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THE BALANCE BETWEEN THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE EU PRINCIPLE OF MUTUAL TRUST

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1. The principles of mutual recognition of decisions and mutual trust

The judicial cooperation in civil matters is a policy of the European Union that seeks to approximate and establish means of cooperation between the judicial authorities of the different Member States. The aim of this policy is to ensure that divergences between the judicial systems and the legal systems of the different Member States do not restrict the access to justice and the exercise of rights. This scope is at the basis of the construction of the European Area of Freedom, Security and Justice, set in Title V of the Treaty of Functioning of the European Union (TFEU). According to Article 67, Section 1, of the Treaty, the Union is an area of freedom, security and justice that shall respect fundamental rights and the different systems and legal traditions of the Member States.

One of the main objectives of the judicial cooperation in civil matters is to facilitate access to justice and to allow the recognition and exercise of rights in the European Union, independently of the political borders of the States, establishing means of

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cooperation between the judicial authorities of the different Member States, according to Article 3, Section 2 of the Treaty on European Union (TEU) and Article 67, Section 4, of the TFEU[1]. One of the instruments to achieve this aim is set in Article 81 of the TFEU and is the principle of mutual recognition of decisions, which was intended to reduce the procedures for recognizing as well as the grounds for refusing the enforcement of judgments in the European Union (EU)[2], in accordance with the principle of mutual trust between Member States. Indeed, in 2010, the European Council launched the Stockholm Program, which established guidelines for the area of Justice, Freedom and Security between 2010 and 2014. Some of its priorities were to facilitate citizens' access to justice so that they could exercise their rights, to improve cooperation between legal practitioners and to remove barriers to recognition in Member States of decisions from other Member States, fostering trust between the various legal systems and increasing the mutual knowledge as a condition for the accomplishment of the principle of mutual recognition. Among the other measures listed, prominent ones were the elimination of exequatur and simplification of the process of recognition of decisions and the extension of mutual recognition to issues considered to be decisive, such as succession and wills, and matrimonial property regimes[3].

So, the principle of mutual recognition of decisions and the principle of mutual trust between Member States are at the bases of the system of automatic recognition adopted by the EU Regulations on judicial cooperation in civil matters[4]. These principles also

[1] About the policy of judicial cooperation in civil matters, see A.S.S. GONÇALVES, *Cooperação judiciária em matéria civil e Direito Internacional Privado*, in A. SILVEIRA ET AL. (ed.), *Direito da União Europeia*, Almedina, Coimbra, 2016, pp. 330-291; A.S.S. GONÇALVES, *Da responsabilidade extracontratual em Direito Internacional Privado, A mudança de paradigma*, Almedina, Coimbra, 2013, pp. 116-127.

[2] In accordance with the conclusions of the European Council in the session of Tampere: European Council, *Conclusions of the Presidency, European Council of Tampere of 15 and 16 October 1999*, in *http://register-consilium.eu.int* [consulted in 1/6/2006].

[3] See European Council, "Stockholm Program - An open and secure Europe serving and protecting citizens".

[4] That is set, e.g., in the Council regulation (EC) No 1346/2000 of 29 May 2000 *on insolvency proceedings*, replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 *on insolvency proceedings* (recast); Council regulation (EC) No 1347/2000 of 29 May 2000 on *jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses* (Brussels II), replaced by 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* (Brussels II *bis*); Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Brussels I), replaced by 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* (Brussels I Recast); Council Regulation (EC) No 4/2009 of 18 December 2008 *on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 *on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*; Council Regulation (EU) 2016/1103 of 24 June 2016 *implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*; Council Regulation (EU) 2016/1104 of 24 June 2016 *implementing enhanced cooperation in the area of*

justify the guideline of the Court of Justice of the European Union (ECJ) that considers that the grounds for non-recognition or non-enforcement of judgments established in those regulations should have a strict interpretation. For the first time, the ECJ ruled in the case *Solo Kleinmotoren v. Boch* about Article 27 of the *Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[5], and decided that the grounds of non-recognition established in the Convention constituted an obstacle to the achievement of the free movement of judgments that demanded for a simple and rapid enforcement procedure, one of the fundamental objectives of the Convention, and therefore they should be interpreted strictly[6]. The orientation of the principle of mutual recognition as a cornerstone of EU judicial cooperation in civil matters was later repeated in several judgments, where the ECJ dealt with the simplified mechanism for the recognition and enforcement of judgments established in those legal instruments that rely on the trust between Member States[7].

On 18 June 2013, the European Court of Human Rights (ECtHR) was called to decide the *Sofia Povse and Doris Povse v. Austria* case, where the *Bosphorus* presumption or presumption of equivalent protection was confronted with the principle of mutual trust and automatic recognition of decisions resulting from the Brussels II *bis* Regulation, which is one of the main instruments of the EU policy of judicial cooperation in civil matters[8]. Later, on 23 May 2016, the Grand Chamber of the ECtHR delivered its judgment in the case of *Avotiņš v. Latvia*, where again the *Bosphorus* presumption was confronted with the automatic recognition of decisions system resulting of the Brussels I Regulation[9]. The objective of this study is to analyze the decisions of the ECtHR and the future influence of the European Convention of Human Rights (ECHR) over the principle of mutual trust, namely the compatibility of the system of mutual recognition of decisions established under EU law (among others, in Regulation Brussels II *bis* and Regulation Brussels I Recast) with the European Convention of Human Rights.

2. The *Bosphorus* presumption

jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

[5] The predecessor of Brussels I Regulation.

[6] Court of Justice of European Union, judgment of 2 of June 1994, *Solo Kleinmotoren v. Boch*, case C-414/92, par. 20.

[7] See, e.g., Court of Justice of European Union, Grand Chamber, judgment of 9 December 2003, *Erich Gasser GmbH v. MISAT Srl*, case C-116/02, par. 72; Court of Justice of European Union, Grand Chamber, judgment of 10 February 2009, *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, Generali Assicurazioni Generali SpA, v. West Tankers Inc.*, case C-185/07, para. 30.

[8] European Court of Human Rights, judgment of 18 June 2013, appl. no. 3890/11, *Sofia Povse and Doris, Povse v. Austria*.

[9] European Court of Human Rights, Grand Chamber, judgment of 18 June 2013, appl. no. 17502/07, *Avotiņš v. Latvia*.

The protection of fundamental rights is guaranteed in the EU treaties. Article 6 of the TEU establishes that the EU is founded on the values of respect for human rights. As a consequence, Article 6, Section 1, of the TEU acknowledges that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties, which means that EU legislation, also in the field of judicial cooperation in civil matters, has to respect the catalogue of rights and guarantees established in the Charter. In addition, Article 6, Section 3, recognizes fundamental rights as general principles of EU law, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States. So, it is possible to say that those are the constitutional grounds on which the guarantee of human rights in the EU and by EU law is based.

The need of the EU´s law to respect human rights results from the constitutional Treaties. However, the construction of the European area of freedom, security and justice, based on the principles of mutual trust and mutual recognition, the free circulation of judgments and the need of certainty and security that it implies, creates a tension between this EU ambitious project of deeper integration and the protection of human rights, as it was clear in the cases that will be analyzed. So, the question arises whether the guarantee of human rights can become a frontier to the European area of freedom, security and justice and a limit to a deeper integration.[10]

There is a presumption of compliance with European Union law with the European Convention of Human Rights and when a Member State implements European Union law, insofar as the latter leaves no discretion to States, since the protection of fundamental rights by the European Union is considered to be equivalent to the protection established in the European Convention of Human Rights[11]: this is known as the presumption of equivalent protection or the *Bosphorus* presumption.

This presumption of compliance was set out in the *Bosphorus Hava Yolları Turizm v. Ticaret Anonim Şirketi* case, where it was decided that State actions in fulfillment of their obligations towards an international organization are justified, provided that it is recognized that that international organization protects fundamental rights in a manner equivalent to that established by the European Convention of Human Rights, not only in terms of the guarantees offered, but also in the mechanisms which control their observance[12]. If equivalent protection is deemed to exist within that organization, it is presumed that the State has complied with the European Convention of Human Rights, when it fulfills the legal obligations arising from its membership to that organization[13]. However, this presumption may be rebutted if, in the light of the circumstances of the case, the protection of the rights established in the European Convention of Human

[10] Question already posed by A. DI STASI, *Lo spazio europeo di libertà, sicurezza e giustizia*, in A. DI STASI (a cura di), *Spazio europeo e diritti di giustizia. Il Capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Milano, 2014, pp. 40-43.
[11] European Court of Human Rights, *Sofia Povse and Doris Povse v. Austria*, cit., par. 74.
[12] European Court of Human Rights, judgment of 30 June 2005, appl. no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, par. 155.
[13] *Idem*, *ibidem*, par. 156.

Rights is manifestly defective, in which case «the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights»[14].

In the *Bosphorus* case, the ECtHR considered that the protection of fundamental rights by the European Union was in principle equivalent to that of the European Convention of Human Rights, both in the context of substantive guarantees and in the framework of mechanisms for monitoring compliance with it, thanks to the role played by the ECJ[15]. Later, the *Michaud* judgment clarified two requirements for the application of the presumption of equivalent protection: the absence of any margin of maneuver on the part of domestic authorities when deciding; the exploitation of the full potential of the supervisory mechanism provided by the European Union[16]. In presence of both requirements in a specific case, the presumption of equivalent protection of European Convention of Human Rights or the *Bosphorus* presumption will apply.

The *Bosphorus* presumption was used in the *Povse* case and the *Avotiņš* case to assess the compatibility of the system of mutual recognition of decisions under EU law and the European Convention of Human Rights.

3. Brussels II *bis* Regulation and the *Povse* case

The *Posve* case is about, on one hand, the right to respect for private and family life, set in Article 8 of the ECHR, and the Brussels II *bis* system of automatic recognition in situations of removal or retention of children, on the other hand. So, to understand the case it is useful to look briefly at both elements.

3.1. The right of respect for family life

Article 8, Section 1, of the ECHR guarantees the right to respect for family life, protecting the family and existing family ties, whereas, Article 8, Section 2, prohibits illegitimate intrusions of the States in the family, forcing the State to respect family autonomy. A State interference in family life will be in accordance with Article 8, provided that, as affirmed in Section 2: the law is foreseen to pursue a legitimate objective provided for in this provision (interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others); and it is a necessary step in a democratic society in order to achieve that end.

According to the ECtHR, Article 8 protects the individual against the arbitrary action of public authorities (resulting in a negative obligation), but also imposes on the States positive obligations in order to create effective conditions for respect for family life. In

[14] *Idem, ibidem*, parr. 150-151.
[15] *Idem, ibidem.*
[16] European Court of Human Rights, judgment of 6 December 2012, appl. no. 12323/11, *Michaud v. France*, parr. 113-115.

both cases, States are given a margin of appreciation about their action, in which they must take into consideration the need to balance the interest of the individual and the community[17].

In the context of these positive measures, the ECtHR has decided that Article 8 implies the right of parents to have at their disposal measures to allow them to reunite with their children (from whom they were separated) and the duty of States to make such measures available[18]. However, the nature and extent of such measures depend on the circumstances of the case and involve a margin of balancing of interests by the States. In such situations, the State should promote cooperation between the parties and restrict the use of coercive measures and should, within its discretion, take into account the child's best interest and the balance between the child and the interests of the parents[19].

Within the scope of the positive obligations resulting from Article 8, the ECtHR considered that the right of parents to reunite with their children in situations of international abduction of children (which is integrated in the respect for family life), should be read in accordance with the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), and a uniform application of the two instruments should be promoted[20]. This means that the obligations imposed on States by virtue of Article 8 of the ECHR in situations of wrongful removal or retention of children[21] should be interpreted in the light of the Hague Convention[22] and, more recently, of Brussels II *bis* Regulation[23]. The Hague Convention aims to promote the immediate return of the child to the family and social environment from which he/she was withdrawn wrongfully (Article 1 (a)), and this objective is reinforced by the Brussels II *bis* Regulation.

Wrongful removal or retention of children happens when one of the parents wrongfully removes or retains the child in a country that is not the one that corresponds to the child´s social and family environment of origin (country of habitual residence),

[17] European Court of Human Rights, judgment of 18 December 1986, app. no. 9697/82, *Johnston and Others v. Ireland*, par. 55; European Court of Human Rights, judgment of 21 February 1990, app. no. 9310/81, *Powell and Rayner v. The United Kingdom*, par. 41; European Court of Human Rights, judgment of 26 May 1990, *idem*, app. no. 16969/90, *Keegan v. Ireland*, par. 49.

[18] European Court of Human Rights, judgment of 1996, app. no. 31679/96, *Ignaccolo-Zenide v. Romania*, par. 94, consulted in http://hudoc.echr.coe.int, in 20.03.2016; European Court of Human Rights, judgment of 27 June 2000, app. no. 32842/96, *Nuutinen v. Finland*, consulted in http://hudoc.echr.coe.int, in 20.03.2016.

[19] European Court of Human Rights, *Ignaccolo-Zenide*, cit., par. 94

[20] European Court of Human Rights, *Ignaccolo-Zenide*, cit., par. 94

[21] About the wrongful removal or retention of children in Brussels II bis Regulation, see A.S.S. GONÇALVES, *A deslocação ou retenção ilícitas de crianças no regulamento nº 2201/2003 (Bruxelas II bis)*, in *Cuadernos de Derecho Transnacional*, 2014, vol. 6, n. 1, pp. 147-160; A.S.S. GONÇALVES, *The Rinau case and the wrongful removal or retention of children*, in *Unio-EU Law Journal*, nº 0, pp. 124-147.

[22] About the Hague Convention regime, see A.S.S. GONÇALVES, *Aspectos civis do rapto internacional de crianças: entre a Convenção de Haia e o regulamento Bruxelas II bis*, in *Cadernos de Dereito Actual*, 2015, n. 3, pp. 173-186.

[23] See, *e.g.*, European Court of Human Rights, judgment of 21 July 2015, app. no. 63777/09, *R.S. v. Poland*, Fourth Section, consulted in http://hudoc.echr.coe.int, in 20.03.2016.

separating the child from the other parent. So, the protection of the right to respect for family life, in accordance with Article 8, Section 1 of the ECHR, includes the right of parents not to be separated from their children and the protection of family ties between parents and children. In addition, it is also a right of the child to maintain personal relationships and direct contacts with both parents, as established in Article 9, Section 3 of the *Convention on the Rights of the Child*.

With regard to the guidelines of the ECtHR in international child abduction cases, very briefly[24], one of them is the need to comply with the deadlines laid down in the Hague Convention and that international child abduction situations should be resolved expeditiously, because the passage of time has serious and permanent consequences in the relationship between the child and the father who has been separated from the child[25]. It is also clear from the ECHR case-law that measures, adopted by States, to promote the return of children must be effective, adequate and sufficient[26]. The adequacy of the measure, according to the ECtHR, that allows the child to return to his/her social environment of origin, and to the parent who asks for the return, is measured by the speed of its execution, because these are situations that require urgent treatment, since, as we have already mentioned, the passage of time can cause irreparable damage to the relationship between the child and the father who was separated from the child[27].

3.2. The suppression of exequatur in the decisions of return of the child in Brussels II *bis* Regulation

According to article 11 of the Hague Convention and Article 11 of the Brussels II bis Regulation priority is to be given to decisions on the return of a child in cases of

[24] For a more comprehensive overview about the guidelines of the ECtHR, see A.S.S. GONÇALVES, *O Direito ao Respeito pela Vida Familiar no Rapto Internacional de Crianças*, in ASS GONÇALVES *et. al.* (eds), *Direito na Lusofonia. Diálogos Constitucionais no Espaço Lusófono*, Escola de Direito da Universidade do Minho, Braga, 2016, pp. 101-112; N. LOWE, *A supra national approach to interpreting the 1980 Hague Child abduction Convention – a tale of two European courts, Part 2: the substantive impact of the two European Courts` ruling upon the application of the 1980 Convention*, in *International Family Law*, 2012, n. 170, pp. 170-179; J. PATON, *The Correct Approach to the Examination to the Best Interest of the Child in Abduction Convention Proceedings Following the Decisions of the Supreme Court in Re E*, in *Journal of Private International Law*, 2012, n. 8, pp. 545-574; L. WALKER, *The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: the Danger of Neulinger*, in *Journal of Private International Law*, n. 6, 2010, pp. 649-685; L. WALKER/P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approach of the European Court of Human Rights and European Court of Justice*, *Journal of Private International Law*, n. 7, 2011, pp. 231-299; P. BEAUMONT/K. TRIMMINGS/L. WALKER/J. HOLLIDAY, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, in *International & Comparative Law Quarterly*, n. 64 (1), 2015, pp. 39-63.

[25] European Court of Human Rights, *Ignaccolo-Zenide*, cit., par. 94.

[26] European Court of Human Rights, judgment of 29 April 2003, app. no. 56673/00, *Iglesias Gil and A.U.I. v. Spain*, parr. 58-59.

[27] So was decided in the case European Court of Human Rights, *R.S. v. Poland*, cit.

wrongful retention or removal of children, and judicial or administrative authorities of the Member States should adopt emergency procedures to ensure a fast return. However, the Hague Convention provides for exceptional situations in which a retention order may be issued in the country of abduction taking into consideration the child´s best interests, in the circumstances described in Articles 12 and 13 of the Hague Convention: for example, proof by those who oppose to the return of the child that this return poses a serious risk to the physical or mental health of the child or places the child in an intolerable situation (Article 13 (b) of the Hague Convention).

The Brussels II *bis* Regulation has priority between Member States over the application of the 1980 Hague Convention (which continues to apply but the legal provisions of the Regulation are meant to complement it)[28].

In addition to the short deadlines established in Article 11 and the system of automatic recognition of decisions (set in Article 41, Section 2, and Article 42, Section 2), Article 11 of the Brussels II *bis* Regulation modifies the weight of Article 13 of the Hague Convention as a ground for the decision to retain the child.

The system of the Brussels II *bis* Regulation gives priority to the decision of the court of the habitual residence of the child, whose assessment of the case prevails over judgment of the court of the place where the child has been wrongfully retained[29]. The court of the habitual residence of the child, facing a decision of retention of the child rendered on the ground of Article 13 of the Hague Convention by the court of the place of abduction may order the return of the child, in which case this last decision will prevail.

In accordance with Article 11, Section 6 of the Brussels II *bis* Regulation, if the court of a Member State issues a retention order under Article 13 of the Hague Convention, it must immediately send a copy of that decision and related documents to the court of the child's habitual residence, which must receive them within one month of the date of the retention order. That court, in accordance with Section 7 of Article 11, shall notify the parties of the information received and shall invite them to submit any observations which they consider relevant within three months after notification.

After examining these elements, the court of the child's habitual residence may reach a different decision and order the return of the child. Under Article 11, Section 8 of the Brussels II *bis* Regulation, that decision of return is automatically recognized and enforceable in another Member State without the need for any subsequent declaration of enforceability in the country where it is intended to be enforced (abolition of exequatur) and cannot be contested. To that end, it is necessary for the judge of the Member State of the habitual residence of the child to issue the certificate provided for in Annex IV to the Regulation (Article 42, Section 2), whose conditions are set in the provision: the

[28] Article 61 and European Commission, *Practical Guide for the application of the new Brussels II Regulation*, http://ec.europa.eu, consulted in 01.09.2017.

[29] Which does not happen in the system of the Hague Convention. About the differences between the Hague Convention and Brussels II bis, see A.S.S. GONÇALVES, *Aspectos civis do rapto internacional de crianças: entre a Convenção de Haia e o regulamento Bruxelas II bis*, cit., pp. 173-186.

child should have an opportunity to be heard (unless this proves to be inappropriate in view of the child's age and maturity); the parties should have an opportunity to be heard; the court of the child's habitual residence has taken into account the justification and evidence on which the retention order was issued under Article 13 of the Hague Convention[30].

3.3. The *Povse* case

Doris Povse was separated from *Mauro Alpago*, with whom she lived in Italy and had a daughter. On 8 February 2008, the mother left Italy with her daughter, without the consent of the father, and settled in Austria[31]. On 19 June 2008, the father asked the child´s return to Italy, invoking the Hague Convention, but the request was rejected by the Austrian courts on the grounds that the return to Italy represented a serious risk of psychological harm to the child, in accordance with Article 13 (b) of the Hague Convention[32]. On 9 April 2009, the father filed a request for the return of the child, under Article 11 (8) of the Brussels II bis Regulation to the *Tribunale per i minorenni di Venezia*, which had jurisdiction, as court of the habitual residence of the child, in order to assess the case. This court decided that the child should return to Italy: if the mother would return with child, the child would stay with the mother in an accommodation provided by the social services and a program would be established for the exercise of the father's right to visit; if the mother decided not to return to Italy, the child would live with her father[33]. That court issued the certificate provided for in Annex IV to the Regulation, which provides for the immediate implementation of that decision in any Member State, according to Article 47, Section 2, of the Regulation.

Unfortunately, that was not the case, since the Austrian court, in first instance, refused to enforce the Italian decision on the ground that the return would put the child in a serious risk, under Article 13 of the Hague Convention[34]. After the appeal by the father, the appellate court revoked the decision of the first instance and ordered the child´s return to Italy[35]. However, the mother appealed to the Austrian Supreme Court, which stayed the proceedings and referred a preliminary ruling to the ECJ[36]. The latter, by decision of 1 July 2010, confirmed the jurisdiction of the Italian court and the need for automatic execution of the decision issued by this court, according to Article 47, Section 2, of the Regulation[37]. The ECJ stated that the enforcement of a decision of that

[30] For a more detailed analysis of the system of recognition in Brussels II bis Regulation, see A.S.S. GONÇALVES, *The Rinau case and the wrongful removal or retention of children*, cit., pp. 140-147.
[31] European Court of Human Rights, *Sofia Povse and Doris Povse v. Austria*, cit., parr. 4-7.
[32] *Idem, ibidem*, parr. 11-15.
[33] *Idem, ibidem*, parr. 20-22.
[34] *Idem, ibidem*, parr. 26.
[35] *Idem, ibidem*, parr. 27-28.
[36] *Idem, ibidem*, parr. 29-30.
[37] Court of Justice of the European Union, judgment of 1 July 2010, *Doris Povse contra Mauro Alpago*, case C‑211/10 PPU, parr. 39-50 and 69-79.

kind could not be refused in the Member State of enforcement, by declaring that "that enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment"[38]. As a result of that decision, the Austrian Supreme Court, on 13 July 2010, rejected the mother's claim.

Following a request made by the mother on 31 August 2010, the *Tribunale per i minorenni di Venezia* denied suspension of the execution of the return decision and, on 23 November 2011, granted custody of the child exclusively to the father, ordering: the return of the child to Italy; that the child should live with the father; and measures to allow the child to be integrated into the new social and family environment[39]. In view of this decision, on 19 March 2012, the father again asked the Austrian courts to enforce the Italian court's decision, attaching the certificate provided for in Article 42 of the Regulation[40]. After some confusion in the Austrian courts, which included a change in the Austrian court that had jurisdiction, because the child and the mother changed their residence in Austria, finally, on 20 May 2013, the Vienna District Court ordered the return of the child to Italy and the delivery of the child to the father by 7 July 2013[41], more than five years after the removal of the child from Italy.

The ECtHR was called upon to examine the decision of the Austrian court ordering the enforcement of the second decision ordering the child´s return in accordance with the Brussels II *bis* Regulation. A State interference in family life is only admissible, according to Article 8, Section 2 of the ECHR, if it is in accordance with the law, pursues a legitimate end and is necessary. The ECtHR considered that the measure adopted by the Austrian courts: was in accordance with the law, namely with Article 42 of the Brussels II *bis* Regulation; aimed to pursue a legitimate objective, in this case the protection of third party rights; and compliance with European Union law corresponds to an objective and general interest[42].

Concerning the need for interference, the ECtHR referred to the Bosphorus case to consider that there is a presumption of compliance with the ECHR when a Member State complies with EU law, since the protection of fundamental rights by the EU is equivalent to the protection established in the ECHR[43]. The ECtHR considered that the protection of fundamental rights by the Union was in principle equivalent to that of the ECHR, both in the context of substantive guarantees and in the framework of the

[38] *Idem, ibidem*, §83.
[39] European Court of Human Rights, *Sofia Povse and Doris Povse v. Austria*, cit., parr. 35-36.
[40] *Idem, ibidem*, par. 38.
[41] *Idem, ibidem*, par. 50.
[42] *Idem, ibidem*, parr. 72-73, objective and general interest that had already been identifyed by the ECtHR in the *Bosphorus* case: European Court of Human Rights, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, cit., parr. 150-151.
[43] European Court of Human Rights, *Sofia Povse and Doris Povse v. Austria*, cit., par. 74.

mechanisms for monitoring compliance with the ECHR, in this case by the ECJ[44]. To that extent, there was a presumption of compliance with the ECHR when the Austrian courts, having no margin of discretion, enforced the decision of the Italian court in accordance with Article 47, Section 2 of the Brussels II *bis* Regulation.

It was also held that there was no evidence in the present case to rebut the presumption, since the court which ordered the return, the Italian court, had to consider whether the return of the child constituted a serious risk for the child[45], which effectively was verified in accordance with the system of the Regulation itself. This system obliges the court of habitual residence of the child to weigh the decision of retention of the court of the place where the child is, and related documents, as well as the observations of the parties, according to Article 11, Sections 6 and 7.

In addition, the ECtHR stressed that the Austrian Supreme Court used the supervisory mechanism which ensures the application of the rights set out in the Regulation, the preliminary ruling procedure before the ECJ, which made clear that the Austrian courts could do nothing more than enforce the Italian decision and that any change in circumstances should be raised before the Italian courts, which could suspend implementation of the decision[46].

4. Brussels I Regulation and the *Avotiņš* case

The *Avotiņš* case is related with the right to a fair trial set in Article 6 of the ECHR, and the system of automatic recognition of Brussels I *bis* Regulation. So, it would be useful to look at both before analyzing the *Avotiņš* case.

4.1. The right to a fair trial

The right to a fair trial is set in Article 6 of the ECHR which establishes that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

To understand the application of Article 6 to the *Avotiņš* case, it is important to look at the concept of civil rights and obligations. According to the ECtHR, this concept should have an autonomous interpretation[47], and for a right to be considered civil in the light of the Convention, one must measure its substantive content and effects under the domestic law, the ECHR's aims and the national legal systems of the other Contracting

[44] *Idem*, *ibidem*, parr. 77-78.
[45] *Idem*, *ibidem*, par. 80.
[46] *Idem*, *ibidem*, par. 81.
[47] European Court of Human Rights, judgment of 10 October 1994, appl. no. 21522/93, *Anastasios Georgiadis v. Greece*, par. 34; European Court of Human Rights, judgment of 12 July 2001, appl. no. 44759/98, *Ferrazzini v. Italy*, par. 8.

States[48]. For example, a judgment ordering the payment of a contractual debt is considered a civil obligation[49].

In addition to others, the concept of fair trial includes the fundamental right to adversarial proceedings, which means the opportunity for the parties to know and comment on all evidence adduced or observations filed to influence the court's decision[50]. Besides, the parties should have the opportunity to produce the evidence that sustains their claims[51]. In addition, reasons of economy or the existence of fast proceedings do not justify disregarding the right to adversarial proceedings[52].

Related with this dimension of the right to a fair trial is the principle of equality of arms in the sense of a fair balance that should exist between the parties. That means that both parties should have a reasonable opportunity to present their case, including evidence[53]. So, it should not be allowed to one party to make submissions to a court without the knowledge or the chance to comment of the other party[54].

According to the ECtHR, Article 6, Section 1 is also applicable to disputes regarding the execution of foreign judgments[55], which was the situation in the *Avotiņš* case.

4.2. The system of recognition in the Brussels I Regulation

One of the characteristic features of the Brussels I Regulation was the automatic recognition of judgments between Member States (Article 33, Section 1), without the need for a review and confirmation procedure as a condition of recognition. However, as established in Section 2, of Article 33, that recognition could be challenged.

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[48] European Court of Human Rights, judgment of 28 June 1978, appl. no. 6232/73, *König v. Germany*, par. 89.

[49] European Court of Human Rights, Grand Chamber, judgment of 23 May 2016, appl. no. 17502/07, *Avotiņš v. Latvia*, par. 96.

[50] European Court of Human Rights, judgment of 2 September 1994, appl. no. 21835/93, *Hauser and Werner v. Austria*, par. 66; European Court of Human Rights, judgment of 15 June 1999, appl. no. 42957/98, *Ruiz Santillan and Others v. Spain*, par. 63; European Court of Human Rights, Grand Chamber, judgment of 24 February 1995, appl. no. 16424/90, *McMichael v. the United Kingdom*, par. 80; European Court of Human Rights, judgment of 26 June 1992, appl. no. 19075/91, *Vermeulen v. Belgium*, par.33; European Court of Human Rights, Grand Chamber, judgment of 29 November 1993, app. no. 15764/89, *Lobo Machado v. Portugal*, par. 31; European Court of Human Rights, Grand Chamber, judgment of 7 June 2001, appl. no. 39594/98, *Kress v. France*, par. 74.

[51] European Court of Human Rights, judgment of November 2004, appl. no. 65399/01, *Clinique des Acacias and Others v. France*, par. 3.

[52] European Court of Human Rights, judgment of 18 February 1997, app. 18990/91, *Nideröst-Huber v. Switzerland*, par. 30.

[53] European Court of Human Rights, Grand Chamber, judgment of 29 May 1986, app. no. 8562/79, *Feldbrugge v. the Netherlands*, par. 44; European Court of Human Rights, Grand Chamber, judgment of 27 October 1993, appl. no. 14448/88, *Dombo Beheer B.V. v. the Netherlands*, par. 33.

[54] European Court of Human Rights, Grand Chamber, judgment of 5 October, appl. no. 32367/96, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, par. 42.

[55] European Court of Human Rights, judgment of 29 April 2008, app. no. 18648/04, *McDonald v. France*; European Court of Human Rights, judgment of 18 December 2008, app. no. 69917/01, *Saccoccia v. Austria*, parr. 60-62; European Court of Human Rights, judgment of 31 July 2012, appl. no. 40358/05, *Sholokhov v. Armenia and the Republic of Moldova*, par. 66.

In situations where enforcement of judgments in other Member States was intended, a prior declaration of enforceability is required (Article 38, Section 1). The application requesting the declaration of enforceability should be filed in the courts identified in Article 39 (place of domicile of the party against whom enforcement is sought, or place of enforcement) and, according to Article 41, the judgment should be declared enforceable immediately without any review (that means without the verification of the reasons for refusal) and the party against whom the enforcement was sought could not, at this stage of the proceedings, make any submissions against the enforcement. The declaration of enforceability could, however, be subject to appeal at the request of either party, in accordance with Article 43. In any of the situations described, there was a prompt and effective procedure for the recognition of judgments from other Member States, which was based on the principle of mutual trust, and a foreign judgment recognized under the Regulation had the same effect in the requested State that it produces in the State of origin.

The grounds for refusal which may give justification for challenging the recognition or for the appeal of the enforceability decision were set in Articles 34 and 35 and were limited. These did not include control of the jurisdiction of the courts of the Member State of origin of the decision, in accordance with Article 35, Section 3, with the exception of the situations set forth in Section 1 and 2 of the same legal provision. Also according to Article 36, under no circumstances could a foreign judgment be reviewed as to its substance.

In the recast of Brussels I, the enforcement procedure was changed so that it would be faster and simpler. The exequatur, which was necessary for a judicial decision from one Member State to be enforced in another, has been cited as a source of delays and costs in the exercise of rights across borders, distancing businesses and individuals from cross-border trade and liable to undermine the real advantages inherent in the internal market[56]. In this way, the European Commission, in its proposal for a revision of the Brussels I Regulation in 2010, put forward the proposal to abolish the exequatur, safeguarding some matters, in order to achieve a less complex, less costly and more automatic system of recognition of judicial decisions[57]. So, Article 39 of the Brussels I Recast Regulation establishes that a judgment given in a Member State and enforceable therein may be enforced in another Member State without the need for a prior declaration of enforceability. Therefore, such decisions must be treated as national decisions of the Member State where enforcement is sought, since, in accordance with Article 41, Section 1, 2nd part, "a judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same

[56] European Commission, *Commission Staff Working Paper Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, SEC (2010) 1547 final, Brussels 14 December 2010, pp. 11-13.

[57] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, Brussels, 14 December 2010, COM(2010) 748 final, p. 7 e pp. 49-55.

conditions as a judgment given in the Member State addressed". However, the person against whom enforcement is sought, according to Article 46, may make a request for refusal of enforcement based on the grounds set forth in Article 45.

The grounds for refusal of recognition are set forth in Article 45 of Brussels I Recast, and are substantially equivalent to those previously provided for in Articles 34 and 35. To understand the Avotiņš case it is important to highlight two grounds of refusal. Recognition may be refused, among others, when such recognition is manifestly contrary to public policy in the Member State addressed (a); and where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so (b).

In spite of the system of simplified and fast recognition and enforcement arising from the Brussels Regulations, along the years, the protection of fundamental rights as a ground for non recognition and enforcement of decisions, in the Brussels system recognition, has been acknowledged by the ECJ. The ECJ has stated that fundamental rights are a part of the general principles of law that the Court ensures, and those rights also result from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties, like the ECHR[58]. About the similar wording of 45 (b) in the Brussels Convention, the ECJ has stated that while it is true that there is an objective of simplifying the formalities of recognition and enforcement of judgments in the Union, that objective cannot be attained by undermining in any way the right to a fair hearing[59]. So, the right to a fair trial was recognized as a fundamental right by the ECJ in several cases[60].

4.3. The safeguard of fundamental rights and the ECJ

[58] Court of Justice of the European Union, judgment of 28 March 2000, *Dieter Krombach and André Bamberski*, case C-7/98, par. 25. See also, Court of Justice of the European Union, judgment of 6 September 2012, *Trade Agency Ltd v. Seramico Investments Ltd*, case C‑619/10, par. 42.

[59] Court of Justice of the European Union, judgment of 11 June 1985, *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v. Cornelis Gerrit Bouwman*, case 49/84, par. 10; Court of Justice of the European Union, judgment of 3 July 1990, *Isabelle Lancray SA, whose registered office is at Neuilly-sur-Seine (France), and Peters und Sickert KG, whose registered office is at Essen (Federal Republic of Germany)*, case C-305/88, par. 21; Court of Justice of the European Union, *Trade Agency Ltd v Seramico Investments Ltd*, para. 42.

[60] For example, Court of Justice of the European Union, judgment of 17 December 1998, *Baustahlgewebe GmbH v. Commission of the European Communities*, case C-185/95, parr. 20-21; Court of Justice of the European Union, judgment of 11 January 2000, *Kingdom of the Netherlands and Gerard van der Wal v. Commission of the European Communities*, joined cases C-174/98 P and C-189/98, par. 17.

The safeguard of fundamental rights was often related with the public policy mechanism, being considered as the last resort of a legal system to protect its fundamental values[61].

In several decisions, the ECJ has ruled that the definition of the content of the public policy clause belongs to the Member States, but the ECJ can control the limits of the application of the mechanism[62]. In this function of control, in the *Krombach* case, the ECJ admitted recourse to the public policy clause in a situation in which "the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognized by the ECHR"[63], despite considering that the use of the public policy clause should be exceptional and subject to a strict interpretation because it is an obstacle to the objectives of the Regulation[64]. In the case at hand, the right to a fair trial was at stake, because the court of the State of origin refused to hear the defense of the accused person (through his lawyer) because the person was not present at the hearing.

The reference to the Charter of Fundamental Rights of the European Union appears in the *Rudolfs Meroni* case, where it is restated that the implementation of the Brussels I Regulation should be done in accordance with fundamental rights, and specifically with Article 47 of the Charter that provides the right to effective judicial protection[65].

However, the ECJ never ceased to underline the exceptional intervention of public policy in the system of automatic recognition and enforcement of Brussels I, urging the national courts to certify, for example in the *Gambazzi* case, that there was a manifest and disproportionate infringement of the right to be heard, outlining some criteria to assess whether the circumstances in which the decisions of the court were taken could infringe that fundamental right[66]. In the *Trade Agency* case, the ECJ even decided that if the defendant brings an action against the declaration of enforceability of a judgment

[61] About the role of the public policy clause as a safeguard of fundamental rights, see J.J. FAWCETT, *The Impact of Article 6(1) of the ECHR on Private International Law*, in *International and Comparative Law Quaterly*, 2007, vol. 56, no. 1, pp. 24-30; J. OSTER, *Public policy and human rights*, in *Journal of Private International Law*, 2015, vol. 11, no 3, pp. 544-549.

[62] Court of Justice of the European Union, judgment of 11 May 2000, *Régie national des usines Renault SA v. Maxicar Spa and Orazio Formento*, case C-38/98, parr. 27-28; Court of Justice of the European Union, Grand Chamber, judgment of 28 April 2009, *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, case C-420/07, parr. 56-57; Court of Justice of the European Union, judgment of 25 May 2016, *Rudolfs Meroni v. Recoletos Limited*, case C-559/14, par. 40; Court of Justice of the European Union, judgment of 2 April 2009, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, case C-394/07, par. 38; Court of Justice of the European Union, *Trade Agency Ltd v. Seramico Investments Ltd*, par. 49.

[63] Court of Justice of the European Union, *Dieter Krombach*, cit, par. 44. Also in Court of Justice of the European Union, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, cit., par. 37.

[64] Court of Justice of the European Union, *Dieter Krombach*, cit, par. 24. Also in Court of Justice of the European Union, *Rudolfs Meroni v. Recoletos Limited*, cit., par. 39.

[65] Court of Justice of the European Union, *Rudolfs Meroni v. Recoletos Limited*, cit., par. 44.

[66] Court of Justice of the European Union, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, cit., parr. 41-47. See also, Court of Justice, *Trade Agency Ltd v. Seramico Investments Ltd*, parr. 61-62.

given in default of appearance in the Member State of origin which is accompanied by the certificate, claiming that he has not been served with the document instituting the proceedings, the court of the Member State in which enforcement is sought has jurisdiction to verify that the information in that certificate is consistent with the evidence[67].

Moreover, in 2014, analyzing the draft agreement on the EU´s accession to the ECHR, the ECJ found several incompatibilities between that agreement and the EU Treaties, namely and among others, regarding the role of the principle of mutual trust in the construction of the European area of freedom, security and justice. In the opinion 2/13, the Court considered that the principle of mutual trust between Member States is a constitutional principle that holds the EU´s area of Freedom, Security and Justice[68]. This principle implies that Member States, save in exceptional circumstances, consider that all the others are complying with the fundamental rights recognized by EU law, which means that: they cannot demand a level of protection of fundamental rights from another Member State higher than the one established in EU law; nor may they verify whether another Member State has in fact, in a particular case, observed the fundamental rights guaranteed by the EU, save in exceptional circumstances[69]. So, the Court considered that the accession to the ECHR would likely upset the underlying balance of the EU and undermine the autonomy of EU law, insofar as far the ECHR would entail that a Member State would verify that another Member State has observed fundamental rights, although the obligation of mutual trust between Member States required by EU law[70].

The position of the ECJ in the opinion 2/13 and the arguments used were strongly criticized, as it was seen as a way of frustrating the enhancement of protection of human rights in the EU, by raising the power and position of the ECJ in its constitutional role[71]. The *Avotiņš* case decision was the answer of the ECtHR.

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[67] Court of Justice of the European Union, *Trade Agency Ltd v. Seramico Investments Ltd*, par. 46.

[68] Court of Justice of the European Union, Full Court, *Opinion 2/13 of the Court*, 18 December 2014, ECLI:EU:C:2014:2454, par. 191. About the principle of mutual trust as constitutional principle of the area of Freedom, Security and Justice, see L.R. GLAS, J. KROMMENDIJK, *From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, in *Human Rights Law Review*, 2017, n. 0, p. 7; K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *The Fourth Annual Sir Jeremy Lever Lecture*, University of Oxford, 2015, pp. 6-7, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [accessed 10 November 2017].

[69] Court of Justice of the European Union, Full Court, *Opinion 2/13 of the Court*, 18 December 2014, ECLI:EU:C:2014:2454, parr. 191-192.

[70] *Idem*, *ibidem*, par.194.

[71] For such critical perspective, see, for example, C. KREEN, *Autonomy and Effectiveness as Common Concerns: A Path to the ECHR Accession after Opinion 2/13*, in *16 German Law Journal*, 2015, n. 1, pp. 147-167; P. EECKHOUT, *Opinion 2/13 on EU accession to the ECHR and judicial dialogue: autonomy or autarky?*, in *Fordham International Law Journal*, 2015, vol. 38, n. 4, pp. 955-992; J. ODERMATT, *A Giant Step Backwards - Opinion 2/13 on the EU's Accession to the European Convention on Human Rights*, in *New York University Journal of International Law and Politics*, 2015, vol. 47, n. 4, pp. 783-797; A. LAZOWSKI; R. A. WESSEL, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal*, 2015, vol. 16, n. 1, pp. 179-212. With a different

4.4. The *Avotiņš* case

In *Avotiņš v. Latvia*, *Avotiņš* claimed that a Cypriot court had ordered him to pay a debt without duly summoning him to appear or allowing the exercise of his defense rights and, subsequently, the Latvian courts had ordered the enforcement of the Cypriot court judgment in accordance with Brussels I Regulation[72]. The applicant was served in an address that was not his home or his business premises and that did not allow him to receive the judicial documents[73]. So, he claimed that the recognition of the Cypriot decision infringed his right to a fair hearing guaranteed by Article 6, Section 1, of the ECHR and Article 34, Section 2, of the Brussels I Regulation (current Article 45 (b)), that states that a judgment given in default in another Member State could not be recognized if the defendant had not been served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defense.

The ECtHR, in the decision of the Chamber, invoked the *Bosphorus* presumption to consider that, taking into consideration the principle of mutual trust that inspires the Brussels I Regulation, the Latvian courts had a duty to ensure the recognition and a fast and effective enforcement of the Cypriot judgment in Latvia. Besides, it was recognized that the protection of fundamental rights by the EU is in principle equivalent to that provided by ECHR[74]. Additionally, it was considered that the applicant did not demonstrate that he had no effective remedy in the Cypriot courts and, in fact, he did not appeal against the Cypriot judgment, so there wasn´t any infringement of Article 6 of ECHR[75]. Not satisfied with this decision the applicant referred to the Grand Chamber.

Firstly, the Grand Chamber considered that, in the case, the conditions of the presumption of equivalent protection were fulfilled. Article 34 (2) of the Brussels I Regulation did not give any discretionary powers of assessment to the court from which the declaration of enforceability was sought. It was also considered that the supervisory mechanism put into place in the EU was equivalent of that provided by the Convention and was deployed in the case[76].

However, considering itself a Constitutional instrument of European public order in the field of human rights, the Court made some remarks about the mutual recognition system, based on the principle of mutual trust. Despite acknowledging the essential role

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view, considering that Opinion 2/13 must be considered "sign of endorsement of the ECtHR´s positive approach towards the principle of mutual trust", see K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 8.

[72] European Court of Human Rights, Grand Chamber, judgment of 23 May 2016, appl. no. 17502/07, *Avotiņš v. Latvia*, par. 13-35.

[73] *Idem, ibidem*.

[74] *Idem, ibidem*, par. 71.

[75] *Idem, ibidem*.

[76] *Idem, ibidem*, parr. 105-112.

of the principle of mutual trust in EU legislation, the remarks made by the ECtHR can have an influence in future decisions of the Court about this topic and change the Court´s benevolent attitude towards this mechanism.

Recognizing that this system is essential to the construction of the area of freedom, security and justice in Europe, the ECtHR also states that the methods used to accomplish this project must not infringe the fundamental rights of the persons affected and the aim of effectiveness of some of these mechanisms brings forth a "tightly regulated or even imitated" observance of fundamental rights[77]. The Court considered that, limiting the power of the State of recognition to review the observance of fundamental rights by the State of origin to exceptional cases, "could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient"[78].

Moreover, the court states that the presumption of equivalent protection and the mutual recognition mechanisms cannot be a cause of deficient protection of human rights provided by the Convention, therefore the principle of mutual recognition cannot be applied in such way as to automatically and mechanically impair human rights[79]. As a conclusion, if the court where the recognition is sought is called to comply with the system of mutual recognition, and the rights protected by the Convention are not at risk, it should do so. Nevertheless, if there is a "serious and substantiated complaint" raised before them that there is a Convention right whose protection is "manifestly deficient" and that EU law does not have a mechanism to remediate it, "they cannot refrain from examining that complaint on the sole ground that they are applying EU law"[80].

After these statements, the Court concluded that in the case at hand there was not a manifestly deficient protection of fundamental rights, namely the adversarial principle and the principal of equality of arms, components of the right to a fair hearing. Notwithstanding the applicant's argument that he was not summoned in the requested State and, for that reason, the judgment should not be recognized, the fact is that he could have challenge the judgment in the court of origin of the decision[81]. However, although the law of the country of origin of the judgment allowed the applicant to appeal of the decision, based on the grounds that the applicant was not summoned, he decided not to do so. Therefore, there were means at the disposal of the applicant that would have allowed him to enforce his right to a fair hearing in the country of origin of the judgment, but the applicant did not use them.

[77] *Idem*, *ibidem*, par. 114.
[78] *Idem*, *ibidem*.
[79] *Idem*, *ibidem*, par. 116.
[80] *Idem*, *ibidem*.
[81] *Idem*, *ibidem*, parr. 121-122.

5. Conclusions

In spite of the outcome of the *Avotiņš* case - deciding that that was not a breach of Article 6 of the ECHR -, the truth is that the ECtHR sounded a serious warning to the EU and to the project of construction of the European area of freedom, security and justice, taking upon itself the role of guardian and Constitutional instrument of European public order in the field of human rights[82]. It is true that EU law's respect for human rights has its grounds in the constitutional Treaties of the EU, but the *Povse* and the *Avotiņš* cases made clear that there is a tension between the principles upon which the construction European area of freedom, security and justice lays and the protection of human rights.

From the *Povse* to the *Avotiņš* case there seems to be an evolution in the position of the ECtHR, evolution in which Opinion 2/13 probably had some influence. Although acknowledging the principle of mutual and automatic recognition and the abolition of the exequatur as a mechanism of effectiveness of the EU legal order, the ECtHR clearly states that the principle of mutual recognition cannot be applied automatically and mechanically without safeguarding human rights and that the court of recognition cannot excuse itself with the EU automatic recognition system, when a serious and substantiated complaint about a manifestly deficient protection of a right protected by the Convention is raised before it. In this situation, the court of recognition cannot rely solely on the presumption that there was a sufficient protection of fundamental rights in the State of origin, and has the duty to examine that complaint.

Although the EU has progressively retained an increasingly passive role for the courts of the country of recognition, as can be seen in the recent recast to the Brussels I Regulation or the Brussels II *bis* Regulation in situations of wrongful retention or removal of children, according with the ECtHR´s position in the *Avotiņš* case, that role cannot be so passive when the protection of fundamental rights established in the ECHR is at stake. Ultimately, and following the reasoning of the ECtHR, it is possible to accept that the court of the State of recognition retains the power to review a judgment originating in another Member State, exceptionally, as a control against manifest deficient protection of fundamental rights even when EU law does not allow it.

According to the ECtHR, the full elimination of the power of control by the State of enforcement is not admissible, because that State cannot renounce their responsibility to adjudicate complaints about a manifestly deficient protection of a right protected by the

[82] Also considering that in *Avotiņš* the ECtHR wanted to show its discontent with Opinion 2/13, see L.R. GLAS, J. KROMMENDIJK, *From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, cit., pp. 11-20. According to the Authors, despite having considered "that the presumption could not be rebutted, it needed no less than nine paragraphs to arrive to that conclusion and, for the first time, came close to conclude that the protection had been manifestly deficient»: *idem*, *ibidem*, p. 19. See also, G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual recognition of Judgments and protection of Fundamental Rights*, in *European Papers*, 2016, vol. 1, n. 2, pp. 582-583.

Convention[83]. This reasoning implies "that the courts of the Member Sate of enforcement should always enjoy an extraordinary power of review, in order to ensure that the protection of Convention rights is not impaired, even when no provision to that effect is contained in the applicable EU act"[84].

Of course, this solution would jeopardize the treatment of foreign judgments purely as national ones in the EU, and any ambition of the EU of abolition of all controls on foreign judgments. However, reading the position of the ECtHR in all its consequences, a Member State may be condemned for not complying with its international obligations when, although complying with EU law, it refrains from examining serious and substantiated complaints about deficient protection of human rights protected by the Convention.

It is true that the *Bosphorus* presumption is still alive, but it is possible to consider the *Avotiņš* decision as an answer by the ECtHR to the position of the ECJ in Opinion 2/13, stating clearly that the ECtHR will not renounce its responsibility as the guardian and Constitutional instrument of European public order in the field of human rights, independently of the constitutional role that the ECJ assumes in EU law. The *Avotiņš* decision can also be considered as a sign by the ECtHR "that the presumption of equivalent protection should not be taken as given"[85], that means that it can be rebutted in the future, for the first time, if the ECtHR concludes in a case that there is a deficient protection human rights. Additionally, the exceptional power of revision of the court of the State of recognition over a judgment originating in another Member State, as a control against manifest deficient protection of fundamental rights, even when EU law does not allow it, can be seen as a solution to reconcile the protection of human rights in the EU and the principle of mutual trust, that underlies the system of mutual recognition of decisions in civil and commercial matters[86].

It is uncertain whether the ECJ will accept any exceptional power of revision. Consequently, the question is whether the ECtHR will maintain the *Avotiņš* decision when deciding a case in which the court of the country of enforcement does not have, according to the EU law, any power to refuse the recognition and enforcement of a judgment coming from a Member State, as in the *Posve* case in application of the Brussels II *bis*, where the foreign decision must be treated as a national one, where a serious and substantiated claim exists about a manifestly deficient protection of a right protected by the Convention. Maybe the ECtHR is moving backwards, but the warning to the EU was clearly made: the protection of fundamental rights will not yield to the political projects of deeper integration of the EU and the ECtHR will not resign from its role as Constitutional instrument of European public order in the field of human rights. The answer to this question will also determine whether the protection of human rights

[83] G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual recognition of Judgments and protection of Fundamental Rights*, cit., p. 589.
[84] *Idem*, *ibidem*, p. 591.
[85] L.R. GLAS, J. KROMMENDIJK, *From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, cit., p. 20.
[86] Which is also the aim of the *Bosphorus* presumption.

will be a constitutional barrier to the development of the European area of freedom, security and justice and to a deeper integration.

ABSTRACT: In 2013, the European Court of Human Rights (ECtHR) was called to decide the *Povse* case, where the *Bosphorus* presumption was confronted with the principle of mutual trust and automatic recognition of judgments. These principles are a cornerstone of the EU policy of judicial cooperation in civil matters and are a decisive instrument to the construction of the area of freedom, security and justice. In 2016, in the *Avotiņš* case, again the ECtHR faced the application of the *Bosphorus* presumption and the mechanism of automatic recognition of decisions, and sounded a serious warning. The objective of this study is to analyze these decisions of the ECtHR and their possible future influence over the principle of mutual trust, namely the compatibility of the current system of mutual recognition established under EU law with the European Convention of Human Rights.

KEYWORDS: fundamental rights – principle of mutual trust – principle of mutual recognition – *Bosphorus* presumption – European Convention of Human Rights.