C:1976:174, I-01807. For details see: M. HAZELHORST, Free movement of civil judgments in the European Union and the right of fair trial, op. cit.,

¹¹² J.J. KUIPERS, The right to a fair trial and the free movement of civil judgments, in *Croatian Yearbook of European Law and Policy*, 6, 2010, pp. 25ss

¹¹³ In particular, we complained that, in the ecclesiastical proceeding, according to canon law, the defendant was not informed of any proceedings against him, as well as the object of these proceedings, before being invited to appear for a hearing or the possibility of appointing a lawyer. Furthermore, it was contested, contrary to Article 6 of the Convention, that it was impossible for the defendant's lawyer to obtain a copy of the file relating to the proceedings before the ecclesiastical authorities, in order to organize an effective defense in the recognition before the Italian authorities.

¹¹⁴ See the case: *Vrbica v. Croatia* of 1st April 2010, par. 61. S. STEIN, In search of “red lines” in the jurisprudence of the ECHR on fair trial rights, in *Israel Law Review*, 50, 2017, pp. 180ss. O. PRIDAL, The right to a fair trial. Article 6 of the European Convention on Human Rights, Kluwer Law International, the Hague, 2014. A. PANAIT, The right to a fair trial in the dynamic interpretation of the European Court of Human Rights, in *Challenges of the Knowledge Society*, 2016, pp. 226ss. J.J. FAWCETT, The impact of art. 6 (1) of the ECHR in private international law, in *The International and Comparative Law Quarterly*, 56, 2007, pp. 25ss. See also: *Jackson Mc Donald v. France* of 29 April 2008. *Hornsby v. Greece* of 19 March 1997; *Burdov v. Russia* of 6 March 2003; *Sylvester v. Austria* of 9 October 2003; *Jovanovski v. The Former Yugoslav Republic of Macedonia* of 7 January 2010. For details see: L.R. KIESTRA, The impact of the European Convention on

explicit reference to the right of the party to appear personally in the process, by virtue of a well established jurisprudential practice of ECtHR¹¹⁵ the principle has been established that this provision imposes, however, that, in the civil default proceedings, effective knowledge must be guaranteed of the procedure by the defendant. The protection of the right to adversarial duty occupies a specific role in it, since in a system of protection of fundamental rights such as that outlined in relation to the principle of mutual trust, the effectiveness of the moment of protection before the court of the State of origin of the This decision is of paramount importance given the limited possibility of obtaining a new assessment of the compatibility of the measure with those rights before the enforcement judge. The safeguarding of the defendant's right to be promptly informed of the proceedings against him, in order to enable him to organize an effective defense in the original place of trial, finds a very special place. It is not accidental, in fact, that both Regulation 44/2001, which was emphasized in the specific case, and Regulation 1215/2012 that happens to him, provide for an independent reason for refusing recognition and execution of the judgment by default "if the a judicial request or an equivalent document has not been notified or communicated to the defendant in good time and in such a way as to be able to present his defense"¹¹⁶.

Such protection can operate every time the decision is made in the absence of the defendant, with the not negligible particularity that-coherently with the principle of autonomous interpretation-the reference to national regulations cannot be considered decisive in determining the notion of default under Regulations. It follows that a decision may be included in the scope of the provision in question even when, pursuant to the law of the State of origin, it is not formally rendered in absentia. In *Hendrikman*¹¹⁷ the CJEU has in fact stressed that "a defendant who ignores the judgment instituted against him and for whom appears, before the judge of origin, a lawyer whom he has not conferred, is absolutely unable to defend himself"¹¹⁸ and it must therefore be considered as

Human Rights on private international law, T.M.C. Asser Press & Springer, The Hague, 2014, pp. 204ss.

¹¹⁵ See in particular from the ECtHR, *Lobo Machado v. Portugal* of 20 February 1996; *Vermeulen v. Belgium* of 20 February 1996; *Mantovanelli v. France* of 18 March 1997. For details see: O. JOHAN SETTEM, Applications of the fair hearing norm in ECHR article 6 (1) to civil proceedings, ed. Springer, Berlin, 2015.

¹¹⁶ Artt. 34(2) of Regulation 44/2001, 45(b) of Regulation 1215/2012.

¹¹⁷ CJEU, C-78/94, *Hendrikman and Feyen v. Magenta druck & Verlag* of 10 October 1996, ECLI:EU:C:1996:380, I-04983.

¹¹⁸ CJEU, C-78/94, *Hendrikman and Feyen v. Magenta druck & Verlag* of 10 October 1996, op. cit.

contumacious regardless of the provisions of national legislation. Furthermore, in order for the grounds for refusal referred to in article 34 (2) to be invoked, it is necessary that the defendant has not proved to be inexperienced in exercising the remedies put forward by the order of origin of the provision. Therefore, the use of this ground for refusal of recognition will be precluded when the defendant in default has not challenged, within the limits of the provisions and permitted by the law of the State of origin, the fact that the judicial request has not been notified or communicated useful time and in such a way as to be able to present one's own defenses¹¹⁹. The interpretation of the second part of article 34 (2) was clarified by the CJEU in the *ASML*¹²⁰ and *Apostolides*¹²¹.

In *ASML*, the CJEU interpreted the provision “in the sense that a defendant has” the possibility “of challenging a default decision issued against him only if he actually knew the content of the decision”¹²², even if this had for notification of the application or through other sources-knowledge of the procedure, there is, however, the obligation to make it aware of the content of the decision rendered in absentia: in default, the limitation referred to in the second part of article 34

¹¹⁹ This is a modification of Regulation 44/2001, as the Brussels Convention of '68 did not provide for this obligation, which introduces a further limit to the application of the clause in question. It is interesting to note that this modification explicitly nullifies a particular jurisprudential orientation, in fact the Court of Justice, again in *Hendrikman and Feyen/Magenta Druck & Verlag* had specifically excluded that “the possibility of subsequently appealing a default judgment, already enforced, (may) constitute a remedy equivalent to a defense before the decision (...)”.

¹²⁰ CJEU, C-283/05, *ASML Netherlands BV v. Semiconductor industry services GmbH (Servis)* of 14 December 2006, ECLI:EU:C:2006:787, I-12041, that: “(...) a balance must be struck under the Brussels I Regulation to prevent undermin(ing) (...) the rights of the defense (...) this balance must reflect effective judicial protection, itself to be achieved in fulfillment of the common constitutional traditions of the Member States (...) and thereby the ECtHR (...). see for details: E. TORKRUBB, *Civil procedure and EU law. A policy area uncovered*, Oxford University Press, Oxford, 2008, pp. 150ss. P. ROBERSON, *Collier's conflict of laws*, Cambridge University Press, Cambridge, 2013, pp. 230ss. A. BRIGGS, *The conflict of laws*, Oxford University Press, Oxford, 2013. M. HARDING, *Conflict of laws*, ed. Routledge, London & New York, 2013. J.J. KUIPERS, *The right to a fair trial and the free movement of civil judgments*, in *Croatian Yearbook of European Law and Policy*, 6 (1), 2010, pp. 24ss.

¹²¹ CJEU, C-420/07, *Apostolides* of 28 April 2009, ECLI:EU:C:2009:271, I-03571. See, P. STONE, *Private international law*, Edward Elgar Publishing, Cheltenham, 2018. L. COLLINS, A. BRIGGS, J. HARRIS, J.D. MCCLEAN, C. MCLACHLAN, C.G.J. MORSE (eds), *Dicey, Morris and Collins, The conflict of laws*, ed. Sweet and Maxwell, London, 2012, pp. 14 ss.

¹²² A. BRIGGS, *The conflict of laws*, op. cit., M. HARDING, *Conflict of laws*, op. cit., J.J. KUIPERS, *The right to a fair trial and the free movement of civil judgments*, op. cit.,

(2) will not be able to operate, since it will not have been able to challenge the default decision. In *Apostolides*, on the other hand, it was pointed out that this restrictive clause operates in any case where the defendant was able to lodge an appeal against the decision rendered *in absentia* and that appeal enabled him to assert that the judicial request or the equivalent document he had not been notified or communicated in good time and in such a way that he could present his defense¹²³.

In the *Trade Agency* case¹²⁴, the CJEU has instead examined the issue concerning the extent of the judge of the execution in relation to the verification of the requirements for the refusal of recognition or enforcement under article 34 (2) of the Regulation, this especially in the presence of any findings of the judge of origin in relation to the same factual requirements. As is well known, in fact, any review of the foreign decision is precluded by the opposition judge. It will therefore be excluded the possibility that the execution or recognition of a foreign provision may be denied as a result of new and different assessments, made by the judge of the requested State, in relation to the findings in fact and in law already completed in the original proceeding, from the foreign judge. That said, there could be a doubt that, even when examining the grounds for opposition to enforcement, the judge of the requested State may be bound by any findings, as made by the judge of origin, in relation to the ascertainment of the grounds of denial listed in articles 34 and 35 of the Rules. The executing judge wondered whether, being indicated in the certificate in Annex V of Regulation 44/2001¹²⁵, the date of notification or communication of the judicial request in the event of non-compliance, it was possible, in the opposition, “verify the concordance between the information contained in said certificate and the evidence”¹²⁶ eventually provided by the parties and, consequently, formulate a new assessment in this sense on a statement of fact already put in place by the court of origin in the mentioned certificate, without falling in the prohibition set out in articles 36 and 45¹²⁷. The solution offered by the CJEU has been favorable to the possibility of checking the information provided in the certificate, for

¹²³ P. STONE, *Private international law*, op. cit.,

¹²⁴ CJEU, C-619/10, *Trade Agency* of 5 September 2012, ECLI:EU:C:2012:531, published in the electronic Reports of the cases.

¹²⁵ See the next cases from the CJEU: C-325/18 PPU, *C.E. and N.E.* of 19 September 2018, ECLI:EU:C:2018:739; C-595/17, *Apple Sales International and others* of 24 October 2018, ECLI:EU:C:2018:854; C-337/17, *Fenikes* of 4 October 2018, ECLI:EU:C:2018:805, all of them published in the electronic Reports of the cases.

¹²⁶ CJEU, C-337/17, *Fenikes* of 4 October 2018, op. cit.

¹²⁷ CJEU, C-619/10, *Trade Agency* of 5 September 2012, op. cit.

a variety of reasons: first, the foreclosure referred to in articles 36 and 45 is addressed exclusively to the foreign decision¹²⁸, so that there appears to be no provision in the Regulation to prohibit an eventual and review in this regard in relation to the attestation referred to in Annex V; secondly, the judge, or the authority responsible for issuing such a certificate, does not necessarily coincide with the body that issued the decision whose execution is required, so that the information is purely indicative, the value of which it is simply informative.

Finally, it should be emphasized that the provision by the legislator of the grounds for refusing recognition and enforcement pursuant to articles 34 and 35 has as its ultimate purpose the extraordinary protection- notwithstanding the principle of mutual trust-of a series of values of fundamental importance, such as public order and defense rights. This protection must necessarily be carried out by means of a subsequent and further check carried out by the execution judge in relation to a series of parameters strictly indicated by the aforementioned articles; limiting the scope of the examination power available at that stage to the judge of the requested Member State, by the mere fact that the certificate was produced, would mean “depriving the control which that court is required to carry out and of any useful effect; consequently, preventing the realization”¹²⁹ of this objective, by reducing the system referred to in Regulations 44/2001 and 1215/2012¹³⁰ to a mere automatic recognition and enforcement mechanism. It was therefore considered that, in opposition to the recognition and enforcement, the judge of the requested State is entitled to verify the validity of any finding, in fact and in law, put in place by the court of origin, different from those expressly indicated in articles 36 and 45, and therefore not directly or indirectly related to the content of the foreign decision¹³¹.

This clarified, under Union law, the judge of the executing State, who has been the subject of the dispute on this ground against the plaintiff, must: a) first check whether the defendant is defective pursuant to Regulations 44/2001-1215/2012¹³² (b) independently verify the correctness of the notification of

¹²⁸ CJEU, C-C-619/10, *Trade Agency* of 5 September 2012, op. cit.

¹²⁹ CJEU, C-337/17, *Fenikes* of 4 October 2018, op. cit.

¹³⁰ F. GASCÓN-INCHAUSTI, La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis, in E. GUINCHARD (eds), *Le nouveau règlement Bruxelles I bis*. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, op. cit.

¹³¹ P. LETTO-VANAMO JAN SMITS (Ed), *Coherence and fragmentation in european private law*, ed. Sellier, Bruxelles, 2012.

¹³² F. GASCÓN-INCHAUSTI, La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis, in E. GUINCHARD (eds), *Le nouveau règlement Bruxelles I*

the application to the defendant, c) finally examine whether the defendant in default had been in a position to challenge the decision¹³³. It follows that such an obligation is justified only if the *prima facie* interpretation of the common rule presents incompatibility profiles with the rights guaranteed by the ECHR and that question has not already been dealt with earlier by the courts of Luxembourg¹³⁴.

If it is well reflected where the principle of mutual trust is declined in its highest expression-which leads to recognition and automatic enforcement-control over the observance of the fundamental rights of the judge of the executing State is limited by the presumption equivalence, under two different profiles. The first is active, that is related to its ability to ascertain possible manifest violations of fundamental rights by the authorities of the State of origin, by virtue of the principle of mutual trust. The second passive, that is with regard to the possibility of being the subject of the scrutiny of the Court of Strasbourg, this because of the presumption of equivalence. Nevertheless, the judges in Strasbourg nevertheless seem to accept the suitability of the composite mechanism for the protection of the fundamental rights of the Union-also by virtue of the fact that,

bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, op. cit.

¹³³ An element which may appear to be of secondary importance, if not to justify the application of the presumption of equivalent protection (which is addressed to the Union system and not to the signatory States), but which could find new interest following the accession of the EU to the ECHR system.

¹³⁴ As was envisaged by the interpretative pronouncement of the *Cilfit* judgment (C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* of 06 October 1981, ECLI:EU:C:1981:335, I-03415) where the CJEU has stated "(...) any provision of Community law must be relied on its own context and interpreted in the light of all the provisions of that right, its aims and its evolution stage at the time when the application of the provision in question is adopted (...) of the terms of a provision of European Union law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and its scope must normally be an autonomous and uniform interpretation throughout the European Union, taking into account the context of the provision and the purpose pursued by the legislation in question (...)". see in argument: L. AZOULAI, *The part of future of EU law: The classics of EU law revisited on the 50th Anniversary of the Rome treaty*, Oxford University Press, Oxford, 2010. G. BECK, *The legal reasoning of the European Court of Justice of the EU*, Hart Publishing, Oxford & Oregon, Portland, 2012. K. LENAERTS, J. GUTIÉRREZ-FONS, *To say what the law of the EU is: Methods of interpretation and the European Court of Justice*, in *EUI Working Papers*, 2013. J. D. LÜTTRINGHAUS, *Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 77 (1), 2013, pp. 32ss.

as has been repeatedly ascertained, it offers protection equivalent to that of the ECHR-to guarantee respect for these rights also within the European system of circulation of foreign judgments: “the Court must satisfy itself (...) that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient (...)”¹³⁵.

In particular, there are two clarifications. Firstly, the judges observe that in implementing the European system of circulation of judgments it will be up to the national judicial authorities to deploy in its entirety the mechanism of equivalent protection which EU law places to protect the rights guaranteed by the ECHR. From this it follows, as is evident, also the obligation to apply to the CJEU, by way of preliminary rulings, where the application of the common rule may appear contrary to fundamental rights. Secondly, where a serious and manifest violation of fundamental rights occurs before the Courts of origin-and it cannot be remedied under the law of the Union-the latter cannot avoid examining it on the basis of their obligations arising from participation in the EU, under penalty of indirect responsibility in the main violation. The equivalent protection offered by the Union to fundamental rights is affirmed also in the context of recognition and enforcement of foreign judgments (as in *Povse*); it is required, in order to be able to ascribe the behavior to the International Organization, and therefore apply the presumption of equivalent protection, the activation in its entirety of the mechanism of guaranteeing fundamental rights envisaged by the EU (as well as in *Michaud*); it is highlighted that this presumption is not absolute, but can be disavowed before serious and manifest violations of fundamental rights (as in *Bosphorus*). The question is therefore reduced to the appreciation of the latter condition.

Instead, what is not convincing is, rather, the application of the Regulation by the Latvian authorities and, more specifically, the methods of assessment with which the supreme court verified the actual possibility of Avotīnš to challenge the injunction, or to assert the violation of their right to be heard in this regard. It is important to note that, from this last observation, the object of the ECtHR examination is not so much the compatibility of the European system of circulation of decisions with the fundamental rights guaranteed by the ECHR, but rather the behavior of the judge of the running. One such approach, it is highlighted that: “reflects a literal and automatic application of Article 34(2) of the Brussels I Regulation, (that) could in theory lead to a finding that the protection afforded was manifestly deficient such that the presumption of

¹³⁵ K. LENAERTS, J. GUTIÉRREZ-FONS, To say what the law of the EU is: Methods of interpretation and the European Court of Justice, op. cit.

equivalent protection of the rights of the defence guaranteed by article 6 par. 1 is rebutted”¹³⁶.

One cannot help but notice, although as already highlighted, the legitimacy of the European system of circulation of decisions is no longer under discussion¹³⁷, a new allusion to those particular circumstances in which the principle of mutual trust—as in the cases referred to in article 41 and 42 of Regulation 2201/2003¹³⁸—prevents any kind of assessment in concrete terms to the judge of the execution on the work of the court of origin, or on the suitability of the legal system in which it operates to adequately guarantee the fundamental rights. The ECHR, while considering the lack of scrutiny of the supreme court “regrettable”, does not actually see a possible violation of article 6. In truth, the Cypriot law offered to *Avotins* a perfectly realistic possibility to challenge the measure, even at a great distance from the issuance of the default decision. Furthermore, it provided that, in the event of the infringement of the applicant’s right to be heard, the possibility for the courts to annul the vitiated decision was established. The sentence therefore concludes in a non-violation of article 6 (1) of the ECHR.

4. On the search for a common standard of judicial protection as a driving force for a deeper procedural harmonization: Build mutual trust

The principle of mutual trust and mutual recognition finds, precisely because of the relative breadth of the hypotheses of refusal of recognition and execution, the weakest implementation. Indeed, it is precisely in these grounds for refusal that the margin of appreciation of the judge of execution on respect for fundamental rights in the original system that is so much referred to by the ECtHR

¹³⁶ X .GROUSSOT, Constitutional dialogues, pluralism and conflicting identities, in M. AVBELJ, J. KOMAREK (eds.) Constitutional pluralism in the European Union and beyond, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 321ss.

¹³⁷ The reasoning of the ECtHR is not, at this point, completely clear. Referring in particular to the possibility of overcoming (instead of not applying) the presumption of equivalence, it seems that the examination of the judges of Strasbourg continues to have as object the compatibility of the system of circulation of judgments referred to in Regulation 44/2001, instead that the behavior of the Latvian authorities. Such a formulation could hide, as already highlighted in the text, the intention of the European judges to keep the attention on the problem of compatibility with the Convention of mechanisms for recognition and automatic execution.

¹³⁸ M. THÖNE, Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht, op. cit.A. HAMED, K. TATSIANA, A step forward in the harmonization of european jurisdiction: Regulation Brussels I Recast, op. cit.

finds expression. That the jurisprudence of the CJEU allows national courts to transmit, by means of article 34 (2), as well as the public-substantive and procedural order clause-a certain amount of control over the work of the original jurisdictions is a consolidated factor and recognized in the same pronouncement *Avotins* as in the case of *Renault*, the CJEU has admitted that, on the basis of this provision, measures may be refused whose content constitutes a serious and disproportionate limit to the principles considered fundamental in the legal system of origin which are certainly the rights protected by CFREU and from ECHR. Likewise, in *Krombach*¹³⁹ and *Gambazzi*¹⁴⁰, it has been stressed that the same clause can always protect all those fundamental procedural rights which do not fall within the special application scope of articles 34 (2) or 45 (b) pursuant to Regulation 44/2001-1215/2012. From this point of view, at first glance, the position of the ECtHR and of the CJEU does not appear to be confusing.

The necessary maintenance of a certain margin of appreciation on the respect of fundamental rights by the judge of execution-regardless of whether it acts in the fulfillment of the obligations arising from the participation of the signatory state to the Union-is not a new element. It is the writer's opinion that the particularly benevolent treatment reserved in *Povse* for the automatic recognition system referred to in Regulation 2201/2003 did not find so much foundation in the ECtHR's desire to exempt the European system of circulation of foreign judgments from this minimum requirement, but rather, it was rooted

¹³⁹ CJEU, C-7/98, *Krombach v. France* of 28 March 2000, ECLI:EU:C:2000:164, I-0193 I the CJEU noticed the right of the German Court to refuse recognition of a judgment rendered in France was based on a procedural rule which penalized the defendant, preventing him from pursuing his defense if he had not submitted himself in the process. The judgment of the CJEU did not bind the Court to a particular solution to the case (in reality, not to recognize the foreign judgment) but to rule out the non recognition of a breach of the Brussels if, in the Court's view there was a manifest incompatibility of the proceedings before the foreign Court with the fundamental safeguards of the defense. In the same case, the ECtHR, by judgment of 13 February 2001, sentenced France for failing to allow the accused to appear in Court under the French Code of Criminal Procedure, which deprived the defendant of the defense in judgment when an alleged crime was being challenged. The CJEU referred to the case law of the ECtHR in defining the refusal to hear the defense of an accused absent from the hearing as a "manifest violation of a fundamental right" par. 40. See also: J.P. COSTA, *La Cour européenne des droits de l'homme. Des juges par la liberté*, ed. Dalloz, Paris, 2017.

¹⁴⁰ In case of the CJEU: C-394/07, *Marco Gambazzi v. Daimler Chrysler* of 2 April 2009, ECLI:EU:C:2009:219, I-02563, the CJEU affirmed: "(...) that the balance to be struck between fundamental rights and public policy was to ensure that the objectives (...) corresponded with the public interest pursued (and were not) disproportionate (...)". For details see: J. OSTER, *Public policy and human rights*, in *Journal of Private International Law*, 14, 2015, pp. 544ss.

in the confidence that the judges placed in the fact that, the CJEU, went to also interpret particularly rigid provisions such as those referred to in articles 41 and 42-always with a view to maintaining an inviolable area of discretion of the execution judge to sanction, through the refusal of recognition, serious and manifest violations of these rights¹⁴¹.

At CJEU, on the opportunity to rethink and re-evaluate, by limiting it, the role and the weight of mutual trust in the system of circulation of foreign judgments, in order to avoid automatisms capable of jeopardizing the compatibility of this system with the rights guaranteed by ECHR. This is all the more evident from the very structure of the decision, within which the ECtHR constantly refers to hypothetical situations of contrast between the system of circulation of judgments and rights protected by the ECHR which, although unattainable in the case of Regulations 44/2001-1215/2012, could well materialize in those circumstances where the expression of this principle is declined with such intensity as to configure a system of recognition and mechanical and automatic execution¹⁴².

What transpires are the problems in relation to a system of control of fundamental rights concentrated exclusively in the State of origin whose validity of the verification is reverberated, by virtue of the principle of mutual trust and without- in most cases-the support for a common legislative intervention to guarantee these rights, within the legal systems of all the Member States.

However, there are two possible solutions to the risk issues raised by the ECtHR and both are well known to the European legislator. The first, of a later character, is substantiated by the obvious maintenance of an area of appreciation by the judge of execution in point of respect for fundamental rights, a solution which is conveyed in the grounds for refusing recognition. A further sign that the legislator, perhaps also following the warning made in Avotiniš, may have decided to temporarily set aside his own projects to abolish the refusal tout court, or to reduce the intensity of the declination of the principle of mutual trust in the The scope of the circulation of foreign judgments seems to emerge also from the very recent Regulation 1104/2016¹⁴³ in the matter of recognition and enforcement of decisions regarding the

¹⁴¹ E. SPAVENTA, A very fearful Court? The protection of fundamental rights in the European Union after opinion 2/13, in *Maastricht Journal of European Studies*, 22 2015, pp. 35ss.

¹⁴² As we can notice in the next cases from the CJEU: C-649/16, *Valach and others* of 20 December 2017, ECLI:EU:C:2017:986; C-498/16, *Schrems* of 25 January 2018, ECLI:EU:C:2018:37; C-168/16, *Nogueira and others* of 14 September 2017, ECLI:EU:C:2017:688, all of them published in the electronic Reports of the cases.

¹⁴³ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of

property consequences of registered partnerships which, in addition to maintaining exequatur, has the same structure as Regulation 1215/2012 with an interesting clarification. Indeed, article 38 of Regulation 1104/2016, entitled “fundamental rights” provides that “the courts and other competent authorities of the Member States shall apply article 37 (which lists the grounds for refusal) of this Regulation while respecting the rights of fundamental rights and principles recognized by the CFREU”¹⁴⁴.

A timid acknowledgment¹⁴⁵ of the problems raised by the ECtHR is also recorded in the proposed recast of Regulation 2201/2003¹⁴⁶, within which an amended article 54 (43 of the current Regulation) is in place to rectify the certificate of execution of the decisions concerning the right of access and certain measures for the return of the child¹⁴⁷ provides for the authority of origin-on request-to revoke this certificate if it has been granted by manifest error, or in violation of the requirements established by the Regulation. Even in the latter case it is inevitable to note a link with the ruling of the ECtHR in *Povse*, where great importance had been given by the judges to the minimum requirements laid down in article 42.

decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016

¹⁴⁴ CJEU, C-498/16, *Schrems* of 25 January 2018, op. cit.

¹⁴⁵ The substantial “impermeability” of the provisions (certificates) relating to the right to visit and certain decisions concerning the return of the minor with respect to the scrutiny of the execution judge is in fact reconfirmed, albeit in a transverse way, by articles 38 and 40 of the proposal, limits in which they state that “the grounds for non-recognition referred to in Article 38 (1) (a) to (c) cannot be relied upon against a decision granting a right of access or providing the return of the child under second subparagraph of Article 26 (4). “In fact, this last one makes provisions that are subject to a possible refusal to execute only in cases of contrast between decisions under the conditions set out in points d) and e) of the same article, or of exceptional change of circumstances-after the pronouncement of the original decision-such as to clearly place it in conflict with the public order of the requested State, within the restricted limits set out in points a) and b) of article 40 (2).

¹⁴⁶ COM(2016)-411, Proposal for a Council Regulation concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, and international child abduction (recast), Brussels, 30 June 2016.

¹⁴⁷ The proposal also provides that this certificate can be issued for all decisions concerning parental responsibility. The recast text of the Regulation provides for the abolition of the exequatur procedure (Article 30 et seq.) For all measures relating to parental responsibility and extends to them the preferential circulation channel that the Brussels II-bis regulation grants today to decisions concerning the right to visit and certain decisions on the return of the child.

A second solution, especially with regard to the protection of procedural rights, could therefore be to guarantee the protection of fundamental rights within the State of origin by means of the definition of minimum standards at the common level. It is equally clear from the ECtHR rulings, in fact, that the element of primary importance is always to guarantee concrete protection of the fundamental rights guaranteed by the ECHR. The need for a scrutiny by the judge of the executing State has reason to be, in fact, in the absence of a protection system capable of guaranteeing such protection at supranational level and postulates, in a certain way, an already mentioned mutual trust (distrust) between the different States, which, in turn, derives from the differences-even substantial-between the different legal systems and traditions, especially in procedural matters.

It is true that the correct application of the EU rule would not be absolutely guaranteed by the authorities or by the law of the State of origin, but the only exercise by the Union of its procedural competence would guarantee those rules, bearers of fundamental rights equivalent to those of the ECHR, an extraordinary compulsory force deriving from all the mechanisms provided for by the Treaties and by the jurisprudence to protect the effectiveness of EU law, including the direct effect and the appeal for infringement. A good example of such a solution can be found in the aforementioned recast proposal of Regulation 2201/2003 in which-together with the provision of a general duty to listen to the minor in the context of parental responsibility procedures¹⁴⁸-following the relative reason for refusal (due to lack of hearing of the minor, in fact) provided for in the current article 23 of the Regulation.

Therefore, the harmonization of national procedural systems could be a key element for the realization of both these goals of central importance for the constitutional evolution of the Union, while at the same time strengthening the protection of fundamental procedural rights and reducing differences in judicial treatment in the various Member States.

5. Concluding remarks and perspectives. Towards a harmonization and integration of european procedural law

The harmonization and approximation action in procedural matters has derived its driving force from the need for Union law to affect the procedural autonomy of Member States, in order to ensure both the effectiveness of Union law, both the achievement-a through the procedural means-of the objectives

¹⁴⁸ See, par. 5, recital 23, article 20 of the proposal.

set by the Treaties. From the examination of the pronouncements which recall the principles of equivalence and effectiveness, as well as of the legislative acts concerning this area, the instrumental character of the principles or, respectively, of the common rules contained therein concerning the need to ensure the useful effect of substantive law provisions, namely the completion or better functioning of the internal market.

The effectiveness of national legal remedies safeguarding the legal positions guaranteed by EU law is an essential requirement for the Union legal order to be able to concretely produce its effects in the company it is called upon to regulate. This is due to the dualistic dispositional/executive approach of the constitutional system of the Union-which entrusts the protection of subjective positions defined by EU law to the only procedural guarantee instruments prepared by each national system-with the risk that, in the absence of the provision of effective judicial remedies by domestic law, the common rule is in fact devoid of legal consequences, with obvious detrimental effects on the achievement of the objectives it pursues.

This close link between the effectiveness of substantive EU law and procedural law has allowed the attraction of procedural matter within the competence of the Union and the scrutiny of the CJEU. This link of interdependence between the effectiveness of the moment of national judicial protection and the effectiveness of EU substantive law-that is the completion, the correct or better functioning of the internal market-has legitimized jurisprudential and normative intervention in the procedural matter, it has deeply shaped and modeled both the methodology and the scope. Both the strictly sectoral approach to the regulation of procedural-confined matter in the context of cross-border disputes, or in even more specific fields, such as procurement, competition, consumer protection-as well as the limited consideration given to harmonization and approximation of aspects of the process related not so much to its effectiveness, but rather to its correspondence to the principles of the "fair trial", reflects the idea that the interference of Union law within the procedural autonomy of the Member States is admissible (ex-art 114 TFEU)-really appropriate (pursuant to article 81 TFEU)¹⁴⁹-only in those cases where the intervention on the procedural law is strictly preliminary to

¹⁴⁹ F. MARTUCCI, *Droit de l'Union européenne*, LGDG, Paris, 2017. M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, Cambridge University Press, Cambridge, 2017, pp. 321ss. R. SCHÜTZE, *European Union law*, Cambridge University Press, Cambridge, 2015, pp. 382. J. USHERWOOD, S. PINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018.

a better effectiveness of EU law, or a better realization of the objectives that it poses¹⁵⁰.

The attitude of the legislator in affecting procedural matter has undergone an evolution over the years, expanding itself from a philosophy of intervention that is merely “defensive” to the effectiveness of the EU norm, to a more “proactive” one. Alongside acts such as the “appeals” directives, issued to prevent the improper use of the wide autonomy of which the Member States enjoy in the procedural matter, further regulations have been issued, as in the case of the Directive IPRED¹⁵¹ and of Directive 2014/104/EC¹⁵² concerning compensation actions for violation of the antitrust rules, the only procedure harmonization implemented was that directly functional to achieving this objective. Very little attention is reserved in the legislation to the procedural rights of the parties involved. Similarly, even in the field of civil judicial cooperation, very few measures were taken to raise the level of protection of procedural rights within the Union by setting common minimum guarantee standards. This refers, in particular, to the aforementioned rules on free legal aid in cross-border disputes established by Directive 2003/08/EC, as well as to the special procedures outlined by the so-called optional instruments.

No reference, except as indicated in the recitals, is made in relation to fundamental rights, as well as due process. The protection is therefore in fact limited only to certain aspects of the fair trial, in particular the right to be informed of the existence of a judicial procedure against it, in order to be able to present its defenses in good time. The legislation in question does not guarantee that an extremely partial protection of the right to due process. There is no reference, for example, to the aspects relating to the presence of a third and impartial judge, to a public hearing, to the parity of the parties or to the right to a reasoned

¹⁵⁰ J.L. CLERGERIE, A. GRUBER, P. RAMBAUD, *L'Union européenne*, op. cit., M. DONY, *Droit de l'Union européenne*, op. cit., J.C. GAUTRON, *Droit européen*, op. cit.

¹⁵¹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 2.6.2004, p. 16-25. For details see: S. LARSOON, *Metaphors and norms. Understanding copyright law in a digital society*, ed. Lund University, 2011. A. SAVIN, *European Union internet law*, Edward Elgar Publishers, 2013, pp. 95ss.

¹⁵² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, p. 1-19. for details see: I.S. FORESTER, *The role of the CJEU in interpreting Directive 2014/104/EC on antitrust damages actions*, in *ERA Forum*, 18 (1), 2017, pp. 68ss.

judgment. The procedural guarantees laid down therein-simplification rules of the procedure apart-constitute nothing more than the mere counterpart of the defendant's loss of a "full" possibility of opposition to the recognition and enforcement of the provision issued, or certificate, in accordance with the aforementioned Regulations. They hardly express a general intention of the legislator to strengthen the level of procedural protection of the parties. Even in these cases, therefore, the only harmonization provided was that instrumental to the realization of the internal market, albeit through better access to justice¹⁵³, better circulation of foreign measures, or the establishment of faster, faster and inexpensive procedures.

The aim of modern procedural law is not only to ensure that the process is "effective" or "efficient" but also, and above all, that this is "just", and therefore respects those fundamental procedural rights, such as the contradictory, defense, equality of arms, the impartiality of the judge, publicity of the hearing etc. sanctioned by both the ECHR, the CFREU, and the national constitutions themselves.

In this context, procedural harmonization has been purely ancillary to the functioning of the internal market: it has emerged as a "by-product" of the impact of EU law on national legal systems in order to guarantee the achievement of the objectives set by the Treaties, without any claim to directly standardize the judicial protection guaranteed to individuals, or define minimum standards for the protection of fundamental procedural rights. In essence, the harmonization action focused solely on the capacity of the process of "giving that"¹⁵⁴ and that the holder of the subjective situation of EU law would have had the right to receive in the absence of the crisis of cooperation, omitting-however-all that part of legislation related to the fair and just performance of the latter, remitted to the individual national laws. According to our opinion the Directive presents the specific rules as regards some novel questions for the extent of harm, which

¹⁵³ A. RIPOLL SERVENT, F. TRAUNER, *The Routledge handbook of justice and home affairs research*, Hart Publishing, Oxford & Oregon, Portland, 2017.

¹⁵⁴ C.F. WEID, *The Directive on actions for antitrust damages after passing the European Parliament*, in *European Competition Law Review*, 35 (4), 2014, pp. 438 ss, who indicates that Art. 2 para 1 of the Directive (at least) does not contain restrictions for making respective claim. B.J. RODGER, *Why not court? A study on follow-on action in the UK*, in *Journal of Antitrust Enforcement*, 1 (1), 2013, pp. 104ss. S. PETER, *Access to competition authorities files in private antitrust litigation*, *Journal of Antitrust Enforcement*, 3 (1), 2015, pp. 58ss. A.P. REINDL, *The 2014 Directive on private enforcement-Looking back and Looking Forward*, in *Competition Policy International/Antitrust Chronicle*, January 2015 (1). S. PEYER, *The antitrust damages directive-Too little, too late, competition policy*, in *International/Antitrust Chronicle*, January 2015 (1).

relates to violations of anti-trust legislation. A most prominent example is the question whether the liability of the cartel members should extend to the harm caused by the inflated pricing of non-cartel members as a reaction to the distortion of competition in the market due to the cartel (known as “umbrella effects” or “umbrella pricing”)¹⁵⁵. The more pronounced effect of the Directive is probably the coordination of private and public enforcement of competition rules. The specific rules relating to the restriction of access to documents which have been submitted to the competition authorities under leniency applications, confirm the importance which continues to be attributed at European level on the public enforcement of competition law, and in particular on the unveiling of cartels through leniency programs, at least where these are successful. In this respect, it will be interesting to see how they will be applied, most notably in view of partially contradicting decisions of the CJEU.

On the illusory certainty of an already full and adequate protection of fundamental rights within the area of freedom, security and justice¹⁵⁶, there is an attempt to build a system of free circulation of foreign measures increasingly based on trust and mutual recognition. Except in the case of the recast of the Brussels I Regulation-before the inevitable finding that a system without common minimum standards for the protection of fundamental rights cannot be able to concretely base the trust necessary for the application of a full faith and credit clause postulating a free circulation of the foreign provision without any possibility of re-examination, not even with regard to the respect of these rights in the State of origin¹⁵⁷.

Even more concern is raised by the fact that one can take for granted the respect of fundamental rights by a State on the sole basis that it is a member of the Union. While the conventional system can only offer protection for

¹⁵⁵ CJEU, C-557/12, *Kone AG* of 5 June 2014, ECLI:EU:C:2014:1317, published in the electronic Reports of the cases, par. 34 (“(...) consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied (...”).

¹⁵⁶ M. FLETCHER, E. HERLIN-ARNELL, C. MATERA, *The European Union as an area of freedom, security and justice*, ed. Routledge, London & New York, 2016.

¹⁵⁷ X.GROUSSOT, *Constitutional dialogues, pluralism and conflicting identities*, in M. AVBELJ, J. KOMAREK (eds.) *Constitutional pluralism in the European Union and beyond*, Hart Publishing, op. cit.

equivalent- together with any enforcement, judicial or legislative enforcement effects, which the individual Member States deem to attribute to the ECtHR ruling-the exercise of the Union's powers in point protection of fundamental rights-with the consequent provision of minimum standards of guarantee-is able to offer, by means of those mechanisms such as the direct effect and the non-application of the incompatible national rule, a specific form of protection. Protection, the latter, which implies a higher standard of protection, even only for the mere application of the principle of primacy.

In my opinion, therefore, given that the two different guarantee schemes have contained-and offer protection- which is not perfectly comparable, the proper fulfillment of the obligations set out in articles 2 and 6 TEU could not be disregarded, where the Union enjoys its own competence, from the adoption of common minimum standards to safeguard fundamental rights on the sole basis that the same rights are also protected by the ECHR. This is because, by exercising the Union's regulatory competence, better and more effective protection could be guaranteed to them. This is especially true in connection with the construction of a system of free circulation of foreign judgments based on the principle of trust and mutual recognition, respect for fundamental rights cannot be presumed by the fact that all Member States are also part of the ECHR. Indeed, in this case the question assumes the same tautological character as a presumption of respect for fundamental rights based solely on participation in the Union, in accordance with article 2 TEU¹⁵⁸.

In particular, the balancing act between the right to effective judicial protection and other opposing interests- which, as we have seen, presupposes a rich series of political evaluations-should be placed primarily on a legislative level. Only later, if the assessment of the European legislator is flawed by unreasonableness, or is disproportionate, the question could pass to the examination of the judicial power. However, legislation which is "systematic" and not strictly sectoral in the matter of fundamental procedural rights would constitute a useful benchmark for the CJEU in those cases in which it must balance their protection in the specific case- that is to assess the compatibility of a legislative act with the same-attenuating the "political" character of these decisions and calming any criticism in relation to the excessive "activism" of the courts of Luxembourg.

¹⁵⁸ M. WIERZBOWSKI, A. GUBRYNOWICZ, *International investment law for the 21st century*, Oxford University Press, Oxford, 2015. A.H. TÜRK, *Judicial review in European Union law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 788ss

The legislative action on harmonization and procedural approximation did not follow that transition between economic Europe and the Europe of rights that the Treaty of Lisbon wanted to give to every aspect of the Union, but rather remained firmly anchored to that functional link between the procedural impact and the functioning of the internal market which has characterized the early stages. And indeed, there is a marked gap between the declarations of intent of the European institutions on the protection of fundamental rights in the EU Justice Agenda for 2020¹⁵⁹-and the effective action of the Union in this area.

If one were to identify one of the most needy aspects of development and evolution within the harmonization work, this is certainly relative to the protection of fundamental rights in civil proceedings. Action in this sense appears to be extremely urgent, as also highlighted by the recent resolution of the European Parliament of 25 October 2016 concerning the establishment of a safeguard mechanism at the level of the Union of fundamental rights¹⁶⁰. And this not only to guarantee individuals a better level of protection for their rights,

¹⁵⁹ COM(2014)-144, The EU Justice Agenda for 2020: strengthening trust, mobility and growth in the Union, Brussels 11 March 2014.

¹⁶⁰ Only the harmonization and approximation of national laws by means of common provisions which, inter alia, ensure respect for fundamental procedural and non-procedural rights could allow the concrete removal of the necessary scrutiny by the national court of the execution, and consequently the reasons for refusal, without necessarily sacrificing the prerogatives of individuals. It is true that, at a precise and timely reading of the *Povse* and *Bosphorus* rulings, a presumption of absolute equivalent protection, and consequently the realization of a full European full faith and credit clause, would always be incompatible with compliance with the Convention. However, it is also clear from the rulings of the European Court that the element of primary importance is that of guaranteeing concrete protection of the fundamental rights guaranteed by the Convention. The presence of a normative corpus of EU law capable of infusing and realizing within the legal systems of the Member States a minimum, common and uniform standard for the protection of fundamental procedural rights-also modeled taking due account of the decisions of the Courts of Strasbourg and Luxembourg-would greatly reduce both the possibility of a conflict between the legal systems of the Union and the individual Member States with the provisions of the Convention, and possible conflicts between the jurisprudence of the two Courts. Furthermore, one would thus reconcile the pursuit of the "justice" component of the SLSG.-understood as a better realization of the right to effective judicial protection, with consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market - with a concrete realization, and not presumed, of the "freedom" component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed. Such a course of action was undertaken, for example, in relation to criminal law, starting with the Council resolution of 30 November 2009, which established a roadmap for strengthening

especially in connection with the free circulation of foreign measures-does not detract from the latter¹⁶¹.

¹⁶¹ CJEU, joined cases C-404/15 and C-659/15, *P. Aranyosi and R. Căldăraru* of 5 April 2016, ECLI:EU:C:2016:198, published in the electronic Reports of the cases. In particular the attitude of the Luxembourg courts in relation to the interpretation of the principle of mutual recognition and mutual trust in civil procedural matters is intended to align with the “warnings” enucleated by the European Court in Avotínš. The reasons behind the less rigorous interpretation of this principle in the aforementioned ruling-based on the derivation of a new mandatory reason for non-execution of a European arrest warrant, where such execution exposes the person concerned to the actual risk of suffering treatment inhuman or degrading-they cannot in fact move perfectly within the civil procedural matter, considering the ontological difference of the fundamental rights at stake. The CJEU has gone further on the mutual recognition and has been based on another interpretative way stating that the art. 3 of the ECHR and 4 of the CFREU must be interpreted: “(...) in a convergence between (...)”. In particular the Advocate General Yves Bot ha dichiarato relativamente che: “(...) In the AG’s search for balance he considers first whether Article 1(3) FDEAW constitutes a ground for non-execution of an arrest warrant. He rejects such a notion for the following three reasons. First off, interpreting Article 1(3) as a non-execution ground would run counter to the phrasing of that Article, which due to its place and wording does not express a non-execution ground, but rather the principle of mutual trust. Secondly, such a notion would not be in agreement with the EU legislator’s intent to create a system of surrender with exhaustively enumerated non-recognition grounds, whereby, in addition to the grounds in Articles 3, 4, and 4a FDEAW, only in the exceptional circumstances described in Recitals (10) and (13) surrender can be suspended or removal, expulsion or extradition can be prohibited. Last, a ground of non-recognition in Article 1(3) would severely damage mutual trust between judicial authorities on which the Framework Decision is based and would, as a result, make the principle of mutual recognition meaningless (...)”. We are also talking about another principle-value of the Union, that of proportionality as a balancing of interests and the widening of the discretionary sphere of the internal judge, and the circumstances in speciem. Criminal cooperation does not seem to be comparable with the similar ground and dates back to the experience of the single market, in terms of decisive jurisprudential protagonism. Let us not forget that criminal cooperation has been based on the definition of common minimum standards for delineating spaces and limits of cooperation between judicial and police authorities in the areas selected by the Member States and by the Union legislator. Of course we can speak of a positive and normative unification for years in the criminal sector and especially after the Treaty of Lisbon the merit belongs to the principle of mutual recognition of judicial decisions which continues to guarantee a median solution to integration that is summarized in the protection of rights fundamental rights, the inalienable rights of individuals and a continuous progress dictated by the Member States towards an increasingly active and proactive contribution, a harbinger of innovations and achievements with the main objective among others the continuous accelerated integration but within a harmonious development and development of all the individual interest and not the state one. S.GÁSPÁR-SZILÁGY, *Joined cases Aranyosi and Căldăraru*. Converging human rights standards, mutual trust and new grounds for postponing a european

Furthermore, it would be necessary to reconcile the pursuit of the “justice” component of the Freedom and Security Area-intended as a better realization of the right to effective judicial protection, with a consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market-with a concrete and not presumed realization of the “freedom” component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed. Such a course of action was undertaken, for example, in relation to criminal law from the Council Resolution of 30 November 2009¹⁶² which established a

arrest warrant, in *European Journal of Crime, Criminal Law and Criminal Justice*, 24 (1), 2016, pp. 198ss. K. BOVEND’ EERDT, The joined cases Aranyosi and Căldăraru: A new limit to the mutual trust presumption in the Area of Freedom, Security and Justice?, in *Utrecht Journal of International and European Law*, 32, 2016, pp. 112ss. M. GUIRESSE, Confiance mutuelle et mandat d’arrêt européen: Evolution ou inflexion de la Cour de justice?, in *GDR-ELSJ*, 12 avril 2016. R. NIBLOCK, Mutual recognition, mutual trust?: Detention conditions and deferring an EAW, in *New Journal of European Criminal Law*, 24 (2) 2016, pp. 250ss. A.E. VERVAELE, Mutual legal assistance in criminal matters to control (transnational) criminality, in N. BOISTER, R.J. CURRIE (a cura di), *Handbook of transnational criminal law*, ed. Routledge, London & New York, 2015, pp. 123ss. N. SYBESMA-KNOL, The european system for the promotion and protection of human rights, in *Georgia Journal of International & Comparative Law*, 20, 2014. N. FOSTER, *European Union law directions*, Oxford University Press, Oxford, 2014, pp. 51ss. D. MANSELL, The european arrest warrant: The role of Judges when human rights are at risk, in *New Journal of European Criminal Law*, 2 (1), 2011, pp. 133ss. A. TINSLEY, Protecting criminal defence rights through EU Law: Opportunities and challenges, in *New Journal of European Criminal Law*, 3 (3), 2013, pp. 461ss. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss. L. BACHMAIER, Mutual recognition instruments and the role of the CJEU: The grounds for non-execution, in *New Journal of European Criminal Law*, 5 (4), 2015, pp. 505ss. E. SMITH, Running before we can walk? Mutual recognition at the expense of fair trials in Europe’s Area of Freedom, Justice and Security, *New Journal of European Criminal Law*, 3 (1), 2013, pp. 82ss. S. SWOBODA, The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters: A small note on a fundamental misunderstanding, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2015, pp. 361ss. M.P. BROBERG, N. FENGER, Preliminary references to the Court of Justice of the European Union and the right to a fair trial under article 6 ECHR, in *European Law Review*, 23 (4), 2016, pp. 602ss.

¹⁶² Council Resolution of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295.4.12.2009, pp. 1-3. G. VERMEULEN, J. FLAMME, *Defence rights. International and european developments*, ed. Maklu, U.S., 2011, pp. 89ss. M. JIMENO-BULNES, *Towards common standards on rights of suspected and accused persons in criminal proceedings in the EU?*, CEPS policy paper, 2010. I. VAN PUYENBROECK, G. VERMEULEN, *Towards*

roadmap for strengthening the procedural rights of suspects or defendants in criminal proceedings, from which they a whole series of transversal measures originated-including the 2016/343/EC¹⁶³ and 2016/800/EC¹⁶⁴-aimed at strengthening mutual trust between the judicial systems of the Member States by means of procedural harmonization.

Unfortunately, in the field of civil matters the legislator does not seem to have made use of the possibilities offered by the new approach of the Lisbon Treaty¹⁶⁵, especially as regards the cross-border judicial cooperation sector, where the immanent requirement for the functioning of the market the interior has been dequalified from a necessary to merely preferential element. Once this requirement had been removed, it would have been relatively simple to justify a cross-cutting procedural harmonization action, aimed at defining a series of common rules to protect fundamental procedural rights, albeit limited to cross-border disputes.

The possibility of interpreting article 114 TFEU, individually or jointly with article 81 TFEU¹⁶⁶, should not be excluded a priori, as the legitimacy of the adoption of a directive aimed at defining a set of minimum standards or common principles in civil procedural in order to facilitate the free circulation of judgments through the strengthening of mutual trust between the judicial systems of the Member States-and thereby facilitate the functioning and complete establishment of the common market. Furthermore, a possible recourse to the instrument of enhanced cooperation should not be excluded.

minimum procedural guarantees for the defence in criminal proceedings in the European Union, in *International & Comparative Law Quarterly*, 60 (4), 2011, pp. 1019ss.

¹⁶³ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of the of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11.

¹⁶⁴ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1–20. see, R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union Law*, Oxford University Press, Oxford, 2018. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 788ss.

¹⁶⁵ The reason for such a difference in treatment could be raised. Even in this case, the most likely appears the ontological difference between the “very personal” values at stake in the criminal sphere-among which, of course, personal freedom stands out - and those that can be traced back to civil matters. Nevertheless, such a reasoning does not fully satisfy. Indeed, within civil matters are not only rights from exclusively economic but also social nature, such as that of family life.

¹⁶⁶ A.H. TÜRK, *Judicial review in European Union law*, op. cit. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, op. cit. C. BARNARD, S. PEERS, *European Union law*, op. cit.

Likewise, a more structured approximation action could, in part, already be done by means of the optional instruments, in the area of cross-border disputes. This also by setting up genuine special courts¹⁶⁷ of the Union competent to resolve-following their procedural rules-disputes in cross-border civil and commercial matters, or in areas where the Union's harmonization action is already substantial, such as consumer protection, copyright, industrial patents¹⁶⁸, public procurement, competition¹⁶⁹. That is, in the event that the necessary political agreement could not be reached, defining special procedures applicable to such disputes, while maintaining them in the executive strate of the individual national judicial authorities. In this case, the competence could easily be inferred both directly pursuant to art. 81 TFEU (for cross-border disputes) that indirectly pursuant to art. 114 and 115 TFEU (for further subjects)¹⁷⁰. The proposal made by the European Parliament in the aforementioned declaration of 25 October 2016 to make article 2 TEU and CFREU itself a valid legal for the adoption of legislative measures to protect fundamental rights.

The evolution of civil procedural harmonization within the Union seems to have followed a merely "extensive /inclusive" rather than "qualitative" path, since the new provisions, while expanding the spectrum of regulated subjects, have not attempted to reach a degree of legislative approximation, in procedural matter, significantly higher-that is more "systematic" or "structural"-respect to that already obtained in other fields with pre-Lisbon measures. Indeed, in some cases the level of harmonization has even dropped.

Currently there are no official EC proposals or legislative acts worthy of note, despite the issue of great interest in doctrine, especially as a result of the activation of the project ELI-UNIDROIT¹⁷¹, since 2013, which aims to develop

¹⁶⁷ It must not be forgotten, in fact, that the dispute before the Court of Justice and the Court of First Instance is governed by its own procedural regulations. However, the recent decline, by Regulation (EU) no. 2015/2422 of 16 December 2015, of the only specialized court pursuant to art. 257 T.F.U.E. seems to exclude the will to proceed towards the creation of a series of ad hoc European judges.

¹⁶⁸ On the model, for example, the Unified Patent Court, which owns a very detailed procedural regulation, which regulates in detail every aspect of the process before it, including any extremely important accessory aspects for effective access to justice, such as legal aid and exemption from court fees.

¹⁶⁹ B. HESS, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure*, P.E. 556.971, (Study of European Parliament, 2016), pp. 13ss.

¹⁷⁰ A. KACZOROWSKA-IRELAND, *European Union Law*, op. cit. F. MARTUCCI, *Droit de l'Union européenne*, op. cit.

¹⁷¹ See the ultimate study LXXVIA-Transnational civil procedure. Formulation of regional rules. ELI-UNIDROIT-Transnational principles of civil procedure of 14 September

a series of common principles in the transnational civil procedural matter¹⁷². According to our opinion the ALI/Unidroit Principles are a considerable achievement in its breadth, eloquence, and conciseness the practical influence of the ALI/Unidroit seems, however, rather limited. This is probably due to the subject matter. Procedural law, and in particular court litigation, is up to the present day closely interwoven with legal traditions and cultures, and is largely local in nature. Harmonisation and legal transplants are limited. In addition, outside the scope of arbitral proceedings and unlike substantive contract rules, parties enjoy little or no freedom to select their own rules of civil procedure.

On the institutional level, however, the working document drawn up by the European Parliament's justice Commission on the introduction of common minimum rules of civil procedure in the European Union¹⁷³, as well as the subsequent draft report containing recommendations to the EC to prepare a formal proposal for a Directive to the pursuant to article 225 TFEU¹⁷⁴. In

2018. D. WALLIS, Introductory remarks on the ELI-NIDROIT project, in *Uniform Law Review*, 19 (2), 2014, pp. 174ss. C.B. PICKER, H. SEIDMAN, The dynamism of civil procedure. Global trends and developments, ed. Springer, Berlin, 2011, pp. 43ss. B. HESS, M. BERGSTRÖM, E. STORKRUBB (eds), *EU civil justice: Current issues and future outlook*, Hart Publishing, Oxford & Oregon, Portland, 2016. X.E. KRAMER, Procedure matters: Construction and deconstructivism in european civil procedure, in *Erasmus Law Lectures*, 33, 2013. Z. VERNADAKI, Civil procedure harmonization in the EU: Unravelling the policy considerations, in *Journal of Contemporary European Research*, 9 (2), 2013, pp. 299ss. M. TARUFFO, Harmonisation in a Global Context: The ALI/Unidroit Principles, in X.E. KRAMER, C.H. VAN RHEE, *Civil litigation in a globalising world*, T.M.C. Asser Press/Springer, The Hague, Heidelberg, 2012, pp. 208ss. X.E. KRAMER, The structure of civil proceedings and why it matters: Exploratory observations on future ELI-UNIDROIT european rules of civil procedure, in *Uniform Law Review*, 19 (2), 2014, pp. 219ss.

¹⁷² D. LIAKOPOULOS, *The regulation of transnational mergers in international and european law*, Brill Academic publications and Martinus Nijhoff Publishers, The Hague, 2010. U. BUX, *The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law*, P.E. 556.972, (Study of European Parliament, 2017).

¹⁷³ Working document on the introduction of common minimum standards of civil procedure in the European Union of 21 December 2015, Commission of Justice, P.E. 572.853.

¹⁷⁴ C. BOUTAYEB, *Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux*, op. cit., Draft report giving recommendations to the Commission on common minimum standards of civil procedure in the European Union of 10 February 2017, Commission of Justice, P.E. 593.974. see also: *Opinion 23/2018 on Commission proposals on European Production and Preservation Orders for electronic evidence in criminal matters (Art. 70.1.b) adopted on 26 September 2018*.

particular, Annex I to the aforementioned report-which already contains a preliminary legislative draft-appears to accommodate many of the positions expressed in this paper, including, in particular, the need to strengthen mutual trust between Member States through the protection of fundamental right to a fair and harmonized process at common level¹⁷⁵.

Of course, such a position is understandable, especially considering the doubts in relation to the existence of a generalized Union competence in procedural matters and the possibility-apparently excluded from the case law *Lück*¹⁷⁶ and *Germany v. European Parliament and Council*¹⁷⁷-to interpret article 114 TFEU as a legitimate structural intervention tout court on the legal systems of the Member States. Of course there are doubts about the limitation of particular actions or procedures harmonized only to cross-border disputes, an option which I consider to be irrelevant with the idea of a European judicial area based on common access to justice and equal treatment of citizens of different Member states. Of such problems, especially at the point of possible inequality of treatment between internal and cross-border actions, it seems to take note to widen the notion of “transnational controversy” as far as possible, including cases where-although the parties are domiciled in the same Member State of the court seised-the place of performance of the contract, in which the harmful event occurs or the enforcement of the judicial decision is situated in a different Member State, or the matter at issue falls within the scope of Union law.

However, this solution, although appreciable, does not convince in terms of practical feasibility. Indeed, it has already been pointed out that the Member States are inclined towards a strict interpretation of the requirement of cross-border implications referred to in article 81 TFEU, the latter recently reconfirmed with the approval of Regulation 2015/2421-of modification of the European procedure for small claims and the order for payment procedure-in which the Commission’s proposal to widen the scope of the aforementioned proceedings was rejected through an almost similar extensive interpretation of the concept of a dispute border. Excluding exceptional revisions of the positions of the Council-possibly also following the exit of the United Kingdom from the Union-the scope of application of the draft of Directive therefore runs the risk of being brought back into the narrowest riverbed as per Regulations

¹⁷⁵ DEF points and L and following, pages 9 and 11 of the document.

¹⁷⁶ CJEU, C-34/67, *Lück v. Hauptzollamt Köln* of 4 April 1968, ECLI:EU:C:1968, I-00359.

¹⁷⁷ CJEU, C-376/89, *Federal Republic of Germany v. European Parliament and Council* of 5 October 2000, ECLI:EU:C:2000:544, I-08419. K. GUTMAN, *The constitutional foundations of european contract law. A comparative analysis*, Oxford University Press, Oxford, 2014, pp. 295 ss.

1896/2006¹⁷⁸ and 861/2007¹⁷⁹. and 861/20072. Moreover, particular perplexity arises from the extensive clause aimed at considering cross-border any dispute that falls within the scope of Union law, if only because of the considerable difficulties in application and interpretation that it entails, which are configured as neither more nor less difficult with respect to those relating to the scope of the restrictive clause in article 51 CFREU.

It would have been perhaps politically simpler-in order to guarantee a generalized scope of application to the provision-to try to promote an extensive interpretation of article 114 TFEU capable of legitimizing a minimum harmonization intervention in terms of protection of rights fundamental procedural law in the whole civil and commercial matter, rather than a notion of a dispute with cross-border implications so broad that it essentially clears article 81 TFEU¹⁸⁰-which already provides for the possibility to intervene directly on the procedural arrangements of the Member States, albeit limitedly, in fact, to the transnational dispute-from every one of its borders. The latter option, which will hardly be accepted by the Member States willingly, if not for the implications present, but to avoid the creation of a precedent that could be inconvenient in the future¹⁸¹.

In conclusion, the slowness of the institutions in profiting the openings of the Lisbon Treaty, also with the aim of guaranteeing better protection of fundamental procedural rights, is partly disheartening, but probably also a child of the delicate moment of turbulence-or open crisis-that Union has lived in these last years. The harmonization of national procedural systems-now becoming a necessary element for a further development of the free circulation of foreign judgments and provisions (and therefore for the completion of the common market)-could ultimately benefit from the strong political will that is usually formed in relation to issues related to the functioning of the internal market,

¹⁷⁸ As we can see from the next cases from the CJEU: *C-21/17, Catlin Europe SE* of 6 September 2018, ECLI:EU:C:2018:675; *C-245/14, Thomas Cook Belgium* of 22 October 2015, ECLI:EU:C:2015:715, all of them published in the electronic Reports of the cases. See also for the last case: S. PEERS, *European Union justice and home affairs law*, Oxford University Press, Oxford, 2016, pp. 380ss.

¹⁷⁹ See from the CJEU: *C-516/18, Sun Express Deutschland* of 22 August 2018, ECLI:EU:C:2018:730, published in the electronic Reports of the cases.; *C-422/18 PPU, FR* of 27 September 2018, ECLI:EU:C:2018:784, not published.

¹⁸⁰ A. HARTKAMP, C. SIBURGH, W. DEVROE, *Cases, materials and text on European Union law and private law*, op. cit.

¹⁸¹ Therefore, it is not mere coordination arrangements between the different courts, or obligations of mutual recognition in relation to notifications made in a different Member State with respect to that of the course seised.

to reinforce the protection of fundamental procedural rights and reduce differences in judicial treatment in the different Member States. In this way, that balancing operation would take place between the different components that for too long has been postponed in favor of “security”, or “justice”, to the partial detriment of strengthening the protection of the fundamental rights of European citizens.

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