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THE EFFECTIVENESS OF MUTUAL TRUST IN CIVIL AND CRIMINAL LAW IN THE EU

ABSTRACT

According to the sociologist Niklas Luhman trust represents a ‘confidence in one’s own expectation to another person’s behavior. With such understanding of the etymology of the term “trust”, its position in the everyday life has paramount importance in the social interaction of humans. Therefore, the understanding of the term ‘mutual trust’ must be derived from its definition as a basic fact of social life and a component of human behavior. This term has reached new level of meaning in Europe with the creation of the European Union. The whole apparatus of cross-border cooperation in criminal and civil matters in the EU is centered around the principle of “mutual trust” and its influence regarding “mutual recognition”. In this article the authors will address these aspects from different point of views: cross-border cooperation in criminal matters and in civil matters in order to determine whether “mutual trust” really exist between the designated stakeholders in criminal and in civil matters, and try to identify the reasons for the drawbacks. Having in mind that these two fields are completely different, the authors will try to find common ground in the actual effective implementation of the principle of ‘mutual trust’ and understand the functioning of the principle in these two fields. Alternatively, their proposition is that the main stakeholders in the EU should use their resources in building a long term ‘actual trust’ instead of politically motivated ‘mutual trust’ that creates notable difficulties in the functioning of the ‘mutual recognition’ in the EU.

Keywords: Mutual trust, mutual recognition, European Union, recognition and enforcement, foreign judgments, EU private international law, EU criminal law.

1. INTRODUCTION

One of the main objectives of the European instruments of cross border cooperation in criminal and in civil matters is to achieve the ‘free movement of court decisions’, to create a ‘genuine judicial area’ within the ‘area of freedom security and justice’ and recognizing and enforcing all judgments given in Member States in the Euro-

pean Union without a formal recognition procedure.¹As a prerequisite for achieving such objectives the EU has established the principle of mutual recognition as a key concept and a vital rule for construction of an area which unites the diversity of 28 Member States.²In order to have proper functioning of the internal market (later in other areas) this principle³ has been established as an alternative for the full substantive harmonization which in general is unachievable.⁴Having in mind that full substantive harmonization cannot be achieved, in order to effectively materialize free movement of goods/services/people Member States have to recognize standards of another Member State which can be potentially lower or at least different than their own.⁵However this “cheap alternative”⁶ of full substantive harmonization as it is sometimes referred to⁷, does not mean that Member States should not have some degree of minimum approximation of their legal standards. Nevertheless the question is how much degree of equivalence or approximation of standards is essential precondition for mutual recognition.⁸In all of these cases in which mutual recognition is carried out, mutual trust is the main component for its functioning.⁹

The idea of introducing mutual recognition in the area of recognition of decisions between the Member States was also based on the principle of mutual ‘confidence’.¹⁰ Further in the Commissions’ White Paper from 1985, the mutual

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union’, COM (2014) 144 final of 11 March 2014.

² This article has been written during the United Kingdom’s prospective withdrawal from the European Union known as ‘Brexit’ and its final outcome.

³ Firstly, introduced with the *Cassis de Dijon* case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649). See also Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (‘Cassis de Dijon’) [1980] OJ C 256, p. 2–3

⁴ Möstl M., *Preconditions and Limits of Mutual Recognition*, Common Market Law Review, No.47, 2010, p.406.

⁵ Weller, M., *Mutual Trust: In Search of the Future of European Private International Law*, Journal of Private International Law, Issue 1, 2015, p.76.

⁶ Möstl M., *op.cit.* note 4, p. 407

⁷ Möstl M., *op.cit.* note 4, p.407; Kerber W., Vanden Bergh R., “Unmasking Mutual Recognition: Current Inconsistencies and Future Chances”, Marburg Papers on Economics, No. 11, 2007, available at URL=<https://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2007-11_kerber.pdf>;

⁸ Möstl M., *op.cit.* note 4, p.418.

⁹ Weller, M., *op.cit.* note 5, p. 65; Canor I., *My brother’s keeper? Horizontal solange: “An ever closer distrust among the peoples of Europe”*, 50 Common Market Law Review, Issue 2, 2013, p. 400; Wischmeyer, T., *Generating Trust Through Law? – Judicial Cooperation in the European Union and the ‘Principle of Mutual Trust’*, 17 German L. J., 2016, p. 341.

¹⁰ Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard OJ No. C 59/1, pp. 46-47.

‘confidence’ has been restated as the ‘principle of mutual trust’ which is precondition for mutual recognition in the single market.¹¹In this fashion, the principle has been adopted and explained, establishing the nexus between mutual recognition and mutual trust.¹²

The whole idea of the cross border cooperation in the EU is ‘to make sure that the bridges built between Member States’ legal systems are structurally sound’.¹³The basis for the functioning of the whole EU legal system in the EU is mutual trust.¹⁴In view of the CJEU in Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights it was stated that the principle of mutual trust is at the heart of the EU and a “fundamental premise” of the European legal structure.¹⁵ Often it is reiterated that ‘mutual trust is cornerstone of judicial co-operation in the EU’.¹⁶Moreover, this position is reassured even by the ECtHR where it is stated that the Brussels regime in the EU ‘is based on the principle of ‘mutual trust in the administration of justice’ in the European Union’.¹⁷

The principle of ‘mutual trust’ from the perspective of the recognition and enforcement of foreign decisions in the EU¹⁸ is manifested through the principle of ‘mutual recognition’. However, ‘mutual trust’ and ‘mutual recognition,’ understood as terms and principles, are not synonyms. Mutual recognition of judgments is a goal, an objective,¹⁹ while the principle of mutual recognition is a legal principle of EU law²⁰, a cornerstone of the internal market, and a fundamental principle in judicial cooperation in civil and criminal matters.²¹ On the other hand, mutual trust is an obligation of all the authorities of a Member State to trust the authori-

¹¹ Completing the Internal Market, White Paper from the Commission of the European Communities to the European Council, COM (85) 310 final, Brussels, 14.06.1985, para.93

¹² Wischmeyer, T., *op.cit.* note 9, p. 351

¹³ The EU Justice Agenda for 2020, p. 144

¹⁴ European Commission, Press Release ‘Building Trust in Justice Systems in Europe: ‘Assises de la Justice’ Forum to Shape the Future of EU Justice Policy’, 21 November 2013.

¹⁵ See Opinion 2/13, ECLI:EU:C:2014:2454, para.168 and 169.

¹⁶ European Commission, Press Release *Towards a true European area of Justice: Strengthening trust, mobility and growth*, 11 March 2014.

¹⁷ *Avotiņš v Latvia*, app.no. 17502/07, par. 49.

¹⁸ But also in other fields of EU law.

¹⁹ Arenas García R., *Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea*, Yearbook of Private International Law, 2010, p. 362.

²⁰ C-120/79 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1980] ECR 00731.

²¹ Kramer, X., *Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, 2011, p. 209.

ties of the other Member State and therefore to assume their decisions,²² and is the cornerstone in the construction of a true European judicial area.²³ In the area of criminal justice, mutual trust between Member States has been strengthened by progressively establishing, throughout the EU, a set of fair trial rights by means of common, EU-wide, minimum standards to protect persons suspected or accused of a crime.²⁴ Thus, mutual trust is a factual and political ground for the implementation of mutual recognition: and on the other hand when mutual trust exists, mutual recognition should be improved.²⁵

Such position shows how important ‘mutual trust’ is for the area of freedom security and justice in the EU. This article will initially provide a brief explanation of the understanding of trust as a psychological, philosophical and social phenomenon. Further this article will address two aspects of mutual trust from different point of views. The first part will elaborate the mutual trust of cross-border cooperation in criminal matters while the second part will refer to the cross border cooperation in the EU in civil matters (highlighting the recognition and enforcement of foreign decisions, especially the child abduction cases), in order to determine whether “mutual trust” really exists between the designated stakeholders in criminal and in civil matters, and try to identify the reasons for the drawbacks.

2. UNDERSTANDING OF TRUST IN SOCIAL SCIENCES

Trust is something that we became acquainted with from our earliest age. For example, the first demonstration of social trust in the baby is in the ease of his feeding or the depth of his sleep.²⁶ In context of such events, trust is understood as an essential truthfulness of others as well as a fundamental sense of one’s own trustworthiness.²⁷ In the transition from infancy to adulthood along, there are different points of trust and with that people in general are having different level of natural trust as their “trust baseline” or default level of trust.²⁸ Over this “trust baseline”

²² Arenas García R., *op.cit.* note 19, p. 375.

²³ European Council, ‘The Stockholm Programme - An open and secure Europe serving and protecting the citizens’, [2010] OJ C 115, p. 11.

²⁴ The EU Justice Agenda for 2020, p. 144

²⁵ Arenas García R., *op.cit.* note 19, p. 362.

²⁶ Erikson identifies eight stages through which healthy individual passes from infancy to adulthood. The first stage is where the basic interactions with his/her parents leads to trust or mistrust. Erikson E., *Childhood and Society*, Paladin Grafton Books, London, 1950, p.222.

²⁷ The general state of trust, furthermore, implies not only that one has learned to rely on the sameness and continuity of the outer providers, but also that one may trust oneself and the capacity of one’s own organs to cope with urges; and that one is able to consider oneself trustworthy enough so that the providers will not need to be on guard lest they be nipped. Erikson E., *op. cit.* note 26, p.222

²⁸ Cross F., *Law and Trust*, 93 Georgetown Law Journal 1457, 2005, p. 1462.

there are other factors which influence the development of trust or mistrust such as the surrounding circumstances and what is being entrusted.²⁹

From philosophical perspective, it is argued whether trust can be attributed to machines because they are lacking will.³⁰ More over such position trough wide interpretation can be even extended to the state institutions.³¹

The understanding of the term 'mutual trust' must be derived from its definition as a basic fact of social life that is the understanding of trust as a component of human behavior. Trust is described as 'confidence in one's expectations for other peoples' behavior'.³² Therefore, trust directly influences the perception of complexity of life with all its incidents and possibilities. Trust is a behavior meant to reduce complexity to the degree that decisions about present alternatives of actions can be taken with a view to the future.³³ On the other hand, trust is reduced where control is guaranteed.³⁴ In this context, law plays important role in society, because it provides certainty by control.³⁵ So from a sociological point of view, law and trust represent functional equivalents.³⁶ In context of cross-border cooperation within the EU, the search for better procedures represents a search for the balance between trust and control.

3. MUTUAL TRUST OF CROSS-BORDER COOPERATION IN CRIMINAL MATTERS IN THE EU

Ius Puniendi is traditionally considered as emanate power of one state. However, with the Treaty of Lisbon and the creation of the EU's Area of Freedom Security and Justice (AFSJ) it appeared that the EU Member States have individually reduced this original right which was until than jealously guarded and considered as un-transferable and un-detachable part of a state sovereignty. Furthermore, starting with the establishment of the mutual recognition of the decisions in the criminal matters, based upon the principle of mutual trust, the EU Member States have steadily moved towards the creation of the mutual EU Criminal Law. In this fashion, Andre Klip³⁷ has noted that the European criminal justice system is emerging

²⁹ *Ibid.*

³⁰ Jones K., *Trust as an Affective Attitude*, Ethics, Vol. 107, No. 1, October 1996, p.14.

³¹ *Ibid.*

³² Luhmann N., *Vertrauen*, 4th ed., Frankfurt, 2000, p.1, (translated by Weller, M., *op.cit.* note 5, p. 68).

³³ Weller, M., *op.cit.* note 5, p. 68.

³⁴ Luhmann N., *op.cit.* note 32, p. 19.

³⁵ Weller, M., *op.cit.* note 5, p. 68.

³⁶ Weller, M., *op.cit.* note 5, p. 69.

³⁷ Klip, A., *European Criminal Law. An Integrative Approach*, 2nd edition, Intersentia, Cambridge/ Antwerp, 2012, p. 425

through the gradual establishment of Union bodies and offices such as Europol, Eurojust, the European Judicial Network, and the European Public Prosecutor's office³⁸, by merging the two areas as provided by the Treaty of Lisbon. As he continues, this was a result of the Member States' obligation to enforce the Union law and the application of the supervisory mechanism that allows the Union to be characterized as a criminal justice system *sui generis* that applies the rule of law.

Bearing this in mind, it is of essential importance to examine whether the principle of mutual trust in the criminal matters between the Member States was the driving force for such expansion and creation of the EU Criminal Law.

Considering the beginnings of this idea, namely the implementation of the Convention implementing the Schengen Agreement (CISA) or better known as Schengen Agreement, it was obvious that the EU Member States needed instrument which would replace the existing cumbersome procedures for mutual cooperation in the area of criminal law.³⁹ With the establishment of the principles developed in the internal market of the EU, several problems have risen regarding the crimes, as part of the third pillar of the Justice and Home Affairs (JHA), which were performed in the Schengen area. These problems were primarily based on the fact that until then assistance between the EU Member States in the criminal justice area rested solely upon the bilateral or multilateral Treaties which were overburdened, overcomplicated and ineffective as such.⁴⁰ Solution to this was the creation of the EU instrument for recognition of the EU Member State's decisions in the area of the criminal justice and as such to accept it into the national criminal justice system.⁴¹ These were the reasons for establishing the idea of mutual recognition. However, this principle could not be accepted if it was not based upon the principle of mutual trust of the EU Member States' criminal justice system, trust that the other Member State's criminal justice system is equally democratic and bears equally effective mechanisms for protection of the human rights. In essence, this means that one EU Member State recognizes a decision performed within the criminal justice system of another EU Member States trusting that this decision was performed considering the same or similar procedural guarantees as estab-

³⁸ Caianiello, M., *The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes, or Nothing Changes*, European Journal of Crime, Criminal Law and Criminal justice, No.21, 2013, pp. 5-25.

³⁹ Spencer, J.R., in *European Union Law*, Bernard C. and Peers S., Eds., Oxford University Press, 2014, pp. 755-756.

⁴⁰ Chalmers, D., Davies, G. and Monty, G., *European Union Law*, 2-nd Edition, Cambridge University Press, 2010, pp. 583-586; or Woods, L., Watson, P., *Steiner and Woods EU Law*, 11-th Edition, Oxford University Press, 2012, pp. 576-578.

⁴¹ Kaczorowska, A., *European Union Law*, 3-rd Edition, Routledge, 2013, pp. 943-945.

lished within the criminal justice system of the recognizing state. Furthermore, this principle of mutual recognition based upon mutual trust means that the criminal justice systems of the EU Member States are based upon same principles and bear same ethical and legislative values which are of immense importance for just and effective criminal justice system.⁴² As Valsamis Mitsilegas defines mutual recognition - “a journey into the unknown”, where national authorities are in principle obliged to recognize standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality.⁴³

Besides the general determination for mutual recognition⁴⁴ and general idea of trust between the EU Member States, the situation of lack of legal mechanisms for effective implementation of these principles was still present. This situation has been circumvented by the enactment of several Framework Decisions which gave the incentive of practical implementation of the principle of mutual recognition and mutual trust in the area of criminal justice. Framework decision for establishment of the European Arrest Warrant was the first and most frequently used in the series of these mechanisms, enacted by the European Council.⁴⁵

These mechanisms were enacted as tools for efficient recognition⁴⁶ of the decisions between the Member States brought in the context of the criminal justice procedures. It is needless to mention that these instruments were initially meant to support the criminal procedures that were commenced for the cross-border crimes and/or to provide assistance to the Member States in the criminal procedures which had cross-border elements within the EU Member States.

⁴² See for example art. 4 of the Directive 2010/64/EU of The European Parliament and of The Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, URL=<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>

⁴³ Mitsilegas, V.,; *The Constitutional Implications of Mutual Recognition In Criminal Matters in the EU*, Common Market Law Review, No. 43, 2006, 1277-1311, p. 1281.

⁴⁴ Sullivan, G., *The European Arrest Warrant: Abuse of Process as a Bar to Extradition*, New Journal of European Criminal Law, Volume 0, 2009, Special edition. pp. 37-44; Lavenex, S., *Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy*, Journal of European Public Policy 14:5, August 2007, pp. 762-779.

⁴⁵ Under the Principle of mutual trust there are 8 Framework Decisions that provide mutual recognition: European Arrest Warrant (2002/584/JHA); European Evidence Warrant (2008/978/JHA); Framework Decision Mutual Recognition of Freezing Orders (2003/577/JHA); Framework Decision on Mutual Recognition of Supervision Orders as an alternative to detention (2009/829/JHA); Mutual Recognition of Fines (2005/214/JHA); Mutual Recognition of Confiscation Orders (2006/783/JHA); Mutual Recognition of Probation Orders and other Non-custodial Penalties (2008/947/JHA) and Mutual Recognition of Prison Sentences (2008/909/JHA). Spencer, J.R., *op.cit* note 39, pp. 766-767.

⁴⁶ See inter alia: Borgers, M. J., *Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters*, European Journal of Crime, Criminal Law and Criminal Justice, No. 18, 2010, pp. 99-114.

Considering the effects of these mechanisms, additional Framework decisions and Council Directives' were enacted in the area of Substantive Criminal Law,⁴⁷ as well, as part of the optimistic necessity for unification of the legislation regarding the most important crimes, which were tangling the EU interests as union.⁴⁸

Regarding the principle of mutual trust within this period it was obvious that it has remained as basic principle for the implementation of these Framework decisions between the Member States, but also served as an apparatus for examination of their efficient implementation. As Linda Groningen has observed that regarding the mutual trust in criminal matters between the EU Member States the problems of legitimacy, asymmetry and constitutional pluralism exist on system level, and considering the necessary development of the EU criminal law these problems will have to be solved in order to uphold the virtues of the criminal justice system.⁴⁹

Namely, with the process of expanding of the EU over 28 Member States⁵⁰ and in the ambiance of the enactment of the Treaty of Lisbon, it appeared that the implementation of the principle of trust within these mechanisms was more perceived as distrust and as mechanisms that highlighted the differences of the criminal

⁴⁷ Harmonization through Framework Decisions in the area of Substantive Criminal Law was performed by establishing criminalization and providing legal definitions regarding the following crimes: terrorism (2002/475/JHA); drug-dealing (2004/757/JHA); child sexual abuse and pornography (2011/92/EU); cybercrime (2013/40/EU); bribery(2003/568/JHA); money-laundering (2001/500/JHA); human trafficking (2011/36/EU); human smuggling (2002/946/JHA); racism and xenophobia (2008/913/JHA); frauds in relation to electronic payments (2001/413/JHA); counterfeiting the euro currency (2000/383/JHA) and frauds against EU budget (OJ [1995] C316). Together with the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014/42/EU). Spencer, J.R., *op. cit.* note 39, pp. 770-771. See also: Mostl M., *Preconditions and Limits of Mutual Recognition op. cit.* note 4, p. 407, or Herlin-Karnell, E., *Waiting for Lisbon... Constitutional Reflections on the Embryonic General Part of EU Criminal Law*, European Journal of Crime, Criminal Law and Criminal Justice No. 17, 2009, pp. 227-242; or: Elholm, T., *Does EU Criminal Cooperation Necessarily Mean Increased Repression?*, European Journal of Crime, Criminal Law and Criminal Justice 17, 2009, pp. 191-226.

⁴⁸ Such problem Andre Klip identifies with the EU frauds cases. See: *The Substantive Criminal Law Jurisdiction of the European Public Prosecutor's Office*, European Journal of Crime, Criminal Law and Criminal Justice 20, 2012, pp. 367-376; See inter alia: Klip, A., *European Criminal Policy*, European Journal of Crime, Criminal Law and Criminal Justice Vol. 20, No. 3-12, 2012, p.5. or: Hetzer, W., *Fight against Fraud and Protection of Fundamental Rights in the European Union*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14/1, 2006, pp. 20-45.

⁴⁹ Groning, L., *A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law*, European Journal of Crime, Criminal Law and Criminal Justice, No. 18, 2010, pp. 115-137.

⁵⁰ For example see the Croatian example with the implementation of the EAW regarding the principle of mutual recognition: Sokol, T., *Implementation of European Arrest Warrant in Croatia: A Risk for the Functioning of Judicial Cooperation in Criminal Matters in the EU?* European journal of crime, criminal law and criminal justice 23, 2015, pp. 258-280.

justice systems between the Member States⁵¹. This perspective was even more reinforced by the jurisprudence of the ECtHR⁵² regarding the proper protection of the human rights by the EU Member States.

However, despite the fact that in the recent years the principle of trust in the criminal matters was questioned more than ever, its influence and significance has not been reduced at all. Furthermore, considering the provisions regarding the articles 82-98, Chapters 4 and 5, of Title V, Part Three of the TFEU, proscribing that the EU Criminal Law provisions are enacted as part of the regular legislative procedure of the EU (art. 288 TFEU), can be only concluded that in regard to the AFSJ of the EU the legal activity is aimed in further strengthening of the strive for establishment of one mutual EU Criminal Law⁵³. This process of creation of the EU Criminal Law is done through harmonization process by the enactment of European Parliament's and Council's Directives in the area of Procedural Criminal Law, such as: Directive on the Right to Interpretation and Translation in Criminal Proceedings (2010/64 EU); Directive on the Right to Information in Criminal Proceedings (2012/13 EU); Directive on the Right to a Lawyer in Criminal Proceedings (2013/48 EU) and Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (2016/800 EU).

This general trend was further supported with the European Council's Stockholm Programme⁵⁴ where its priorities were defined as endeavor for process of recognition and enforcement of all judgments given in Member States in the European Union without a formal recognition procedure.⁵⁵ While specifically in the area of criminal justice, mutual trust between Member States has been strengthened by progressively establishing, throughout the EU, a set of fair trial rights by means of

⁵¹ See: Willems, A., *Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character*, European Journal of Legal Studies, Vol. 9, No. 1, 2016 pp. 212-249; or Helenius, D., *Mutual Recognition in Criminal Matters and the Principle of Proportionality, Effective Proportionality or Proportionate Effectiveness?* New Journal of European Criminal Law, Vol. 5, Issue 3, 2014; or: Öberg, J., *Subsidiarity and EU Procedural Criminal Law*, European Criminal Law Review, Vol. 5, 2015, pp. 19-45.

⁵² See: Banach-Gutierrez J.B., Christopher Harding, *Fundamental Rights in European Criminal Justice: An Axiological Perspective*, European journal of Crime, Criminal Law and Criminal justice, No. 20, 2012, pp. 239-264.

⁵³ See more: Spronken, T., *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: An Analysis of the First Steps and a Plea for a Holistic Approach*, European Criminal Law Review, 2011, p. 212-233

⁵⁴ European Council, *The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01).

⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union', COM (2014) 144 final of 11 March 2014.

common, EU-wide, minimum standards to protect persons suspected or accused of a crime.⁵⁶

4. MUTUAL TRUST OF CROSS-BORDER COOPERATION IN CIVIL MATTERS IN THE EU (WITH SPECIFIC REFERENCE TO CHILD ABDUCTION CASES)

Recognition and enforcement represents one aspect of private international law whose goal is to avoid re-litigation and provide for harmonized decisions in which the parties' rights are protected.⁵⁷ The principle of territoriality and the rise of the sovereignty among the countries provided for the limitations of the authority of judgments to within State boundaries. Due to these facts, no foreign judicial decision could be executed *proprio vigore* in another country.⁵⁸ That places the countries involved between two separate necessities: on one side, they have to protect their sovereignty and the integrity of their legal system,⁵⁹ and on the other they have to satisfy the party's needs by sparing them of starting a new action in front of a court of a foreign country on an issue and between the same parties which was already decided by a court of another country.⁶⁰ In essence this relates to the balance between 'trust' in the procedural and substantive law standards of foreign legal systems and the extent of the 'control' of the state of enforcement that it imposes on the foreign decision and through that on the foreign legal order.

⁵⁶ *Ibid.*

⁵⁷ Whytock, Christopher A., *Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments* (January 14, 2015). *Erasmus Law Review*, No. 3, November 2014, p. 121.

⁵⁸ Lenhoff A., *Reciprocity and the Law of Foreign Judgments: A Historical - Critical Analysis*, *Louisiana Law Review*, Vol. 16 No. 3, 1956, pp. 465-466; Castel J.G., *Recognition and Enforcement of foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada*, E.G., *McGill Law Journal*, Vol 17 No.1, 1971, p.14; Michaels R., *Recognition and Enforcement of Foreign Judgments*, Rüdiger Wolfrum ed., *Max Plank Encyclopedia of Public International Law*, Heidelberg and Oxford University Press, 2009, par. 1.

⁵⁹ Whytock defines these actions as 'governance values' and provides that governance values focus on policies facilitating, guiding or restraining collective activity. These values have implications that extend beyond the parties to particular disputes. Governance values include efficiency, which is concerned with avoiding the expenditure of societal resources to re-litigate issues that have already been litigated, and with reducing transaction costs in transnational business. Further it elaborates that "Governance values also include certainty and predictability, which help 'to establish the security of contracts, promote commercial dealings, and generally further the rule of law among states that are interdependent as well as independent", Whytock, *op.cit.* note 57, p. 120.

⁶⁰ Rights values focus on justice for particular litigants in particular cases. These values emphasise what Arthur von Mehren calls the 'principle of correctness,' which 'expresses the concern that legal justice, as understood by the society in both substantive and procedural terms, be done. Rights values also entail the 'concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent. Whytock, *op.cit.* note 57, p. 120.

With the Amsterdam treaty norms of private international law are established in the first pillar.⁶¹ As a result of that, the EU has direct competences over recognition and enforcement of foreign judicial decisions coming from the EU Member States in particular legal fields.⁶² This directly influences the ‘trust’ between the countries where in the EU this principle is raised to a new level of ‘mutual trust’ and in the field of recognition and enforcement is manifested through the principle of ‘mutual recognition.’ This aspect in turn influences the ‘control’ of foreign judicial decisions in the EU where fewer and fewer standards are required and the tendency is to fully abolish *exequatur*.

The idea of the abolition of the *exequatur* has been in development for almost 20 years. Its origin can be traced back to the summit of the European Council held in Tampere on 15-16 October 1999 (Tampere summit),⁶³ which is known as a starting point of the development of the European Union as an area of freedom, security and justice.⁶⁴ Among the 62 conclusions,⁶⁵ regarding cross-border recognition and enforcement the European Council held that:

[E]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.⁶⁶

In civil matters, the Commission was called upon to make a proposal for further reduction of the intermediate measures which were still required to enable the recognition and enforcement of a decision or judgement in the requested State.⁶⁷ The idea was that such decisions would be automatically recognized throughout the

⁶¹ Treaty of Amsterdam, OJ 1997, C 310. With this Treaty the responsibility for creating legislation with regard to international judicial co-operation in civil matters was shifted from the third pillar to the first pillar, i.e. the Community legislator, Wischmeyer, T., *op. cit.* note 9, p. 354.

⁶² Stone P., *EU Private International Law: Harmonization of Laws*, (first ed.), 2006, p. 4.

⁶³ Even before the summit in Tampere, there were considerations about the abolishment of the *exequatur*, nevertheless because of differences of procedural law regarding enforcement it became official EU policy at the Tampere summit, Kramer, X., *Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights*, Netherlands International Law Review (NILR), Vol. 60 Issue 3, 2013, p. 348.

⁶⁴ The Tampere Summit was the first summit in which the head of states and governments of 15 EU Member States come together to discuss the justice and home affairs policies of the European Union. European Commission, Fact Sheet #3.1 Tampere Kick-start to the EU's policy for justice and home affairs, available at URL=http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf. Accessed 12 March 2016.

⁶⁵ For the full Presidency Conclusions of the Tampere European Council, see URL=http://www.europarl.europa.eu/summits/tam_en.htm. Accessed 12 March 2016.

⁶⁶ Point 33 of the Presidency Conclusions of the summit in Tampere.

⁶⁷ Visitation rights was pointed out as one of the fields, point 34 of the Presidency Conclusions of the summit in Tampere.

Union without any intermediate proceedings or grounds for refusal of enforcement, and could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.⁶⁸

From that moment on it started to be considered that mutual recognition is a ‘cornerstone of judicial cooperation.’⁶⁹ The first instrument that abolished *exequatur* for particular decisions was the Brussels II bis Regulation.⁷⁰ This policy initiated legislative activities that at the beginning were expected to lead to abolition of *exequatur*⁷¹ in the new Brussels I Regulation.⁷² The Commission conducted consultations on the basis of the Green Paper of 2009⁷³ and proposed only partial abolition, maintaining safeguards in the form of extraordinary remedies that permitted a limited review of the jurisdiction to be enforced but with no public policy exception.⁷⁴ However, the final result is that the Council adopted a recast Brussels I Regulation that abolished *exequatur* generally but permits an application by any interested party for refusal of recognition (including public policy)⁷⁵ and application by the person against whom the enforcement is sought for refusal of enforcement.⁷⁶ In this way the possibility of opposing recognition and enforcement was maintained in the Brussels Ibis Regulation, but limited significantly by the fact that the exceptions must be expressly invoked by application.⁷⁷

The return mechanism for the child abduction cases in the Brussels IIbis Regulation represents a manifestation of the concept of ‘mutual recognition’. This policy should reflect the integration and the trust that exists in the European Judicial

⁶⁸ Point 33 of the Presidency Conclusions of the summit in Tampere.

⁶⁹ Kramer, X., *op. cit.* note 63, p. 348.

⁷⁰ The abolishment of *exequatur* in family matters was outlined in Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [2001] OJ C12/1.

⁷¹ Report from the Commission to the European Parliament, the Council and The European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 174 final p.4. For more on evolution of the systems for the recognition and enforcement in the EU see text to n 450 Part II ch V sec 5.1.

⁷² More on the Brussels Ibis Regulation see text to note 477 Part II ch V sec 5.1.

⁷³ 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.

⁷⁴ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final.

⁷⁵ Article 45 Brussels Ibis Regulation.

⁷⁶ Article 46 Brussels Ibis Regulation.

⁷⁷ Scott M. J., *A question of trust? Recognition and enforcement of judgments*, Nederlands Internationaal Privaatrecht (NIPR), 2015, p. 29.

Area.⁷⁸ At the core, there are two main rationales for this policy stance: the economical and the political.⁷⁹ Regarding the former rationale, this abolition of the exequatur increases the economic welfare of the European economic actors and citizens⁸⁰. Regarding the latter rationale, ‘mutual recognition’ exists to ensure that judgments circulate freely within the European Union.⁸¹ In civil and commercial matters, to achieve these goals brings certainty and efficiency.⁸² However, the implementation of this policy in the aspect of parental responsibility issues, namely child abduction cases, creates a certain discomfort.

The basis for the functioning of this return mechanism is that the Courts and the Central Authorities cooperate among themselves. Each case holds its peculiarities and at the same time basic principles have to be taken into account by the relevant institutions. This means that the Court must apply the rules of the Brussels II bis Regulation and protect the principles of the 1980 Child Abduction Convention. This aspect is in conflict with the short time in which these procedures should be completed. These ‘procedures’ refer not only to the measures that the Court should take regarding the case in the Member State of refuge, but also to the transfer of the information and documents to the Court of habitual residence of the child. Problems may arise because of the language barriers which are result of the multi-lingual character of the EU and as a consequence represent a problem for direct communication between the relevant authorities. This can be a real danger to the proper transfer of the guiding principles according to which the Court of refuge rendered the non-return order. They could easily be neglected and improperly applied, according to the application guidelines provided in article 42(2) (c) of the Brussels II bis Regulation.⁸³ Article 11(8) of the Brussels II bis Regulation gives discretionary power to the Court of habitual residence of the child to determine whether or not to issue a certificate of enforceability to the extent that it follows the guiding principles. In such an event, procedural steps which have been taken after a non-return decision has been rendered are not decisive and may be regarded as irrelevant for the purposes of implementing the Regulation.⁸⁴ This

⁷⁸ McEleavy P., *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?* Journal of Private International Law, Issue 17, 2005 p.32.

⁷⁹ Cuniberti G. and Rueda I., *Abolition of Exequatur. Addressing the Commission's Concerns*, *Rabels Zeitschrift*, 2011, p. 286-316(31).

⁸⁰ Cuniberti G. and Rueda I., *op.cit.* note 79, p. 291.

⁸¹ *Ibid.*

⁸² McEleavy P., *op. cit.* note 78, p. 32.

⁸³ *Ibid.*

⁸⁴ Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par. 80.

position is provided so that the Regulation might achieve its full effect, which is the immediate return of the children.⁸⁵

If the Court of habitual residence renders a certified decision, that decision cannot be appealed,⁸⁶ but only rectified, according to the Member State of origin.⁸⁷ Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child, the court of origin may declare the judgment enforceable.⁸⁸ By excluding any appeal against the issuing of a certificate pursuant to Article 42(1), other than an action seeking rectification within the meaning of Article 43(1), the Regulation seeks to ensure that the effectiveness of its provisions is not undermined by abuse of the procedure.⁸⁹ Moreover, Article 68 does not list among the redress procedures any appeal against decisions taken pursuant to Section 4 of Chapter III of the Regulation.⁹⁰ Once a non-return decision has been made and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of the Regulation, if that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place. If no doubt has been expressed as regards the authenticity of that certificate and if it was rendered in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return

⁸⁵ If the position were otherwise, there would be a risk that the Regulation would be deprived of its useful effect, since the objective of the immediate return of the child would remain subject to the condition that the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained have been exhausted. That risk should be particularly balanced because, as far as concerns young children, biological time cannot be measured according to general criteria, given the intellectual and psychological structure of such children and the speed with which that structure develops. See Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par 81.

⁸⁶ Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par. 84.

⁸⁷ Article 43 Brussels IIbis Regulation. In the *Rinau* case it was stated that this article reflects 'procedural autonomy' meaning that the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention. This procedural autonomy of the provisions in Articles 11(8), 40 and 42 of the Regulation and the priority given to the jurisdiction of the court of origin, in the context of Section 4 of Chapter III of the Regulation, are reflected in Articles 43 and 44 of the Regulation, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate and that that certificate is to take effect only within the limits of the enforceability of the judgment. Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par. 63 and 64.

⁸⁸ Article 42(1) Brussels IIbis Regulation.

⁸⁹ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 55.

⁹⁰ Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 para 85; Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 50

is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. In doing so, the Court of the refuge is put in a position to 'trust' the foreign order even if this trust not been reciprocated by the authorities of the Member State of habitual residence of the child.⁹¹

As much as the rationale of this abolition of exequatur can be accepted, that the child must be returned to the place from which it was abducted, still, the 'imposed mutual trust' creates a certain discomfort. The principle of mutual recognition corresponds with the principle of mutual trust. It is said that where mutual trust exists, mutual recognition should be improved.⁹² Nevertheless, in child abduction cases the question arises, which should be first? Does this statement mean that the Member States should firstly develop increased trust among their legal systems and then they should abolish every possibility of opposing enforcement of a certified decision, or they should rely on the imposed trust gained through the political sense of the EU institutions transposed in the Brussels IIbis Regulation and it is through its implementation that they should build actual trust? The answer seems to fall somewhere in the middle. The EU should firstly develop necessary facilities, something that is manifested in the enhanced cooperation between the relevant authorities (for example, EJN), the Justice scoreboard⁹³, and the Guidelines for proper implementation of the Brussels IIbis Regulation measures which should represent a 'physical' manifestation of the proper implementation of the Regulation by the authorities. These activities taken together can establish actual trust. Then for the final stage, full abolition of the exequatur should be introduced and the authorities should help the children involved in the cases. It is left for the future amendments to the Brussels II bis Regulation to gradually accept the differences between the legal systems of the EU and their distrust of one another and to build trust as it should be built. This is achieved by showing that the 'other' legal system applies the same rules properly, as they are applied in the domestic court, and caring for what is most significant: the child's best interest. In such way the trust would cease to be imposed and become a reality, something that the EU needs desperately. It will be a trust in the fact that the whole EU system functions

⁹¹ The CJEU strongly insists that review is only permissible in the Country of origin and with that provides for almost irrefutable presumption of compatibility of member States' laws and judgments with European fundamental rights and with the CFR, Canor I., *My brother's keeper?* *op.cit.* note 9, p.410; McEleavy P., *op.cit.* note 78, p. 33.

⁹² Arenas García R., *op.cit.* note 19, p. 362.

⁹³ EU Justice scoreboard,
URL=http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm. Accessed 12 March 2015.

as a whole and not as a ‘battlefield’ where Member States strive to prove whose system is better.

ECtHR has addressed the issue of the relationship between Article 8(1)⁹⁴ of the European Convention on Human Rights (ECHR) and the enforcement of family law orders in general and the execution of return orders in particular.⁹⁵ Article 8(1) of the ECHR and its violations were initially focused on public law situations, but were later extended to private law situations and have been relied upon, with success, in child abduction cases and access rights.⁹⁶ This is especially important regarding how the exceptions provided in Article 13 of the 1980 Hague Child Abduction Convention are to be applied in a manner that is consistent with Article 8 of the ECHR and how the Courts of the EU Member States handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of the Brussels IIbis Regulation.⁹⁷ In a series of cases the ECtHR has held, in general, that returning a child under the procedures set out in the Brussels IIbis Regulation and in the 1980 Hague Child Abduction Convention who has been wrongfully removed or retained is not in breach of obligations under the ECHR, in particular of Article 8 thereof.⁹⁸ With such an approach of supporting the functioning of the child abduction regime established by the Brussels IIbis Regulation and the 1980 Hague Child Abduction Convention, the ECtHR has shown that it supports the restitution of the *status quo*, which was unilaterally disturbed by the wrongful removal or retention. The ECtHR has in only a small number of cases, and mostly in exceptional circumstances, held that the return of a child after a wrongful removal or retention may constitute a breach of Article 8 of the ECHR.⁹⁹

⁹⁴ Article 8(1) of the ECHR provides that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

⁹⁵ See, cases *Maumousseau and Washington v. France* (Application No 39388/05); *Lipkowsky and McCormack v. Germany* (Application No 26755/10); *Sofia Povse and Doris Povse v. Austria* (Application No 3890/11); *Raban v. Romania* (Application No 25437/08); *Šneerson and Kampanella v. Italy* (Application No 14737/09); *B. c. Belgique* (Requête No 4320/11); *Neulinger and Shuruk v. Switzerland* (Application No 41615/07); *X. v. Latvia* (Application No 27853/09); *Ignaccolo-Zenide v. Romania*, Application No 31679/96, (2001); *Maire v. Portugal*, (Requête no 48206/99); *P.P. v. Poland*, (Application no. 8677/03); *H.N. v. Poland*, (Application No. 77710/01); *Raw and Others v. France*, (Application No 10131/11).

⁹⁶ Magnus U., Mankowski P.(eds) *European Commentaries on Private International Law: Brussels IIbis Regulation*, Sellier, European Law Publishers, 2012, p. 390.

⁹⁷ Beaumont P. and others, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, *International and Comparative Law Quarterly*, Vol.64, 2015, p. 40.

⁹⁸ See, *Maumousseau and Washington v. France* (Application No 39388/05); *Lipkowsky and McCormack v. Germany* (Application No 26755/10); *Sofia Povse and Doris Povse v. Austria* (Application No 3890/11); *Raban v. Romania* (Application No 25437/08).

⁹⁹ See, *Šneerson and Kampanella v. Italy* (Application No 14737/09); *B. c. Belgique* (Requête No

The aim of ECHR and Charter of Fundamental Rights of the EU (CFR) generally is the same; both protect and guarantee fundamental rights and both contain provisions which are intended to protect the rights of the child. Nevertheless, they may not share the same methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which make up the process.¹⁰⁰ It was nonetheless expected that these two legal orders would be addressed over the child abduction, because these cases have a high intensity of emotional charge and the participants in these proceedings would use almost every legal remedy at their disposal because they represent a 'pathological aspect' of the custody disputes.

The *Bosphorus* case provides a solution and gives a certain order in the interaction between ECtHR and CJEU legal orders in that it accepts the change in the dominance of the ECtHR over human right issues.¹⁰¹ This case in a certain way was inspired by the *Solange II* case-law of the German Constitutional Court¹⁰² and gives input to the reasoning of the ECtHR by developing a translation, a kind of 'Europeanisation of the Solange.'¹⁰³ Bringing along the inspiration of the *Solange II*, the ECtHR in the case *M. & Co. v. Germany* [1990] ruled that applications against individual EU Member States concerning material acts of Community law were inadmissible only under one condition: *Provided that within that organization fundamental rights will receive an equivalent protection.*¹⁰⁴ This principle, which evolved during the *Bosphorus* judgment, was referred to as the 'principle of compliance' and provides that the ECtHR has no competence to review Community acts as such. Nonetheless, the Court recognizes a competence to review these acts indirectly through examining specific implementation measures at the national level.¹⁰⁵ In the *Michaud v. France* Case, the ECtHR when applying this

4320/11); *Neulinger and Shuruk v. Switzerland* (Application No 41615/07) and *X. v. Latvia* (Application No 27853/09).

¹⁰⁰ Muir Watt H., *Muir Watt on Abolition of Exequatur and Human Rights*, Online Symposium: Abolition of Exequatur and Human Rights, URL= <http://conflictoflaws.net/2013/muir-watt-on-povse/>. Accessed 10 April 2016.

¹⁰¹ Preshova D., 'Legal Pluralism: New Paradigm in the Relationship Between Legal Orders' in Marko Novakovic (ed.) *Basic Principles of Public International Law: Monism & Dualism*, Belgrade: Faculty of Law University of Belgrade, Institute of Comparative Law and Institute of International Politics and Economics, 2013, p.19.

¹⁰² *Solange II*, [1986], BVerfGE 73, p. 339

¹⁰³ Groussot X. 'Constitutional Dialogues, Pluralism and Conflicting Identities' in M. Avbelj/J. Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond*, 2012, p. 319, (as cited by Preshova D., *op.cit.* note 101, p.18).

¹⁰⁴ *M. & Co. v. Germany*, [1990] ECHR (Ser. A), p. 138

¹⁰⁵ Kuhert K. 'Bosphorus – Double Standards in European Human Rights Protection?' *Utrecht Law Review* Volume 2, Issue 2, 2006. p. 188.

‘principle of compliance’ stated that ‘...*the Court may, in the interest of international cooperation, reduce the intensity of its supervisory role*’.¹⁰⁶ This doctrine now represents a ‘bridge’¹⁰⁷ between these two legal orders, moreover because the CJEU gave opinion that

[T]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.¹⁰⁸

However, this doctrine of ‘principle of compliance’ is not without criticism. The principle is criticized for representing a political gesture on behalf of the ECtHR and for the fact that it applies a much lower standard of protection of human rights to EU law than to non-EU law.¹⁰⁹

The cases of child abduction have shown how complex the situation is regarding the existence of several legal sources that can be applied in a certain case. The ‘Bosphorus presumption’ provides for some resolution between ECHR and EU law. Nevertheless, this aspect is just a starting position because in essence the national courts (local judges) have to decide this ‘mega-conflict’¹¹⁰ between two supra-national regimes which both purport to promote the interests of the child. For example, the local judge, when deciding for return of the child under Article 11(8) Brussels IIbis Regulation, must act promptly and thoroughly because this fast-track procedure and the abolition of the exequatur is counterbalanced by the particular duty to properly conduct ‘in-depth examinations’ as regards the reasons for such refusal (as was the case in *Šneerson and Kampanella v. Italy*, which was reiterated the *Neulinger* approach) and that the child is heard, unless is inappropriate (as was the case in *Zarraga*). If the Court of habitual residence of the child fails to do so, or does it unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in *Povse v. Austria* case).

¹⁰⁶ *Michaud v. France* (App. No. 12323/11), par. 104.

¹⁰⁷ Requejo M., *Requejo on Povse*, Online Symposium: Abolition of Exequatur and Human Rights, URL=<http://conflictflaws.net/2013/requejo-on-povse/>[page unavailable]. Accessed 12 December 2016.

¹⁰⁸ Opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law (2/13), Press Release No.180, 2014 (18.12.14).

¹⁰⁹ Kuhert K., *op.cit.* note 105, p. 188; Beaumont and others, *op.cit.* note 97, p. 56.

¹¹⁰ Muir Watt H., *op.cit.* note 100, p.1.

The Brussels IIbis Regulation in Article 11(6)-(8) is positioned in such a way that the court of origin (the court where the child had his habitual residence before the wrongful removal or retention) is the final arbiter regarding child abduction cases.¹¹¹ The procedure was designed as such because of the restoration of the *status quo ante*, which is the main goal in the child abduction cases.¹¹² Nevertheless, infringement on human rights in correlation with the Charter of the EU and the ECHR can occur in both places, in the country of origin (country of the habitual residence of the child prior to the abduction) and the country of enforcement (country of refuge). This aspect cannot be disregarded, because the procedure provided in Article 11(6)-(8) of the Brussels IIbis Regulation is intended to have limitations in the country of enforcement for the reasons of the child's best interest and the unilateral disturbance of the jurisdictional regime by the abducting parent who voluntarily choose that forum. From the point of view of the Brussels IIbis regime,¹¹³ such conduct is intolerable and the CJEU allowed no exceptions to the concertation of the jurisdiction in the country of origin, (the country of the child's habitual residence prior the abduction) including for human right protection (Article 24 of the Charter of the EU), reasoning that there are locally available remedies despite the fact that the abducting parent and the child are found elsewhere.¹¹⁴ At the same time, the ECtHR in the *Šneersone and Kampanella v. Italy* case evidently left a possibility to the abducting parent to raise human rights infringement in the country of enforcement. Between these two standpoints, there is the *Bosphorus* presumption in the *Povse v. Austria* case, which tries to reconcile these two regimes by diminishing the distress of the national courts to be put in a position to choose between two competing international obligations¹¹⁵ and by that to demonopolize human rights protection. Following this presumption, the ECtHR did not find justification to rebut it and rejected the application.

Such a position of the ECtHR regarding the application of Article 11(6) – (8) of Brussels IIbis Regulation ultimately leads to the two most essential questions regarding the abolition of the *exequatur* in the Brussels IIbis Regulation: Does the abolition of the *exequatur*, as a part of the child abduction procedure, deprive the child of adequate protection? And secondly, taking into consideration the procedure provided in the Brussels IIbis Regulation regarding child abduction

¹¹¹ Such situation is not exclusively attributed to child abduction cases, but also in criminal law in the Case *Advocaten voor de Wereld VZW* the CJEU reached similar result. Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, (2007) I-03633.

¹¹² Perez-Vera report, Actes et Documents de la Quatorzieme Session, Vol. 3, October 1980, p.106.

¹¹³ Case C-211/10 *Doris Povse v Mauro Alpago* [2010] ECR I-06673 par. 74; Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 69.

¹¹⁴ Canor I., *op.cit.* note 9, p.410.

¹¹⁵ Muir Watt H. *op.cit.* note 100, p. 3.

cases, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in particular case the court of origin ordering the return did not deal or dealt inadequately with the human's right challenge?

Regarding the first question, the CJEU and the ECtHR are in line in the reasoning that the court of origin is the forum in which all infringements of are to be addressed. The CJEU held this position in the *Zarraga* Case and in the *Povse* (preliminary ruling) case, that questions concerning the lawfulness of the judgment ordering return as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied,¹¹⁶ are solely questions for the national courts of the Member State of origin to examine, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003.¹¹⁷ The ECtHR reached a similar conclusion by applying the Bosphorus presumption in the *Povse* case and providing, firstly, that the Austrian Courts (court of enforcement) had no discretion but to order the return of the child; secondly, that the CJEU in its preliminary ruling considered that the child and the mother could search for adequate human rights protection, namely Article 8 of the ECHR, in front of the Italian Courts (court of origin).¹¹⁸ With these two factors in mind and applying the 'Bosphorus presumption,' the protection of these rights according to ECHR, which is provided by the ECtHR, is equivalent to the protection afforded by the Brussels IIbis Regulation. In the context of the *Povse* case, there is also a condition which is in line with the Bosphorus presumption, that the parties must avail themselves of all local remedies and challenge the order in the Court of origin (with the possibility of lodging an application with the ECtHR if such an attempt fails). All of these factors provide that in the cases with questions which are specific to the infringement of human rights and are conducted by the abolition of the exequatur in the Brussels IIbis Regulation, are to be addressed in the Country of origin. However, this does not preclude the challenge of the return order in the country of enforcement, which is shown by the mere fact that Bosphorus presumption is rebuttable, but only in extreme cases.

This aspect of the rebuttable presumption (*praesumptio iuris tantum*) under the Bosphorus presumption requires quite strict standards of proof of violation and the presumption can be rebutted if, in the circumstances of the particular case, it is considered that the protection of ECHR rights was manifestly deficient. In such cases, the interest of international cooperation is outweighed by the Convention's

¹¹⁶ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 51.

¹¹⁷ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 69.

¹¹⁸ *Povse v. Austria* (App. No 3890/11) par. 86.

role as a ‘constitutional instrument of European public order’ in the field of human rights.¹¹⁹ So the question stands, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in that particular case the court of origin ordering the return did not deal or dealt inadequately with the human rights challenge? If this aspect is seen only through the *Šneersonė and Kampanella v. Italy* case, then the answer would be yes.¹²⁰ But this case does not bring into the equation the Bosphorus presumption. What this presumption does, together with all that was said about the access to justice in the court of origin, is mandate that only severe disallowance to such access (which includes disallowance of application to the ECtHR) could lead to the possibility of effectively raising the access argument in front of the court of enforcement.¹²¹ From another point of view, if both safeguards are applied and used, that the parties use all of their remedies in front of the Court of origin (provided that they are accessible!) and if that court fulfils its obligations under Article 42 of the Brussels IIbis Regulation, then there wouldn’t be any need to call for help from the courts of the country of refuge under the ECHR.¹²²

With all of which was said, the ECtHR and the CJEU have put on the court of origin, very important role, to swiftly and thoroughly examine all of the circumstances when applying Article 11(6)-(8) of the Brussels IIbis Regulation and to allow access to justice to the parent which wrongfully removed or retained the child in the country of refuge. This role is evidently not an easy one, but it’s necessary, because here at stake is very fragile right. That is the child future, its relation with the environment and its self-awareness. For that there could not be any excuses that the role is hard.

5. CONCLUSION

Historically, countries had different approaches and different concepts regarding *exequatur*. From the first position of free circulation of judgments to the *révision au fond*, the balance has shifted to the extremes. Due to some practical aspects, it was much easier to lower the ‘control’ regarding the application of the substantive law by the foreign court. As a consequence, ‘trust’ was achieved much faster regarding this requirement. Minimum ‘control’ of the application of the foreign substantive law is still kept if these errors amount to violation of public policy. In fact, the ‘trust’ afforded to the foreign legal system is not so much based on the

¹¹⁹ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (App. No. 45036/98) par. 156.

¹²⁰ Canor I., *op.cit.* note 9, p.413.

¹²¹ Muir Watt H., *op.cit.* note 100, p. 4.

¹²² *Ibid.*

abstract legal comity between the countries, but on the 'trust' of the administration of justice by the foreign courts when addressing individuals' rights of access to justice in due time and without disproportionate effort in international cases. Therefore 'trust' is not something general, but is an effective individualization in the performance of the judicial authorities when addressing cross-border cases. As has been previously stated, 'trust' in other countries' administration of justice may be conceptualized as a practice for optimizing the individual's effective access to justice in cross-border cases. Such position is particularly visible within the EU Criminal law, bearing in mind that mutual trust cannot exist without institutional support.

On the other hand, the idea of free circulation of judgments within the EU has existed for more than 35 years, but it was realized for the first time in the Brussels IIbis Regulation for limited cases of child abduction and access rights. The principles upon which this abolition of exequatur is build are 'mutual trust' and 'mutual recognition'. So in a way, increased 'trust' (constructed in the EU in the political idea of 'mutual trust') between the Member States is responsible among other reasons for the decrease of the 'control' that Member States have regarding exequatur. The basic formula is this: where 'mutual trust' exists, procedures for recognition and enforcement should be improved. However, this 'trust' ('confidence in one's own expectation to other person's behavior') is not something which was totally acquired through experience during the interaction between legal orders ('actual trust'), but it is imposed 'trust', a political decision that Member States can have confidence not in their own expectation, but rather in the political assessment of the EU institutions that other Member States' behaviors are satisfying expectations. As such, for this type of trust it can be said that it represents an 'indirect trust' gained through the assessment of the EU institutions. In some cases, it was shown that the lack of the imposed 'mutual trust' was creating problems and resulted in the circumvention of the application of the Brussels IIbis Regulation regarding 'mutual recognition'. Thus, the cure which was proposed by the EU legislator is that the lack of 'mutual trust' should be improved by imposing an obligation for 'mutual recognition'. Once more the problem is what comes first. Should 'mutual trust' be gained first and then the Member States should proceed in building system of 'mutual recognition' with further free circulation of judgments in mind or through the process of 'mutual recognition' the EU should build 'mutual trust'? What is necessary is that instead of building politically imposed 'mutual trust', Member States should steadily build 'actual trust' through direct contact between the authorities of different Member States and with trust in each other's administration of justice. In this approach, the work of the European ju-

dicial network (EJN) and the European judicial training network (EJTN) play important roles.

Therefore, a question of balance between the ‘trust and ‘control’ arises regarding the enforcement of parental responsibility decisions in the EU. If we look at the recent approach taken by the EU regarding the abolition of exequatur in Brussels Ibis Regulation, certain safeguards were kept. So total ‘trust’ was not achieved but rather the approach of limited ‘control’ was postponed to a later stage. ‘Control’ was taken in the form that the *ex ante* control by the state now is transformed to *ex post* control initiated by the parties. So the abolition of the exequatur in the Brussels regime represents moving the coordination to a later stage of the implementation of recognition and enforcement. It is very realistic to assume that the new Brussels IIbis Regulation will follow these new tendencies in the Brussels regime. Again the question of balance regarding the Brussels IIbis Regulation translates to the answer of the question whether removing the requirement of exequatur could mean abandonment of certain ‘control’ and with that introducing new problems, without tackling what is important here, the child’s best interest.

As much as the political will of the EU is understandable, there must be some kind of realistic expectations for the modalities of building ‘actual trust’. This cannot be achieved by imposing an obligation that Member States have to ‘trust’ other authorities. ‘Trust’ is not something which can be built by theoretical or political will. The persons who are implementing the Regulation have to have confidence in the other person’s behavior in the application of the Regulation. In addition, they have to understand the regulation and the values it protects. When they have understood these values and when they are certain that the other persons have also understood the values, then the ‘actual trust’ would emerge. Without ‘trust’ all that would be left are ineffective rules, as much as they are flawlessly drafted or constructed. The protection of the best interest of the child is a universal value. It must be understood and it must be protected.

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