EUROPEAN PUBLIC POLICY (WITH AN EMPHASIS ON *EXEQUATUR* PROCEEDINGS)

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A. Introduction: The (Changing) Role of the Public Policy Exception in Private International Law

The public policy exception was designed as a "safeguard" against the invasion of foreign, unacceptable solutions into the domestic legal order. It is not an exaggeration to state that in this way, it in fact allowed the development of private international law. States that had previously refused to apply foreign law or to recognise and enforce foreign judgments were in this way able to express their willingness to accept foreign and different legal solutions, however, under the condition that in cases where this would entail an infringement of their fundamental values, they may "shield" themselves by means of the public policy exception. The primary role of the latter may therefore be evaluated as a positive one.

With today's growing integration of states, the public policy exception is increasingly seen negatively, as a barrier to creating a common legal space, as it is supposed to be based on distrust of the legislatures and courts of other states and to cause the unpredictability of the regulation of legal relations. In the EU, in comparison with the Brussels Convention of 1968,[1] the regulations Brussels I[2] and Brussels II*bis*[3] have already restricted the use of the public policy exception,[4] and recent regulations governing the enforcement of foreign

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1 The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September, 1968, signed in Brussels by the then six members of the EEC, see eg http://curia.europa.eu/common/recdoc/Convention/en/artidx/b-artidx.htm (accessed 6 June 2011).

2 Regulation 44/2001 EC [2000] OJ L12 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

3 Regulation 2201/2003 EC [2003] OJ L338 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation 1347/2000 EC.

4 The mentioned regulations demand a "manifest" breach of public policy. The Brussels I Regulation additionally abolishes the *ex officio* scrutiny of the possible violations of public policy by the court, moving the control of the compliance with public policy to the second stage of the

judgments in specific areas[5] even abolish it, at least in its classical form (and as well practically abolish any possibility of verifying the decisions of the foreign court in the state where its enforcement is demanded). Despite the fact that these regulations greatly facilitate the movement of judgments between states, it should be noted that at the same time they demand strict compliance with certain fundamental procedural rights (which are a part of the so-called procedural public policy) in the process of issuing decisions. Similarly, the proposal for the reviewed Brussels I Regulation[6] especially protects the procedural public policy, while abolishing, in principle, the protection of the substantive public policy.

In light of this development, the question arises whether the fact that the core values in certain geographical areas are increasingly converging and becoming equal entails that the public policy exception is becoming redundant and that this exception, when it still exists, even hinders this convergence, or whether in such a situation it may begin to play a new role, the role of a promoter of respect for the common values. We will attempt to find the answer to this question looking at the example of the impact of European legal sources on the content and role of public policy in the law of the Member States of the EU and the Council of Europe.

B. Notion and Nature of European Public Policy

Despite the fact that public policy is in principle a national category and includes fundamental values of each individual state, it is obvious that states are not isolated, but linked in a number of international organisations, and are also part of the international community. Many of the fundamental values are therefore common, or become such in time and through joint legal instruments. In Europe, the most important sources of common fundamental values are the law of the EU and the law of the Council of Europe (in particular the European Convention on Human Rights (ECHR)). By joining the EU and the Council of Europe, states committed themselves to respecting and enacting the law of these international organisations. This obligation is under the super-

procedure which only takes place if the defendant objects to the declaration of enforcability of a foreign judgment.

[5] Regulation 805/2004 EC [2004] OJ L143 creating a European enforcement order for uncontested claims; Regulation 861/2007 EC [2007] OJ L199 establishing a European small claims procedure; Regulation 1896/2006 EC [2006] OJ L399 creating a European order for payment procedure; Regulation 4/2009 EC [2009] OJ L7 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[6] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition of judgments in civil and commercial matters, COM(2010) 748 final, Brussels, 14 December 2010.

vision of supranational courts: the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).

The term "European public policy" will be used for the components of public policy stemming from both these sources. "[It involves] the gradual merging of the values of the 'two Europes,' the seat of human rights and the union of economic interests."[7] The relationship between these two components of European public policy in states that are members of both of these two international organisations is in principle harmonious, although some divergences may occur.[8] When emphasising that a particular element of European public policy is based on one or the other European legal orders, in order to avoid confusion, it may be best to talk about "EU" and "Convention" public policy, which together constitute "European public policy".[9]

These values having different origins are largely the same when it comes to the protection of human rights. Given that the ECHR represents a compromise on the minimum standards of the protection of human rights and fundamental freedoms, we can conclude that this Convention as a whole is a part of the public policy of the Member States of the Council of Europe and hence also of the Member States of the EU. These are the "rules which are considered fundamental in European society and which its members must respect".[10] The ECtHR explicitly stated in the *Loizidou* case that the ECHR is a "constitutional instrument of European public order (*ordre public*)".[11] Explicit reference to "Community policy" can be found in the order of the CJEU in *Acciaierie San Michele*.[12] As a former judge at the ECtHR, Pettiti wrote: "[The ECtHR] has helped . . . in the recognition of European public policy, parallel to the one defined by the ECJ in the field of EU law."[13]

If it can be argued that the ECHR as a whole falls within the public policy of the contracting parties, it is more complicated in the field of EU law to determine which rules are "fundamental", and thus part of public policy, and

[7] H Muir Watt, "Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions" (2001) 36 *Texas International Law Journal* 539.

[8] For more on this question see Section D *infra*.

[9] Some authors use the terms "European public policy" for public policy issued by the ECHR, and "Community public policy" for that arising from EU law. See eg M-L Niboyet and G de Geouffre de La Pradelle, *Droit international privé* (LGDJ, 2nd edn, 2009), 284; I Thoma, *Die Europäisierung und die Vergemeinschaftung des nationalen ordre public* (Mohr Siebeck, 2007), 4.

[10] F Sudre, "L'ordre public européen", in *L'ordre public: Ordre public ou ordres publics? Ordre public et droits fondamentaux, Actes du colloque de Caen (11, 12 mai 2000)* (Bruylant, 2001), 111.

[11] ECtHR, *Loizidou v Turkey*, 23 March 1995, Series A Vol 310, para 75.

[12] Order in the Case 9/65, published with the judgment in Cases 9 and 58/65 *Acciaierie San Michele SpA (in liquidation) v High Authority of the ECSC* [1967] ECR 1 at 30. The principle of non-discrimination was at the centre of this affair.

[13] LE Pettiti, "Reflexions sur les principes et les mécanismes de la Convention", in LE Pettiti, E Decaux and PH Imbert (eds), *La Convention européenne des droits de l'homme* (Economica, 1999), 31.

which are not.[14] Undoubtedly, the four fundamental freedoms, intended to ensure a common market, are a part of the fundamental principles of the EU,[15] as well as many other rules and goals of this international organisation, as, for example, the competition law and the protection of consumers. Numerous activities of the EU regarding the facilitating of the recognition and enforcement of judgments from other Member States, which started in the very early stages of European integration, show that this field may be considered as being of fundamental importance for this organisation.

In legal theory, the question arises whether European public policy is of an autonomous nature or "just" a part of the public policies of the Member States of international European organisations. The traditional view is that European public policy does not exist as such, but is constituted by permeation of national (international) public policies with EU law,[16] and by "enrichment with European elements".[17] The case-law, apart from certain judgments of the European courts, refers to national public policy. This is certainly due to the texts of national laws and international agreements, as well as EU regulations.[18] These acts, when dealing with the public policy exception, generally refer to "public policy in the state of recognition". There is, nevertheless, no doubt that this "national" public policy also has a "European part". In this regard, Mayr states that a double reference frame must be considered when assessing the conformity of a judgment with public policy: on one hand, the judgment must not contradict the fundamental values of the national legal system, and on the other hand, must not contradict the fundamental legal principles of the EU law.[19,20] Opponents of the theory of the non-existing European public policy,

[14] See eg PG Mayr, *Europäisches Zivilprozessrecht* (Facultas.vuw, 2011), 240.

[15] In this sense also E Jayme, *Methoden der Konkretisierung des Ordre public im internationalen Privatrecht* (CF Müller, 1989), 21, cited by B Hess, "EMRK, Grundrechte-Charta und europäisches Zivilverfahrensrecht", in H-P Mansel *et al* (eds), *Festschrift für Erik Jayme* (Sellier, 2004), 350; Hess, *ibid*, 353. See also the case *Renault* of the CJEU, discussed Section C.2 *infra*.

[16] See eg Jayme, Kropholler, Martiny, Brödermann/Iversen, cited by J Basedow, "Die Verselbständigung des europäischen ordre public", in M Coester, D Martiny and K A Prinz von Sachsen Gesaaphe (eds), *Privatrecht in Europa, Vielfalt, Kollision, Kooperation, Festschrift für Hans Jürgen Sonnenberger, zum 70. Geburtstag* (CH Beck, 2004), 291.

[17] HJ Sonnenberger, "Kommentar zum Art 6 EGBGB", in *Münchener Kommentar zum BGB, Band X* (CH Beck, 3rd edn, 1998), no 19.

[18] The reference to "Community public policy" concerning the non-compensatory damages in the Rome II regulation (Regulation 864/2007 EC [2007] OJ L199) proposed by the Commission in Art 24 of the Proposal for the Rome II Regulation (COM(2003) 427 final) was, for example, rejected by the European legislators and was not included in the final text of the Regulation. Nevertheless, such damages make a good example of what may be contrary to the substantive public policy of some Member States, which can be protected by a public policy exception of the conflict-of-laws regulations (Rome I and II), as well as, in manifestly disproportionate cases, of the regulations applying to *exequatur*. See eg judgment of the French Cour de cassation, 1st civil chamber, 1 December 2010, no 09-13.303.

[19] Mayr, *supra* n 14, 239.

[20] In order to enhance accuracy, Basedow suggested that explicit references to European public policy should be included in European regulations (those containing references to the public

however, wonder what kind of public policy should then take into account those European courts that must also use this concept and that do not apply national law. As they do not belong to any state, they can enact and protect only "European public policy".[21] What is important from the practical point of view is that the judges interpret the notion of public policy correctly, which means that in the context of the EU and the Council of Europe, the fundamental values of these organisations must also be considered.

The close connection between Convention and EU law was established in Article 6 of the Treaty on EU,[22] before its amendment by the Lisbon Treaty.[23] The CJEU has in many cases based its decisions and the interpretation of fundamental rights on the jurisprudence of the ECtHR.[24] The ECHR was also the basis for drawing up the Charter of Fundamental Rights of the EU in 2000 ("the Charter").[25]

With the Lisbon Treaty, Article 6 of the Treaty on EU was replaced with the text that announces the beginning of the binding application of the Charter, which henceforth has the same legal value as the Treaties (ie the primary sources of EU law).[26] The Charter provides for more rights and freedoms than the ECHR[27] (even though these are often only a more detailed regulation of the rights from the Convention), but is binding on the states "only when they are implementing Union law".[28] Concerning the interpretation of those rights

policy exception), since this would highlight that within national public policy also the components originating from European legal sources have to be protected. Basedow, "Die Verselbständigung", *supra* n 16, 319; J Basedow, "Recherches sur la formation de l'ordre public européen dans la jurisprudence", in M-N Jobard-Bachellier and P Mayer (eds), *Le droit international privé: esprit et méthodes: Mélanges en l'honneur de Paul Lagarde* (Dalloz, 2005), 74: "So Article 34 of the Brussels I Regulation could be transformed as: 'a judgment shall not be recognised if such recognition is manifestly contrary to public policy of the European Union or the Member State in which recognition is sought'."

21 Basedow, "Die Verselbständigung", *supra* n 16, 294.

22 "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of EU law." Consolidated version of the EU Treaty [2006] OJ C321.

23 Treaty amending the Treaty on European Union and the Treaty establishing the European EU, signed at Lisbon, 13 December 2007, OJ C306/07, entered into force on 1 December 2009.

24 See eg, very early, Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219.

25 [2000] OJ C364/1.

26 The new Art 6, para 1 of the EU Treaty.

27 In addition to the rights and liberties determined by the ECHR, the Charter also contains the constitutional traditions of the Member States of the EU, the rights from the European Social Charter, the EC Charter on the fundamental rights of employees (signed in Strasbourg on 9 December 1989 in the form of a declaration and therefore not legally binding), as well as rights from other international treaties which are binding on the European Union and the Member States. For details see the internet page of the European Parliament, dedicated to the Charter: www.europarl.europa.eu/charter/default_en.htm (accessed 6 June 2011).

28 Art 51, para 1 of the Charter.

and freedoms that are analogous to the ones from the Convention, the Charter states that the meaning and scope of those rights are the same as those laid down by the ECHR.[29] In light of the importance given to Article 6 of the ECHR in the *exequatur* proceedings, it is interesting to note that Article 47 of the Charter, which is now hierarchically higher than the EU regulations regarding the "free movement of judgments", even broadens the procedural protection of individuals.[30]

The Lisbon Treaty also provides for accession of the EU to the ECHR.[31] The entry into force of Protocol no 14 to the ECHR enabled this step by amending Article 59 of the ECHR. Such accession entails that not just individual Member States but also the EU may be directly sued before the ECtHR. In this way, EU law will be subject to external scrutiny, once all internal remedies (ie those provided for in the EU) have been used, which is currently in principle impossible.[32] At the time of writing of this paper, experts from both international organisations are working on the necessary legal document for such accession of the EU. An even stronger link is thus being established between Convention and EU law, which will nevertheless add further complexity to the relationship between the two organisations.

C. European Public Policy in the Case-law of the CJEU and the ECtHR

In *exequatur* proceedings, European public policy is protected by the possibility of the application of the public policy exception, as determined by national and in part by EU legal sources. In European states, the public policy exception is today most commonly used in cases where there is a discrepancy between the proceedings for issuing the foreign judicial decision and the procedural public policy of the state of recognition.[33] The fundamental procedural guarantees are laid down in Article 6 of the ECHR and are carefully elaborated in the case-law of the ECtHR. The guarantees stemming from it may be deemed to

[29] Art 52, para 3 of the Charter.

[30] See also E Storskrubb, *Civil Procedure and EU Law, A Policy Area Uncovered* (Oxford University Press, 2008), 89.

[31] The new Art 6, para 2 of the EU Treaty.

[32] For the responsibility of the Member states for violations of human rights by way of application of the EU law, see the *Bosphorus* decision of the ECtHR, discussed in Section D *infra*.

[33] See P Beaumont and E Johnston, "Can *Exequatur* Be Abolished in Brussels I whilst Retaining a Public Policy Defence?" (2010) 6 *Journal of Private International Law* 249, 259 and 276. The French case-law on the applicability of the Brussels Convention never found a breach of public policy regarding the content of the judgment, whereas violations of procedural public policy were found quite frequently. Y Loussouarn, P Bourel and P de Vareilles-Sommières, *Droit international privé* (Dalloz, 9th edn, 2007), 796, no 507-1. Also: H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (LGDJ, 3rd edn, 2002), nos 409–18.

be the European procedural public policy. It is therefore not surprising that in the case-law the bond between Convention public policy and EU public policy was first established precisely in the field of procedural law.

1. Human rights as Public Policy in the Case-law of the CJEU and the ECtHR

It will be shown that the ECtHR has repeatedly called on contracting states to consider the Convention as part of their national public policy.[34] The Convention must also be respected in proceedings for the recognition and enforcement of foreign judgments (not only that these proceedings must correspond to the Convention standards, but the possible existence of the violations that occurred in the proceedings of issuing the judgment in the foreign state must be controlled), since a state that recognises a judicial decision violating Convention rights is responsible for such a violation. [35] This view is in line with the so-called unitary concept of the proceedings, in which the right to enforcement is considered to be a part of the right of access to the court and which is a part of the settled case-law of the ECtHR.[36,37] It could be argued that this is a positive obligation upon the contracting parties to the ECHR to ensure effective implementation of human rights under the Convention where it does not suffice that they refrain from direct violations of rights, but should – where possible – also penalise and remedy the effects of already existing violations and prevent imminent violations.

(a) Drozd and Janousek v France and Spain (ECtHR)

After first establishing the possibility of responsibility for violations of fundamental human rights committed by another state in the case of *Soering* in 1989,[38] the ECtHR then recognised indirect responsibility[39] for enforcing a for-

[34] In this sense, see eg ECtHR, *Loizidou*, *supra* n 11, para 75.

[35] ECtHR, 21 July 2001, *Pellegrini v Italy*, Reports 2001-VIII.

[36] ECtHR, 19 March 1997, *Hornsby v Greece*, Reports 1997-II.

[37] D Bureau, and H Muir Watt, *Droit international privé, Tome I, Partie générale* (PUF, 2007), 273, no 285.

[38] The ECtHR, 7 July 1989, *Soering v United Kingdom*, Series A Vol 161. In this case the Court judged that in the event of the extradition of the defendant to the US, the UK would thereby violate Art 3 of the Convention (the prohibition of torture), because this person would probably be subject to inhuman treatment in the US. The UK would therefore be liable for a violation which would actually be carried out by a third state.

[39] Sinopoli argues that the issue is not that the state where the recognition is sought would be liable indirectly for a violation carried out by the state where the judgment was issued, but that the recognition itself of such judgment is a violation of the Convention. L Sinopoli, "Droit au procès équitable et exequatur: Strasbourg sonne les cloches à Rome" (2002) *Gazette du palais*, 23 July, no 204, 2.

eign judicial decision in the case of *Drozd and Janousek* in 1992.[40] This case dealt with criminal proceedings, conducted in Andorra, in which two persons were sentenced to imprisonment, which was then served in French prisons. Some serious violations of the procedural safeguards were committed in the proceedings (eg a violation of the principle of an impartial and independent court). At that time, the ECtHR held that these proceedings cannot be assessed regarding the strict requirements of the ECHR, because Andorra was not a contracting party,[41] but nevertheless took the standpoint that a state should not enforce a foreign judicial decision "if it emerges that the conviction is the result of a flagrant denial of justice *(déni de justice flagrant)*".[42] The purpose is therefore to safeguard the right to a fair trial, but only in cases of particularly serious violations. The separate concurring opinion of judge Matscher is of special interest; this states that: "certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable", and "a contracting State may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting State, which has been obtained in conditions which constitute a breach of Article 6, whether it is a civil or criminal judgment".[43] In their separate dissenting opinion, judges MacDonald and others emphasised the need to control compliance with the fundamental guarantees, including the independence of the court, also in proceedings for recognition and enforcement.[44]

(b) Krombach v Bamberski (CJEU) and Krombach v France (ECtHR)

In the case of *Krombach v Bamberski* in 2000,[45] the German court referred a question for a preliminary ruling to the CJEU that concerned the possibility to refuse to recognise and enforce a foreign judgment on the basis of the public policy exception pursuant to Article 27(1) of the Brussels Convention[46] on the grounds that in the proceedings for issuing this decision fundamental procedural guarantees were not respected, in this case the principle of an adversarial

[40] ECtHR, 26 June 1992, *Drozd and Janousek v France and Spain*, Series A Vol 240. The Court declared subsequently that it does not have jurisdiction.

[41] The Court did not want to take into consideration that France (as well as Spain, which was also a defendant in this case) had a strong connection with Andorra, the latter being a *sui generis* subject of international law precisely because of its lack of sovereignty.

[42] Para 110.

[43] Judge Matscher joins the opinion of the majority that there was no violation of the Convention, but for the reason that Art 6 of the Convention has a "reduced effect" in the case of the recognition and enforcement of foreign judgments, which means that the violation of the Convention should have been manifest.

[44] Joint dissenting opinion of Judges Macdonald, Bernhardt, Pekkanen and Wildhaber.

[45] CJEU, Case C-7/98, [2000] ECR I-1935.

[46] Today Art 34/1 of the Brussels I Regulation.

procedure.[47] The decision at issue was a French judgment concerning a civil claim in criminal proceedings. The proceedings were carried out in the defendant's absence and consequently even the defendant's counsel did not have a right to participate on behalf of the defendant.[48,49] The CJEU ruled that the German court *can* penalise violations of the right to be heard in the proceedings for the recognition and enforcement of foreign judgments by a refusal on the basis of being contrary to public policy, thus confirming that the right to an adversarial process belongs among the fundamental rights of EU law[50] and that its protection is not contrary to the concept of EU public policy. The content of Article 27(1) of the Brussels Convention, ie the legal standard of "public policy", must therefore be sought also in the provisions of the ECHR.[51] Following Mr Krombach's application, the ECtHR subsequently reiterated its earlier decision[52] on the inadequacy of (the same) proceedings *in absentia* in 2001.[53]

The answer of the CJEU in the *Krombach* case can be interpreted as meaning that the Court accepts the ECHR as being part of the public policy of the Member states, but since it did not oblige the states to refuse *exequatur* on the basis of a violation of the ECHR, it refused to recognise the ECHR as a part of the EU public policy. Such interpretation would, however, hardly be possible now that the EU Charter on fundamental rights gained the primary EU legislation status and the EU is about to accede to the ECHR.

The question remained open whether and under which circumstances a Member State may be convicted of a violation of the ECHR if its court rec-

[47] The great importance of the *Krombach* case lies, among other matters, in the decision of the CJEU that the notion of public policy in the Brussels Convention does not only apply to the content of the judgments, as had been interpreted up to then by numerous authors, but also to the procedural aspects, although the Convention otherwise contains several grounds for refusal of recognition or enforcement expressly referring to procedural failures, especially to the service of the introductory act in the procedure. In the opinion of many, this judgment rendered Art 27/2 of the Convention (now Art 34/2 of the "Brussels I" Regulation) unnecessary. See eg E Pataut, "Notifications internationales et règlement 'Bruxelles I'" in J-P Ancel *et al* (eds), *Vers de nouveaux équilibres entre ordres juridiques, mélanges en l'honneur de Hélène Gaudemet-Tallon* (Dalloz, 2008), 386–90. For a further discussion of the relationship between Arts 34/1 and 34/2 of the "Brussels I" regulation and of similar provisions in Slovenian law, see J Kramberger Škerl, *L'ordre public international dans la reconnaissance et l'exécution des jugements étrangers, Etude comparée : Slovénie, France, Union européenne* (PhD thesis, Poitiers, Ljubljana, 2008, not published), 243–46, 259–62.

[48] The so-called *contumace* proceedings or proceedings *in absentia*.

[49] The Brussels Convention had to be applied although the judgment was issued with regard to a criminal procedure, in the part where it dealt with civil rights and obligations. Compare with the decision of the Slovene Supreme Court no Cp 18/2006, www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/10614/ (accessed 6 June 2011).

[50] Para 42.

[51] The CJEU case-law on the interpretation of the Brussels Convention is still relevant for the interpretation of the Brussels I Regulation.

[52] ECtHR, 23 November 1993, *Poitrimol v France*, Series A Vol 277-A.

[53] ECtHR, 13 February 2001, *Krombach v France*, Reports 2001-II. The Court ruled that the refusal to hear the defendant's counsel entailed a violation of Art 6 of the ECHR.

ognised or enforced, on the basis of the Brussels Convention, a foreign judicial decision vitiated by violations of procedural guarantees.

(c) Pellegrini v Italy (ECtHR)

In the case *Pellegrini v Italy* in 2001,[54] the ECtHR ruled on the application of Mrs Pellegrini concerning the judgment of the Italian court to recognise a decision given by the court of the Holy See to annul her marriage. The ecclesiastical authorities issued a decision in the proceedings in which procedural guarantees pursuant to Article 6 of the ECHR were not provided. The ECtHR ruled that Italy violated the ECHR, as its courts recognised such a foreign decision, even though the applicant objected to the recognition due to the non-compliance with procedural guarantees. Somewhat contrary to its assessment in *Drozd and Janousek*, the ECtHR pointed out that in proceedings for the recognition and enforcement of foreign judgments the contracting parties have to verify the compliance of the proceedings in the state issuing a decision in the case of a state that does not apply the ECHR, especially where the implications of an *exequatur* are of capital importance for the parties.[55] From this Basedow derives that: "The State that violates Article 6 of the ECHR by regulating the recognition in a too complacent manner, must pay damages pursuant to Article 41 of the ECHR."[56]

In the case *Pellegrini*, the ECtHR did not impose a general rule, but expressly limited its ruling to the decisions originating from a state that is not party to the ECHR. Therefore, the question arose whether verifying compliance with the procedural guarantees in proceedings for issuing the decision is not required when the decision originates from a contracting party to the ECHR. A "looser" treatment of decisions issued by the contracting parties to the ECHR could be based on the premise of mutual trust in respect for the Convention, but the everyday case-law of the ECtHR demonstrates that the contracting parties to the ECHR do not always respect it. As the UK Court of Appeal put it in *Maronier v Larmer*: "What we cannot accept is that we must apply an irrebuttable presumption that a judgment given in another member state cannot have resulted from a violation of Article 6."[57] An argument could also be made that there could be an infringement procedure before the ECtHR against the state issuing the decision, and that therefore such an option may be suppressed with regard to the state of enforcement or recognition. We believe that such interpretation would not follow the purpose of the ECHR. The actual infringement generally occurs only when a judicial decision attains real effects, and

[54] ECtHR 21 July 2001, Reports 2001-VIII.
[55] Para 40.
[56] Basedow, "Recherches", *supra* n 20, 68.
[57] *Maronier v Larmer* [2002] EWCA Civ 774; [2003] QB 620, discussed in Beaumont and Johnston, *supra* n 33, 255 and 264.

this happens when it is recognised or enforced. That is the reason why the ECtHR regards judicial proceedings, including enforcement, as a whole.[58] The judicial protection of the ECHR is subsidiary in nature and the purpose of the Convention system is to remedy violations, if possible, within the standard proceedings, which includes enforcement, even if it takes place in another state. The ECtHR cannot interfere with specific proceedings and set aside the decisions rendered and actions carried out, but can only monetarily penalise the violating state.[59] If the state of enforcement actually adopts this violation in its legal order, this also violates the Convention, and therefore it cannot be of any importance whether the state issuing the decision is a contracting party to the ECHR or not.[60] The states must verify the compliance of the proceedings for issuing judicial decisions with Convention standards irrespective of the state that issued the judicial decision.[61] The CJEU *Krombach* judgment only shows that the Brussels Convention does not prevent the EU Member states from doing so.[62]

It is interesting to note that the French Court of Cassation had been previously confronted with the question whether to apply the public policy defence in case of a violation of procedural rights in the initial proceedings which took place in a contracting state to the ECHR. In 1999, it declined to enforce an English judicial decision in the well-known case *Pordéa* on the basis of the public policy exception pursuant to the Brussels Convention due to a violation of Article 6 of the ECHR in the state of origin and in this way penalised a violation of the ECHR committed by another contracting party to the ECHR.[63] It encountered more difficulties when approaching the question of whether to demand respect for the guarantees stemming from Article 6 of the ECHR *also* when it comes to the recognition of judgments originating from states that are not party to the ECHR and are therefore themselves not committed to respect-

[58] *Hornsby*, *supra* n 36.

[59] Pabst proposes that an application to the ECtHR could represent a (more) effective remedy if it could be considered as a challenge according to Art 23 of the European Enforcement Order Regulation, possibly provoking a stay or a limitation of enforcement in the state of enforcement. S Pabst, in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Sellier, 2010), no 46. On the punishment of the states by the ECtHR for violations of procedural guarantees, see G Dannemann, "Haftung für die Verletzung von Verfahrensgarantien nach Art 41 EMRK" (1999) 63 *RabelsZ* 452.

[60] E Fohrer, *L'incidence de la Convention européenne des droits de l'homme sur l'ordre public international français* (Bruylant, 1999), esp 28–29.

[61] Basedow, "Die Verselbständigung", *supra* n 16, 316–17.

[62] This also means that the presumption of the *Bosphorus* case (discussed Section D *infra*) does not apply where the enforcement is sought under the Brussels Convention (now Brussels I Regulation); applying these acts, the courts namely have the discretion to decide whether or not to use the public policy defence in case of a violation of a procedural right.

[63] French Cour de cassation, 1st civil chamber, 16 March 1999, *Pordéa*, no 97-17598, [1999] *Revue générale procedure* 747, note H Muir Watt [2000] *Revue critique de droit international privé* 223, and GAL Droz, "Variations Pordéa" [2000] *Revue critique de droit international privé* 181.

ing the procedural standards pursuant to Article 6. After certain reluctance,[64] the Court of Cassation gave a positive answer to this question as well, even before the judgment of the ECtHR in *Pellegrini*.[65]

Another national judgment must be mentioned in this context. The UK House of Lords stated in its controversial *Barnette (Montgomery 2)* judgment of 2004[66] that the *Pellegrini* judgment of the ECtHR only referred to the legal relationship between Italy and the Holy See and had no broader impact on the *exequatur* proceedings. For the latter, the case-law in the so-called extradition cases (*Soering* and later cases) had to be applied, which means that only a flagrant (extreme) breach of procedural rights could justify the refusal of registration in the UK of a judgment originating in a non-contracting state.[67] This interpretation is difficult to follow, since in *Pellegrini* there is no mention either of the fact that the solution adopted by the ECtHR would be limited to the relationship between the mentioned states, or of the violation having to be manifest or particularly serious to trigger the refusal of *exequatur*. The *Montgomery* judgment is of further interest because the House of Lords considered that there was no serious breach of procedural rights in applying the "fugitive disentitlement doctrine" granting the court "discretion to refuse to hear or decide the appeal, on the ground that the defendant was a fugitive from justice".[68] It is difficult to overlook the factual resemblance with the above-mentioned *Krombach* case which made the CJEU expressly include procedural rights into the public policy protected under Article 27(1) of the Brussels Convention, and the ECtHR condemn France for violating Krombach's procedural rights. On the other hand, a similar (but more complex) situation in *Gambazzi*[69] was dealt with quite differently, at least by the ECtHR and the national courts of different countries.[70]

[64] French Cour de cassation, 1st civil chamber, 10 July 1990, [1991] *Revue critique de droit international prive* 757: refusal to review a Gabonese judgment from the point of view of Article 6/1 of the Convention because Gabon is not party to the Convention. This reluctance may have been due to the above discussed *Drozd and Janousek* case-law of the ECtHR.

[65] French Cour de cassation, 1st civil chamber, 3 December 1996, [1997] *Revue critique de droit international prive* 328, note H Muir Watt: the French courts must take into consideration the demands of Art 6/1 when they apply foreign law and when they give effect to a foreign judgment issued in the state which is not party to the Convention.

[66] House of Lords, 22 July 2004, *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37; [2004] 1 WLR 2241.

[67] Similar position can be found in the above discussed *Drozd and Janousek* case-law of the ECtHR.

[68] *Government of the United States of America v Montgomery (No 2)*, *supra* n 66, para 9.

[69] CJEU, C-394/07, [2009] ECR I-2563. See Beaumont and Johnston, *supra* n 33, 255–56.

[70] The enforcement against Mr Gambazzi was not only demanded in Italy, but in several other countries. For an outline of these proceedings, see http://conflictoflaws.net/2011/gambazzi-looses-in-milan/ (accessed 6 June 2011) and the related documents.

(d) Gambazzi v Daimler Chrysler (CJEU)

In 2009, the CJEU acquired a new opportunity to decide whether a certain procedural practice could be sanctioned by the use of the public policy exception in *exequatur* proceedings. The problem in *Gambazzi*[71] was again related to procedural sanctions imposed on the defendant, this time for not respecting a disclosure order. Mr Gambazzi was debarred from defending on the merits. Additionally, he was denied access to some documents necessary for his defence, because his former attorneys exercised their right of retention for the time being of the dispute over the payment of the fees. Moreover, the default judgment that followed had no reasons.

The CJEU did not decide to overturn its case-law and mostly reiterated its reasoning from *Krombach*, although in a more nuanced manner. Unlike in the *Krombach* case, the CJEU does not take a position as to whether Mr Gambazzi's procedural rights were in fact violated in the country of origin of the judgment, but rather implicitly admits that in light of all circumstances of the case the initial procedure could have been problematic from the point of view of procedural rights. The Court stated that the aim of ensuring the fair and efficient administration of justice is capable of justifying a restriction on the rights of the defence, which must, however, not be disproportionate.[72] It called on the national court to assess all the circumstances of the case so as to determine whether the defendant's right to a fair trial has been violated. Following the CJEU judgment, the Italian court later found that the sanctions incurred by Gambazzi were severe, but proportionate to the aim of the good administration of justice; therefore it decided that the English judgment should be enforced.[73]

There is no ECtHR judgment on the question whether debarment from defending on the merits as a consequence of not complying with a disclosure order constitutes a violation of Article 6 of the ECHR. Remarkably, the ECtHR has refused to decide on this question by dismissing Gambazzi's application as manifestly ill-founded.[74] Thus, in this case, the CJEU has shown more sensibility regarding the possible human rights violations than the ECtHR. This naturally does not mean that in other cases, like in *Krombach*, the EU-law protection is redundant; preventing a judgment from having effects in a foreign country is, in most cases, much more important for the victim of the human

[71] *Supra* n 69.

[72] Paras 29–33.

[73] Corte d'appello di Milano, s I, 14 December 2010.

[74] This decision was criticised by Cuniberti in G Cuniberti, "Debarment from Defending, Default Judgments and Public Policy" [2010] 2 *IPrax* 152. Schilling argues that Gambazzi's application to the ECtHR was in fact manifestly ill-founded, as he renounced his right to a fair trial by not co-operating with the court, so he could not prevail himself of this right later on. On the other hand, the author states that the denying of access to the documentation retained by the law firm clearly poses a procedural problem and should therefore have been considered by the ECtHR. T Schilling, "Das Exequatur un die EMRK" [2011] 1 *IPrax* 37.

right violation than the conviction of the state(s) to pay the victim (usually relatively low) damages.

Even though the CJEU did not overturn its *Krombach* judgment, we can conclude from the comparison of the latter with the *Gambazzi* judgment and of the national judgments following the CJEU rulings in both cases, that a move has been made towards demanding an even more serious and manifest breach of procedural public policy to justify the refusal of *exequatur*.

(e) Zarraga v Pelz (CJEU)

An important decision was issued by the CJEU in December 2010, regarding the question of protection of human rights in the state of enforcement where the applicable EU instruments have abolished *exequatur*.[75] The Spanish judgment was to be enforced in Germany on the basis of Article 42 of the Brussels II*bis* Regulation.[76] The human right which was presumably at stake was the right of a ten-year-old child to be heard in the custody proceedings. This right does not directly stem from the ECHR, but is enshrined in Article 24 of the EU Charter of Fundamental rights.[77]

The Spanish court issued a certificate enabling its judgment to be enforced, without any further scrutiny, in Germany. The German court, however, was of the opinion that the child's right to be heard was infringed in the proceedings before the Spanish courts and that the Spanish court should therefore not have issued the certificate.[78]

The CJEU decided that it is solely for the national courts of the state of origin to decide whether the conditions for the issuing of the certificate based on Article 42 had been satisfied. Therefore, all the controversial procedural issues must be raised before the courts of that state and not in the state of enforcement. The state of enforcement must enforce the judgment accompanied by the certificate, without any further control. The question whether such situation can result in the state of enforcement being condemned by the ECtHR, without having been able to comply with its obligations from the ECHR, will be discussed below (Section D).[79]

[75] CJEU, 22 December 2010, Case C-491/10 PPU, not yet published at the time of writing but analysed in L Walker and P Beaumont, "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) 7 *Journal of Private International Law* 231, 239–49.

[76] Brussels II*bis* was the first EU instrument abolishing *exequatur* in a narrow field of judgments on the return of a child and judgments on the right of access.

[77] As well as, prior to that, in another Council of Europe instrument: the European Convention on the Exercise of Children's Rights of 1996 (especially Art 3).

[78] Art 42(2)a) of the Brussels II*bis* requires that, in principle, the child has to have the opportunity to be heard, in order for the judgment to be able to circulate in the EU without *exequatur*.

[79] The judgment in *Zarraga* is also important, because the CJEU provides a quite extensive interpretation of the child's right to be heard and the obligations of the states, which is to guide the national courts in future similar cases. It is not exaggerated to deduce from this interpre-

(e) The Case-law of the ECtHR after Pellegrini

After the judgment in *Pellegrini*, the ECtHR on several occasions ruled on the responsibility of the contracting parties regarding the enforcement of judicial decisions issued in states that are not contracting parties to the ECHR and which were vitiated by violations of procedural guarantees from the Convention. In *Maumousseau and Washington v France*[80] the ECtHR decided that, in accordance with the subsidiary nature of the application of the ECHR, the applicant must allege any violations of the Convention committed in proceedings for issuing a judgment in a non-contracting state before the courts of the contracting state to the ECHR that is called upon to give effect to the rights arising from that judgment, or else the ECtHR cannot penalise it, save in those situations where the applicant was the victim of a flagrant denial of justice.[81] In its decision on the admissibility of the application in the case *Eskinazi and Chelouche v Turkey*,[82] regarding the impact of a future Israeli judgment, the ECtHR found that the applicants' situation was not comparable with the situation of Mrs Pellegrini (the litigation in Israel had not even been completed), while there were no indications that they would be victims of a flagrant denial of justice in Israel.

The ECtHR also ruled on the responsibility of states that refused to give an *exequatur* to foreign judgments and thereby violated the ECHR. In the case of *Wagner and JMWL v Luxembourg*,[83] the latter was convicted of a violation of Article 8 of the ECHR, because it refused to recognise, on the basis of national rules of private international law, a judicial decision adopted pursuant to foreign legal rules that were different from the Luxembourgish rules (the case dealt with "full adoption" by a single person, which was not possible in

tation that the acting of the Spanish court was at least questionable. Nevertheless, it is not for the state of enforcement to bring a remedy to such situations. On the contrary, this state must use all its state powers to force the debtor into fulfilling their obligation from such judgment.

[80] ECtHR, *Maumousseau and Washington v France*, 6 December 2007, Selected for publication in Reports of Judgments and Decisions, currently available at the HUDOC internet page http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (hereinafter HUDOC). This case is not a case concerning recognition and enforcement of a foreign judgment but rather a case where a child abduction took place in breach of the custody rights arising from a foreign judgment (in the US) and the French authorities were obliged to return the child to the US under the Hague Child Abduction Convention: see 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*" (2010) 6 *Journal of Private International Law* 649, 664–65 and P Beaumont, "The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction" (2008) 335 *Hague Recueil des cours* 9, 61–64.

[81] Paras 97–99.

[82] ECtHR, *Eskinazi and Chelouche v Turkey*, 6 December 2005, Reports 2005-XIII. See Beaumont, *supra* n 80, 76–79.

[83] ECtHR, *Wagner and JMWL v Luxemburg*, 28 June 2007, HUDOC. See T Marzal Yetano, "The Constitutionalisation of Party Autonomy in European Family Law" (2010) 6 *Journal of Private International Law* 155, 170–71.

Luxembourg). In the case of *Leschiutta and Fraccaro*,[84] Belgium was convicted of a violation of Article 8 of the ECHR as well, because it did not immediately enforce Italian judgments on handing over custody of a child.[85]

A recent case, *Romanczyk v France*,[86] must also be mentioned, since it further defines the obligations of a contracting state to the Convention in the field of enforcement of foreign judgments. Mrs Romanczyk wished to obtain the recovery of maintenance granted by Polish judgments in 1999 and in 2003 from the debtor living in France. However, a judicial procedure aiming at the *exequatur* and enforcement of the judgment was only started in 2010, whereas all the previous steps were taken in the proceedings based on the UN Convention on the Recovery Abroad of Maintenance of 1956 ("the New York Convention"). France argued before the ECtHR that Article 6(1) of the ECHR can only be invoked when the judicial procedures do not correspond to the Convention standard; however, the proceedings on the basis of the New York Convention are of a subsidiary nature and only designed to assist the creditor, whereas they do not preclude him/her from initiating the appropriate court proceedings him/herself which the applicant did not do. The ECtHR did not agree. It reiterated its conception of the enforcement being a part of the judicial procedures and the obligation of the contracting states to ensure the enforcement of judicial decisions, without regard to the country in which these decisions were issued.[87] Since the New York Convention provides for a system of cooperation between the states with the goal of overcoming the legal and factual difficulties of filing the applications or enforcing the judicial decisions granting maintenance in a foreign country, the states therefore also have an obligation of instituting appropriate court proceedings in order to achieve enforcement.[88]

It may therefore be concluded that the ECtHR requires that states safeguard the provisions of the Convention also in proceedings for the recognition and enforcement of foreign judgments. The Convention thus represents a framework of the states' regulation of the recognition and enforcement of foreign judgments. The liability of the states can be triggered by their actions or omissions.[89]

[84] ECtHR, *Leschiutta and Fraccaro v Belgium*, 17 July 2008, HUDOC.
[85] Hess speaks about a "procedural dimension" of Art 8 which, in the field of application of this Article, has replaced the general guarantees of Article 6. Hess, *supra* n 15, 351 fn 101.
[86] ECtHR, *Romanczyk v France*, 18 November 2010, HUDOC.
[87] Para 53.
[88] Para 58.
[89] Para 55.

2. EU Public Policy in the Case-law of the CJEU and national courts

Concerning public policy resulting from EU law, the situation is similar to Convention public policy. According to the judgments in *Krombach* and *Maxicar*,[90] public policy is a concept that belongs in the field of the internal private international law of each state, and domestic courts must determine its content, while the CJEU has the task of overseeing the work of these judges.[91] The CJEU can not only prevent Member states from protecting certain national values via the public policy exception that are contrary to EU law but can also require the Member States to protect certain (European) values through the use of the public policy exception.[92]

In 1999, the CJEU decided in *Eco Swiss v Benetton*[93] that the provisions on competition law in the EC Treaty are a part of public policy that should be considered by Member States in proceedings for the recognition and enforcement of foreign decisions.[94] This decision of the court is based on the belief that Article 101 of the TFEU[95] (former Article 81 of the EC Treaty) constitutes a fundamental value for the functioning of the common market, therefore, for the exercise of one of the main objectives of European integration.[96]

Article 101 of the TFEU has later (again) been tested by French,[97] Belgian (in the same case as in France)[98] and Swiss[99] judges, in each case in proceedings for the recognition and enforcement of foreign arbitral awards. The Belgian and the French courts did not doubt that Article 81 forms a part of

[90] CJEU, *Krombach*, *supra* n 45, and CJEU, Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973.,

[91] See also CJEU, *Renault*, *ibid*, paras 26–28.

[92] See eg Bureau and Muir Watt, *supra* n 37, 261, no 274.

[93] CJEU, Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

[94] This case was about the application of the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, specifically Art V/2, which includes a breach of the public policy of the state where recognition is sought as one of the grounds for the refusal of recognition.

[95] Treaty on the Functioning of the EU [2008] OJ C115.

[96] For a similar solution in the field of conflict of laws, see CJEU, Case 22/71 *Béguelin v GL Import Export* [1971] ECR 949.

[97] Court d'appel Paris, 23 March 2006, *Société SNF SAS v Société CYTEC Ind BV*, *Revue de l'arbitrage* 2007.100, note S Bollée.

[98] Tribunal de première instance Brussels, 71st civil chamber, no NRG 2005/7721/1, 8 March 2007, *Soc SNF SAS v Soc CYTEC Ind BV*, not published, cited by F-X Train, "Belgique, France et Suisse. Le contrôle de la conformité des sentences arbitrales au droit communautaire de la concurrence: trois juridictions nationales saisies, un même problème, trois solutions différentes", internet page of the Société de Législation Comparée, www.slc-dip.com/spip.php?page=ispip-article&id_article=150 (accessed 6 June 2011).

[99] Tribunal fédéral suisse, 8 March 2006, *Tensacciai v Terra Armata*, *Revue de l'arbitrage* 2006.763, note LG Radicati di Brozolo. Regarding the same legal question, see also the following Italian judgments: Appelate Court Florence, 21 March 2006, *Les Cahiers de l'arbitrage*, *Gazette du Palais*, 15–17 October 2006 57, note T Tampieri; Appelate Court Milan, 21 July 2006, *Terra Armata v Tensacciai*, *Rivista dell arbitrato* 2006, note LG Radicati di Brozolo (the same case as before the Swiss Federal Court), cited by Train, *supra* n 98.

their public policy, as is clear from the judgment in *Eco Swiss*. However, the Swiss court adopted the opposite view, which, on the one hand, is understandable since Switzerland is not a member of the EU, but, on the other hand, is somewhat surprising, as it is "a state that is geographically, economically, and politically placed in the region where the protection of competition is an important value".[100] The Swiss court emphasised the concept of international public policy in the field of arbitration law under which "the arbitral award is inconsistent with public policy if it does not respect the values that are significant and widely recognised and that according to the majority opinion in Switzerland constitute the foundations of every legal order".[101] In this case, the Federal Court held that EU law on the protection of competition, which safeguards the "public interest of the EU" and whose scope is therefore limited in space, does not constitute a "more general principle, accepted by all the states that are considered a part of the same civilization to which Switzerland belongs".[102]

In its judgment in *Renault v Maxicar*,[103] the CJEU had to answer the question whether the exequatur could be refused if the primary EU law had been misapplied by the court of origin. The court stated that the fact that the legal rule which had been misapplied was an EU legal rule did not make any difference in the level of protection in relation to the national legal rules. The national court has to assess, in each case, whether there was "a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought". This was, in the opinion of the CJEU, not the case in *Renault*. The judgment is controversial as it could be understood to imply that the fundamental freedoms did not constitute a part of the EU public policy. However, it seems more plausible that the court only referred to the concrete case where the breach of the EU rule (even a fundamental one) was not manifest. The CJEU also seemed to balance the freedom of movement of goods and the freedom of competition on one hand with its equally important fundamental objective of what we can call "free movement of judgments", which, at the same time, protects the creditors' fundamental right to enforcement. It decided, in the concrete case, that the latter must prevail.

In 2007, the Austrian Oberster Gerichtshof stated that, in order to successfully oppose the declaration of enforceability of a foreign judgment on the basis of it being contrary to Article 81 of the EC Treaty being an element of the public policy, the defendant must bring sufficient arguments to convince

[100] Train, *supra* n 98.
[101] *Ibid.*
[102] *Ibid.*
[103] CJEU, C-38/98 [2000] ECR I-2973.

the court of a flagrant violation of a fundamental EU law provision, which the defendant failed to do.[104]

D. Differences and Possible Conflicts between Different Elements of the European Public Policy

In this part, the differences and the possible conflicts between the fundamental human rights and the (other) fundamental values of the EU will be addressed. It is, however, possible that conflicts also arise between the different components of the European public policy, stemming from the same source, as for example conflicts between the different human rights. In such cases, the court of the state of enforcement must assess all the circumstances of the case and, if necessary, proceed to the balancing of the human rights and fundamental values in question, as is often the case before the ECtHR or the national courts.[105]

1. General Remarks Regarding the Differences between EU and Convention Public Policy

It has been shown that EU and Convention public policy are in principle complementary. However, as the objectives of the two international organisations, from which the rules of European public policy arise, are partly different and as both legal systems developed separately, certain inconsistencies arise when the fundamental rights and freedoms of the ECHR collide with the areas of economics, biotechnology, drugs, aliens policy, media, etc.[106] The situation is especially problematic when human rights come up against the fundamental freedoms, on which the EU is based, namely the free movement of persons, goods, services and capital. The CJEU has ruled on the relationship between these two bodies of core values on several occasions, but has not established a generally applicable rule.[107] In addition to the conflicts that may arise between the Convention rights and other fundamental values of the EU, conflicts can

[104] OGH, 3Ob233/06w, 22 February 2007.

[105] Eg a conflict can arise already within Art 6 of the ECHR which guarantees a fair trial (also) to the defendant, and, at the same time, the creditor's right to enforcement of the final judgment.

[106] S Guinchard *et al*, *Droit processuel*, *Droit commun et droit comparé du procès* (Dalloz, 2nd edn, 2003), 304, no 209.

[107] Regarding the relationship between human rights and the fundamental freedoms of the EU, see: CJEU, C-260/89 *ERT v DEP* [1991] ECR I-2925; CJEU, C-60/00 *Carpenter v Secretary of State* [2002] ECR I-6279; CJEU, C-71/02 *Karner v Troostwijk* [2004] ECR I-3025; CJEU, C-159/90 *SPUC v Grogan* [1991] ECR I-4685; CJEU, C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689; CJEU, C-112/00 *Schmidberger v Austria* [2003] ECR I-5659; CJEU, C-36/02 *Omega v Oberbürgermeisterin* [2004] ECR I-9609; CJEU,C-328/04 *Vajnai Attila* (order) [2005] ECR I-8577; CJEU, C-265/95 *Commission v France (the "Spanish strawberries" case)* [1997] ECR I-6959. See also

also arise when the ECtHR and the CJEU interpret Convention rights. Some authors speak of the "direct interpretation" of the ECHR by the ECtHR and of the "indirect interpretation" of the ECHR by the CJEU.[108] Given that the EU is currently not yet a member of the ECHR,[109] the CJEU, in principle, is not obliged to rely on the case-law of the ECtHR,[110] although it, as already mentioned, frequently refers to this case-law for obvious reasons. It is interesting to mention that also the ECtHR has already cited the judgments of the CJEU.[111] As the accession of the EU to the ECHR on the basis of the Lisbon treaty is now imminent, such co-operation is even more natural.

The goal of the EU that is particularly important in the field of private international law, but which is not equally pursued by the Council of Europe, are the efforts to facilitate the "transfer" or dissemination of the effects of judgments between Member States.[112] In this regard, the European legislature frequently adopts new legal instruments. Given the importance of this objective for the development of a common market, we could already speak of a fifth freedom, the so-called "free movement of judgments". When the courts of EU Member States are confronted with judgments from other EU Member States that violate the ECHR, it is thus logical that the decision (not) to recognise should also take into account the fact that the principle of the free movement of judgments, in addition to respect for human rights, is one of the fundamental principles of the EU and thus part of its public policy.[113] Therefore, the situation may arise that a national court, while protecting its public policy, constituted also of the fundamental values of the European international organisations of which its state is a member, finds itself in a need to consider which of the components of European public policy should prevail. A court of a Member State of the EU may thus come to a different conclusion when weighing the flaws of a judicial decision and the need for the free movement of judgments than if it did not have to consider the latter, ie differently than in cases where a judicial decision originates from a non-Member State.

T Perišin, "Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms in the EU" (2006) 2 *Croatian Yearbook of European Law and Policy* 69.

[108] Guinchard *et al*, *supra* n 106, no 209.

[109] See CJEU Opinion 2/94 [1996] ECR I-1759.

[110] Guinchard *et al*, *supra* n 106, no 209; M Bobek, "A Rather Awkward Relationship; The European Court of Human Rights, the European Union and the Search for Human Rights Competency" *Common Law Review*, http://review.society.cz/index.php?option=com_content&task=view&id=64&Itemid=2 (accessed 31 May 2011).

[111] Eg in the case *Bosphorus Hava Yollari . . . v Ireland*, 30 June 2005, Reports 2005-VI. Judge Ilešič of the CJEU speaks of "the awareness of the need for respect of the judgment of the 'parallel' court" which is present in the case-law of the CJEU and the ECtHR. M Ilešič, "Mednarodna mreža sodišč – med hierarhijo in sodelovanjem" (2006) 1 *Pravna praksa* 3–4.

[112] See eg the Stockholm programme [2010] OJ C115/1–38.

[113] Also the opinion of Basedow, "Die Verselbständigung", *supra* n 16, 314.

Several authors note that the role of EU public policy, when it comes to the recognition or enforcement of judgments originating from third states, is in particular to reinforce and complement national public policy, while its role is to some extent opposite, ie to limit and correct the content of the public policy of the Member States, when it comes to judicial decisions taken in another Member State.[114] This difference stems from the above-mentioned principle of enhanced co-operation between the Member States of the EU and from the efforts for the free movement of judgments, as well as from (other) fundamental rights of the EU. All these freedoms are protected only in relations between Member States and have no force in relations with third states, consequently not even with the contracting parties to the ECHR which are not members of the EU.

How can EU public policy and Convention public policy be reconciled? In Guinchard's opinion *Pellegrini* teaches that "the international rules of cooperation, governing the recognition of a decision taken in another legal order, are consistent with the ECHR only if they allow the state of recognition to not recognise a judicial decision taken in proceedings vitiated by a violation of Article 6".[115] The CJEU as well, when confronted with the question of which of the European public policies should prevail in the *Krombach* judgment,[116] decided on the procedural guarantees of the ECHR. It seems that both legal theory and the case-law are more inclined towards the solution that in the event of such a conflict, the protection of human rights should prevail, [117] but currently there are no clear criteria set out for the courts to handle such cases.

The right balance must therefore still be found. In this regard, special concern should be given to the co-ordination of the protection of procedural guarantees. Sinopoli's remark as to the effects of the *Pellegrini* judgment of the ECtHR regarding the effects of foreign judgments in general, may be extended, *a fortiori*, also to the relations within the EU:

> "[I]f we understand the magnitude given to the right to a fair trial [in the case-law of the ECtHR], we must ask ourselves whether such an obligation [to verify compliance with it within proceedings for recognition and enforcement] does not constitute a significant barrier to the international movement of decisions."[118]

It should be noted that even in cases where the CJEU interpreted fundamental rights in the same manner as the ECtHR, the use of the public policy excep-

[114] Basedow, "Recherches", *supra* n 20, 70–71; Basedow, "Die Verselbständigung", *supra* n 16, 315. Also the opinion of Loussouarn, Bourel and de Vareilles-Sommières, *supra* n 33, 795, no 507.
[115] Guinchard *et al*, *supra* n 106, no 214.
[116] CJEU, *Krombach*, *supra* n 45.
[117] The CJEU decided in this manner several times when it was weighing, outside the scope of private international law, between the right determined by the Convention and the freedom determined by EU law: see the case-law cited *supra* n 107. For the EU instruments not providing the possibility of this weighing, see the discussion in Sections C.1(e) and D.2.
[118] Sinopoli, *supra* n 39, 2.

tion in *exequatur* proceedings was limited to cases of "reduced" public policy, and in addition, Brussels I and Brussels II*bis* require "manifest" contrariety to public policy. A "manifest" violation of fundamental procedural guarantees was required by the CJEU also in the *Krombach* case, although it applied the Brussels Convention, where the expression "manifestly" is not mentioned. On the contrary, a conviction before the ECtHR does not necessitate a specific standard of a "manifest" violation of the ECHR.[119] We can therefore conclude that the risk of a conflict is not completely excluded.[120]

The fact that also the ECtHR is not insensitive to the argument of promoting judicial co-operation between states in the field of the enforcement of judicial decisions can be seen in the reasoning in the cases *Soering*,[121] *Drozd and Janousek*[122] and recently, for example, in the case *Eskinazi and Chelouche*,[123] where the court stated:

> "The Convention does not require the Contracting Parties to impose its standards on third States or territories and to require [this] would thwart the current trend towards strengthening international cooperation[124] . . ., and would risk turning international instruments into a dead letter, to the detriment of the persons they protect."

Certainly, this "understanding" is relative and excludes serious violations of the Convention. And yet more importantly, the Court refers expressly to the relations between the states party to the convention and the third states, whereas the conflict between the EU and the Convention public policy necessarily arises where the involved states are both party to the Convention.

2. The Abolition of *Exequatur* and the Protection of European Convention Public Policy

The "second generation"[125] regulations on the enforcement of judgments from other Member States[126] abolish the public policy exception (via abolishing the *exequatur* in general). With the judgments in *Krombach* and in *Gambazzi* the CJEU clarified that the obligations of the courts in the state of recognition and enforcement when using the public policy exception under Brussels I cover procedural and substantive public policy. This interpretation of the public policy

[119] *Pellegrini*, *supra* n 35.
[120] Guinchard *et al*, *supra* n 106, no 214.
[121] ECtHR, *Soering*, *supra* n 38.
[122] ECtHR, *Drozd and Janousek*, *supra* n 40.
[123] Decision of the ECtHR, *Eskinazi and Chelouche*, *supra* n 82, para C2.
[124] ECtHR, *Drozd and Janousek*, *supra* n 40, para 110.
[125] Term used eg by Pabst, *supra* n 59, no 12.
[126] The Regulations on the European Enforcement Order for Uncontested Claims, on the European Small Claims Procedure, on the European Order for Payment and on Maintenance Obligations, *supra* n 5.

defence can be applied to all other regulations containing this concept.[127] Under the new regulations, however, the state of enforcement must recognise foreign judgments with almost no verification, since it may refuse enforcement only if there is another judicial decision which is irreconcilable with the one for which enforcement is sought.[128] It would seem that these developments are proceeding simultaneously in two different directions. Nevertheless, it should be noted that the procedural guarantees regarding the serving of the initial document in the proceeding are of particularly great importance even in the "new" regulations, although the verification of compliance to the EU standards is left to the state issuing the decision, leaving the state of enforcement with the sole role of an "enforcement assistant" without any controlling competences,[129] which can be problematised.[130] Other components of procedural public policy and substantive public policy are, however, no longer protected by these regulations.[131]

In this context, the famous *Bosphorus* case must be mentioned.[132] In this case, the ECtHR established a double test aiming at establishing whether a contracting state can, under the ECHR, be held responsible for fulfilling an obligation arising from its membership in an international organisation. The ECtHR stated that this cannot normally be the case when the state had no discretion in implementing this obligation[133] and "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[134] However, the responsibility of the contracting state is engaged

> "if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, 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".[135]

[127] Hess, *supra* n 15, 354. For the necessity of a harmonious interpretation of the public policy defence, see also S Francq, in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier, 2007), no 35.

[128] Art 21/1 of the Regulation on the European Enforcement Order, Art 22 of the Regulation on the European Order for Payment, Art 22/1 of the Regulation on the European Small Claims Procedure, and Art 21/2 of the Maintenance Regulation. All regulations cited *supra* n 5.

[129] Pabst, *supra* n 59, no 14 and the authors cited there.

[130] In the *Zarraga* case, *supra* n 75, this problem is clearly shown: the Spanish and the German court interpreted the right of the child to be heard in a different way, but the latter was left with no possibility of refusing the enforcement of the Spanish judgment.

[131] Regulation Brussels II*bis*, when abolishing *exequatur* for certain judgments, additionally provides for the procedural rights of the concerned parties, especially the child.

[132] ECtHR, *Bosphorus*, *supra* n 111.

[133] Para 156.

[134] Para 155.

[135] Para 156, referring also to *Loizidou*, *supra* n 11.

In the *Bosphorus* case, the ECtHR considered that the above-mentioned presumption of an equivalent protection could be applied to the EU. Since we are dealing with regulations, the Member States do not have, under EU law, the discretion whether to apply them or not.[136] The question is therefore whether, in each concrete case, the protection of human rights in the initial proceedings was manifestly deficient. This question will have to be decided on a case-by-case or at least state-by-state basis.[137]

Since with the Lisbon treaty the Charter of fundamental rights has won the status of primary EU law, the CJEU may be called upon to determine whether the regulations abolishing *exequatur* are compatible with human rights guaranteed by the Charter.[138] However, in its *Zarraga* judgment,[139] the CJEU has already stated that the existence of remedies in the state of origin suffices.

For all these reasons, the entry into force of the instrument which will provide the foundation for the accession of the EU to the ECHR and later the case-law of both European courts who will then be obliged to find a way to reconcile the above mentioned differences are eagerly anticipated.

E. European Public Policy and Public International Law

The EU Member States and the Member States of the Council of Europe are also part of the global community of states and are, therefore, bound by numerous bilateral and multilateral international treaties, as well as the international *jus cogens*. The fundamental values of international law are at the same time part of the public policy which the state must take into account in proceedings for the recognition and enforcement of foreign judgments.

If international law complements national public policy, states can still commit themselves by international treaty to not considering a certain legal rule to be contrary to their public policy. What are the solutions if "European" and (other) international law are in contradiction? This was the question France was facing in the cases of Moroccan and Algerian decisions on Islamic unilateral repudiations. This refers to the so-called "wife dismissal" or unilateral divorce, which according to Islamic law can be carried out by the husband,

[136] The situation is different, however, in the case where the states, in applying a regulation, have to interpret a legal standard contained therein, such as "public policy".

[137] Since the ECtHR has decided that a remedy is only efficient if the body deciding over the remedy is independent from the one that issued the original decision, Schilling argues that the *Bosphorus* protection only applies, if the remedies against the issuing body provided for in the regulations have a devolutive effect. Schilling, *supra* n 74, 40. The author is specifically referring to the European Enforcement Order Regulation and the Maintenance Regulation, both cited *supra* n 5.

[138] Art 263 of the TFEU. See also: CJEU, Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199. In this sense also Pabst, *supra* n 59, nos 41, 42, and Hess, *supra* n 15, 357–58.

[139] CJEU, *Zarraga*, *supra* n 75.

but not the wife, while wives often have no say in proceedings concerning such divorce, and sometimes do not even know that the divorce proceedings are being or have been conducted, or do not receive (appropriate) maintenance.[140] France undertook the obligation by an international treaty in 1981[141] to recognise Moroccan repudiations under the same conditions as divorce decisions rendered in other states. For many experts as well as in the case-law this was understood as equating such repudiation with divorce (even if this was not explicitly specified in the treaty), therefore France should be obliged to recognise a Moroccan decision concerning such unilateral repudiation.[142] On the other hand, the ECHR opposes such recognition, since the wife generally does not have any rights in the proceedings (procedural public policy), and in addition, the possibility of such unilateral divorce is reserved only for men. Such a regulation violates Article 5 of Protocol No 7 to the ECHR, which guarantees the equality of spouses.

Several solutions to the conflict between these international agreements, which exist for France as a party to an international treaty on recognition and enforcement, on the one hand, and the ECHR on the other hand, were proposed. After several different turns, the French Cour de cassation adopted a decision in 2004, which has since been accepted as settled case-law, according to which the ECHR must prevail over a bilateral convention on the mutual recognition of judicial decisions.[143] As the ECHR is a part of French public policy, the public policy exception must prevent the recognition of Moroccan and Algerian repudiations. Although the principle of gender equality is not a generally accepted principle in the international community,[144] the contracting parties to the ECHR must protect it even when faced with foreign decisions.[145]

Already in the cases *Soering* and *Drozd and Janousek*, and in addition through the convincing arguments of the French Cour de cassation, we may assume there is a general rule that a contracting party to the ECHR cannot avoid its

[140] The so-called *talak*, which is one of the forms of divorce in the Islamic law.

[141] The Convention of 10 August 1981 on personal and family status and legal aid, concluded between France and Morocco. France concluded a similar treaty with Algeria.

[142] The development of French case-law in the field of *exequatur* of repudiations is described in detail also, eg, in the ECtHR judgment in *DD v France*, 8 November 2005, where the Court, however, did not decide on the merits, because the applicant withdrew her application.

[143] French Cour de cassation, 1st civil chamber, 17 February 2004, (2004) *Revue critique de droit international prive* 423, note P Hammje; (2004) *Journal de droit international (Clunet)* 1200, note L Gannagé; (2004) Dalloz 824, note Cavarroc, and 815, note P Courbe; *Jurisclasseur périodique (La Semaine juridique)* 2004.II.10128, note H Fulchiron; Répertoire du notariat Defrénois 2004.812, note Massip; B Ancel and Y Lequette, *Grands arrêts de la jurisprudence française en droit international privé* (Dalloz, 4th edn, 2001), nos 63–64.

[144] Ancel and Lequette *ibid*, 605–07, nos 63–64, paras 13, 14.

[145] Nevertheless, it must be emphasised that the Cour de cassation takes this firm position in cases where the legal relationship was, at the time of its coming into existence, already connected with France. It is not yet clear how the judges would decide if the legal situation at hand was, at the time of its coming into existence, purely internal. Niboyet and de Geouffre de La Pradelle, *supra* n 9, 283–84.

Convention obligations by relying on other international agreements, which allegedly determine lower human rights standards in relations between the parties to these agreements. The same rule should also apply to EU law, including the legal instruments in the field of private international law, which, in order to achieve the objective of a common judicial area in the EU, should not decrease the level of protection of human rights established by the ECHR.[146]

Another interesting case, *Apostolides v Orams*,[147] concerning the content of public policy stemming from public international law came before the CJEU in April 2009. This time the question was raised (among others) as to the possibility to include public international law in the protection by the public policy exception of the Brussels convention. The court in the UK where Mr Apostolides wanted to register the Cypriot judgment referred several questions for preliminary rulings. The first problem was whether the *exequatur* can be refused in the circumstances where a court issues a judgment which should be enforced on the territory over which the state of origin of the judgment does not have effective control, eg the judgment could not be enforced even within the issuing state. The CJEU rejected the possibility to invoke practical impossibility of enforcement of the judgment in the framework of the public policy exception. The defendants further argued that the political issues of the Cypriot peace process should be considered as part the public policy of the state of recognition. The fact of the southern Cypriot court issuing a judgment ordering an action on the territory controlled by the Turkish Cypriots was certainly not politically correct; to allow the circulation of such judgments within the EU could jeopardise the peace process. The Commission agreed that certain obligations of the states under the public international law should be considered as part of the public policy. Unfortunately however, the CJEU did not rule on that specific issue.

Public international law must be recognised as one of the sources of public policy of the states to which such law applies. The court must, however, assess in each particular case if the obligations of the state under public international law present a fundamental value for the state of origin being a part of the international society. In case of a collision between the obligations arising from the law of the international organisations and the ECHR, the above mentioned *Bosphorus* double test applies as to the responsibility of the states for fulfilling their obligations under the law of such international organisations.[148]

[146] For more on the relationship between the public policy stemming from the Convention and that stemming from EU law, see Section D.

[147] CJEU, Case C-420/07 [2009] ECR I-3571. See Beaumont and Johnston, *supra* n 33, 256–59.

[148] For more on this subject, see T Lock, "Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights" (2010) 10 *Human Rights Law Review* 529.

F. Protection of European Public Policy in Light of the Lisbon Treaty and the Process of Reviewing the Brussels I Regulation

In the field of enforcement of judgments, the most important aim of the review of Brussels I is the abolition of the *exequatur*. It could seem somewhat surprising that the EU, on one hand, is becoming increasingly devoted to the protection of human rights (the elevation of the Charter to the same level as the treaties and the imminent accession of the EU to the ECHR), and, on the other hand, is progressively working on abolishing one of the instruments for prevention of the violations of such rights.

Many authors have expressed concern regarding the abolishing of the *exequatur*. The arguments for such abolition presented in the Green Paper regarding the revision of Brussels I could be questioned. If the prevailing number of judgments passes the control in the state of recognition without any problems, this does not necessarily mean that the control should be abolished. It could also mean that the states follow the instructions of the CJEU and use the option of refusing the effects to judgments arriving from other Member states in extremely rare cases, thus "intercepting" only the most unacceptable ones. Procedures for granting *exequatur* can be, as shown in many Member States, very short. If this is not the case in some of the Member States, this cannot be a sufficient reason to abolish these procedures, but more of an alert for these states that they must deal with the reason for such delays. Regarding the costs of this procedure, an establishment of a unified European (relatively low) tariff could be envisaged. Finally, it is interesting to note that many geographical areas with a formally much stronger connection between states, such as, for example, the US, still do allow for a public policy exception as a means of preventing enforcement of a judgment arriving from another "member state".[149]

The process of reviewing the Brussels I Regulation is, however, progressing rapidly. At the time of writing, the Commission has drafted a proposal of the modified regulation,[150] after carrying out a wide consultation process on the basis of the Green Paper.[151] With the entry into force of the reviewed

[149] For the US and Canada, see e g PF Schlosser, "The Abolition of Exequatur Proceedings – Including Public Policy Review?" [2010] 2 *IPRax* 102, 103. It seems that the only example of a federal state where the judgments circulate between federal units without a possible obstacle of the public policy defence is Australia. It seems that there is no such example among international organisations.

[150] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition of judgments in civil and commercial matters, COM(2010) 748 final, Brussels, 14 December 2010.

[151] Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, Brussels, 21 April 2009.

regulation, the vast majority of judgments in civil and commercial matters are supposed to obtain *exequatur* automatically.

Nevertheless, an important turn has been made from the original idea of making judgments from other Member States enforceable under the same conditions as the domestic ones. The Commission has heard the voices expressing special concern regarding the fact that together with *exequatur*, the public policy exception will also be abolished. If the Commission's proposal is adopted, the defendant will have the possibility of invoking violations of the procedural public policy, by way of legal remedies in the state of origin, as well as the state of enforcement.[152] This is in line with the predominant importance of the right to be heard in the EU human rights context.[153] The substantive public policy will, however, no longer be protected in the *exequatur* procedures, with the (transitory) exception of defamation cases and collective redress cases.[154] The proposal thus does not follow the same pattern as the regulations regarding the European Enforcement Order, the European Order for Payment, the European Small Claims Procedure and the maintenance obligations, which do not provide for a legal remedy in the state of enforcement which would allow the sanctioning of the procedural public policy violations.[155]

One could argue that the possibility of invoking the violations of procedural public policy in the state of enforcement diminishes the beneficial consequences of the abolition of *exequatur*. The new remedy is similar to the appeal under Brussels I,[156] although the grounds for refusal that can be invoked are reduced. Nevertheless, given that flagrant procedural violations can and do occur also outside the initial stage of the proceedings[157] and that the states do not always

[152] Arts 45 and 46 of the proposal.

[153] For more on that, see Storskrubb, *supra* n 30, 87–91.

[154] Art 37(3) of the proposal.

[155] The "Maintenance Regulation" provides for two different regimes applicable respectively for the decisions given in a Member State bound by the 2007 Hague Protocol and the decisions given in other Member States. *Exequatur* is abolished for the first group of decisions. A special review in the state of origin is possible on the basis of Art 19; however, no such legal remedy is available in the state of enforcement.

[156] Art 43.

[157] See eg German BGH, 26 August 2009, XII ZB 169/07, where the enforcement of a Polish judgment on maintenance obligations was refused because the alleged father was condemned to pay maintenance for a child only on the basis of the allegations of a hearsay witness; his allegations were, however, completely ignored by the court. Even though the initial document in the proceedings was duly served, there was obviously a breach of the right to be heard (specifically of the equality of arms) during the proceedings. Schilling argues that the maintenance obligation can be detached from the decision on paternity and thus recognized and enforced in Germany as a simple pecuniary judgment. Schilling, *supra* n 74, 38. In this sense also German BGH, 14 February 2007, XII ZR 163/ 05, and French Cour de cassation, Civ 1re, 12 July 1994, no 92-17.461-E. The French Cour de cassation also judged that the French public policy was infringed where a default judgment contained no reasons and no additional documents were presented enabling the French court to know the reasons of the foreign judgment. Civ 1re, 28 November 2006, no 04-19031, and Civ 1re, 22 October 2008, no 06-15577.

have the same view about the content of the procedural guarantees,[158] the decision of the Commission can be welcomed.

Regarding this outcome, one could ask themselves whether it would not be wise to allow the defendant also to invoke substantive public policy issues via the legal remedy available in the state of enforcement. The cases where substantive public policy is at question are very rare,[159] and this additional option would not represent a notable obstacle to the free circulation of judgments.[160]

F. Conclusion

We can conclude by noting that European legal sources affect both the content of the public policy of the European states as well as the role of public policy in the private international law of these states. "The public policy exception, which traditionally protects the values and principles of the national legal system, is filled increasingly with . . . Community and Convention law."[161] This is important since public policy traditionally played the role of a guardian of the values of different states, and now, enriched with common, "European values", it also assumes the role of promoter of the latter.[162] With the judgments in *Krombach* and *Pellegrini*, the highest European courts held that the fundamental rights determined by the ECHR can and must be protected even in the phases of the recognition and enforcement of foreign judgments in the European context, and that "too complacent behaviour in this area may be inconsistent with the content of European public policy".[163] "This is particularly so with respect to the fundamental right to procedural fairness, which is taking on unprecedented importance in the various national legal systems."[164]

European public policy today is therefore one of the connecting elements between the European states. The public policies of individual states are enriched, but also restricted by it. Even though the relationship between the national and common European fundamental values can sometimes be very delicate, we can conclude that, as a rule, courts must refuse recognition and enforcement if a foreign judicial decision is inconsistent with common values,

[158] See eg CJEU, *Zarraga*, *supra* n 75.

[159] Eg Francq cites an Italian decision establishing a breach of public policy where one party was obliged to fulfil a distributorship agreement which had not been authorised under Italian law. Francq *supra* n 127, no 34.

[160] For the need to maintain the protection of substantive public policy, see Beaumont and Johnston, *supra* n 33, 259–64, 276–79. For the contrary view see B Hess and T Pfeiffer, *Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law* (Brussels, European Parliament, 2011).

[161] Basedow, "Recherches", *supra* n 20, 55.

[162] See also Muir Watt, "Evidence", *supra* n 7, 539.

[163] Basedow, "Recherches", *supra* n 20, 65.

[164] Muir Watt, "Evidence", *supra* n 7, 539.

and moreover they can no longer refuse to recognise and enforce a judgment if the refusal were not justified and proportionate from the European point of view.[165]

Maintaining the public policy exception is therefore not in opposition to the idea of European integration.[166] The very fact that the verification of the use of the public policy exception is carried out within the framework of the EU and the Council of Europe by a body founded on another, non-national legal order, leads to overcoming particularism.[167] "What was once a factor of division and particularism is to become . . . a common denominator, designed to protect the values of the new European judicial space."[168] "The most nationalistic of all legal concepts has become, in certain respects, the keystone to the European edifice."[169]

It is true that public policy, particularly when expressed as a general formula, also entails a certain unpredictability of legal relations.[170] It is also true that its preservation bears witness to a certain level of distrust regarding respect for fundamental rights and values by other states. However, the renunciation of this legal mechanism alone would not achieve *rapprochement* and mutual trust between states, which is one of the objectives, in particular of the EU. Such trust should grow of its own accord, on the basis of actual respect for the common values of all the Member States. The abolition of the public policy exception should not be a means to achieve that goal, but should follow when this objective has been reached.[171] The fear that its preservation would permit states to protect their special, partial, and to other states incomprehensible interests is unnecessary, since the use of the exception is controlled by the CJEU through the interpretation of regulations concerning the recognition and enforcement of judgments from other Member states, as well as by the ECtHR by assessment of compliance with the Convention rights, while EU and Convention law may also be violated (under common European standards) by an unjustified refusal of recognition or enforcement.

[165] This view allows for the protection of national components of public policy which are not shared by all European states; this protection must, however, not exceed the limits put forward by the European courts.

[166] See also Muir Watt, "Evidence", *supra* n 7, 543.

[167] S Poillot Peruzzetto, "Ordre public et loi de police dans l'ordre communautaire", Comité français de droit international privé, 28 March 2002, www.peruzzetto.eu/art/ordrepublic-loipolice-comitedip-plan.pdf (accessed 6 June 2011), 7.

[168] Muir Watt, "Evidence", *supra* n 7, 544.

[169] *Ibid*, 543.

[170] In spite of this fact, the authors emphasise its role in diminishing or regulating inconsistencies and competition between the national legal orders. C Picheral, *L'ordre public européen, Droit communautaire et droit européen des droits de l'homme* (Aix-en-Provence, Centre d'études et de recherches internationales et communautaires (CERIC), Université Aix-Marseille, 2001), 21.

[171] Pabst speaks about a *petitio principii* (begging the question), where the goal to be achieved is being supposed to exist already, so as to serve as a basis for the abolition of *exequatur*. Pabst, *supra* n 59, nos 15 and 16.