

Right to fair trial in the EU

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1. Introduction

Since the twentieth century international and national lawyers are focusing on fundamental rights. The right to be heard has a great importance among them, while it constitutes a clue in the exercise of individual rights. The EU constructing a real political union wants to reform the system of recognition and enforcement and create a free movement of judgments. The core question is to ensure the protection of fundamental rights and in the mean time the respect of varying legal traditions of Member States when the EU goes further in the unification.¹

2. The protection of the right to fair trial

2.1. *The first problem—different levels and diversity of courts*

The fundamental human rights could have three levels of sources in the European states. In the party states of the European Convention of Human Rights (ECHR) an international, in each states a national, and in the Member States of the European Union (EU) a community level. Since the EU joined the ECHR, it is evident that in the Member States of the EU the fundamental rights could be protected by sources of law that can originate from any of the three levels. Before the court the claimant can refer or to Article 6 of the ECHR² or to Article 47 of the Charter of Fundamental Rights of the EU³ or to articles of the country's Constitution, laws, etc. This already complex system is complicated by the “living law”, by interpretation of courts. Not only because finally it is up to courts to decide what the law is, but because in the case of fundamental rights there could be at least three different courts who has right

¹ „In our days, the main European concern has rather become the maintenance of reasonable balance between integration on the one hand and diversity and regional responsibility on the other hand.” Peter F. Schlosser: *The Abolition of Exequatur Proceedings – Including Public Policy Review*. In: *IPRax*, 2010/2 p.104.

² Article 6. Right to a fair trial (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

³ Article 47. Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. [...]

to decide, and each of them has its own logic and priorities that influence the final decision. And additionally their relationship is much more delicate, than to describe it as hierarchical.

The European Court of Human Rights (ECtHR) is devoted to the protection of individual rights. This is his very aim, and its rulings are subordinate to this purpose. However the EU joined the ECHR, the decisions of the ECtHR don't bind the Court of Justice of the European Union (CJEU). As to the party states, they are obliged by decisions of the ECtHR.⁴

The CJEU is working with community logic. It takes into consideration the interest of the individuals and of the states, but its vocation is to support the building-up of a union in Europe. In the protection of fundamental rights the four freedoms are deeply taken into account. As the CJEU can be consulted by national courts in hard cases, national courts are eager to follow its decisions.

National courts are at the end of this line, although the protection of fundamental rights depends on them in most cases. To go to trial to Strasbourg needs on the one hand courage, on the other hand considerable resources, the CJEU have a voice only if the national court demands its opinion.

2.2. The second problem – different stages of procedure

Normally the standards of fundamental rights, such as of the right to fair trial, are met in the original procedure because courts have obligation to ensure these rights. Their protection could also occur in the stage of recognition or enforcement.

The problem arises when a decision wants to be implemented in the national legal order, but the fundamental rights, especially the right to fair trial, were not respected in the original procedure. Four questions can be asked. Can the court of the state in which the recognition or the enforcement is sought accept the decision? Or does the court have to accept it? Has this court the possibility to deny this decision? Or is it obliged to deny it? Answers to these questions could show the very meaning and real content of the right to fair trial. The purpose of this paper is to point out the elements of cross-border litigation which are problematic to the right to fair trial and to seek an answer which is convenient to the EU, to the states, and to the individuals as well.

2.3. The third problem – the space and the time

The adequate protection of the right to fair trial is actual and very urgent to solve. Not because the EU citizens can experience severe abuses by national courts, but because the meaning of "fair trial" change from country to country.⁵ These changes, even smaller ones, could cause considerable difficulties in the unifying European civil justice system.

⁴ Article 46 of ECHR.

⁵ The problem is deeper than a mere question about a definition, because the differences „reflect fundamental societal choices and form an important part in the different identities of polities and societies.“ Joseph H. H. Weiler: *The constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999. p. 102.

At this time three standards exist in the EU. The standard of the ECtHR, as a minimum level, the standard set up by the CJEU, as a unified and obligatory level, and diversity of national standards. Already the first two standards could differ, but national interpretation of right to fair trial could provide multitude of approaches. For example the meaning of the right to an effective defence and the presence before court is not understood in the same way in the United Kingdom as in Hungary. The British courts have the right to exclude the defendant from the procedure by a debarment order, if he or she held to be in contempt of court. In this case nor the defendant, nor his or her legal representative will be heard. This type of exclusion is not imaginable for Hungarian judges.

The core question in the construction of the European legal order is the effective protection of fundamental human rights such as the right to fair trial. I am convinced that rules of recognition and enforcement could be changed to a totally automatic system, if this problem will previously be solved. In the EU judges were facing the question several times: what happens if a decision arrives from a Member State which interprets narrowly or simply otherwise⁶ the right to fair trial?

3. Means of protection in the stage of recognition and enforcement

In the EU in the stage of recognition and enforcement the right to fair trial could be protected mainly by public policy.⁷ The legal basis of procedural public policy was Article 27 point 1 of the Brussels Convention, and now it lies in Article 34 point 1 of the Brussels Regulation.⁸ The article guarantees the procedural rights of the individual by its points 1 and 2.⁹ The notification in due time is ensured by the point 2, and since the *Krombach* case all other aspect of procedural rights can be protected by procedural public policy (point 1).

⁶ Oberhammer's opinion on *exequatur* procedure is true for procedural law in general. „[...] procedural details differ strongly from one jurisdiction to another.”. Paul Oberhammer: *The Abolition of Exequatur*. In: *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2010/3, p. 198.

⁷ „[...]public policy has [...] become an increasingly uniform and universal concept of justice.” Schlosser p.104.

⁸ Outside the EU their parallels could be found in the two Lugano Conventions. Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters and Convention of 28 March 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters („new Lugano Convention”).

⁹ Article 34 A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

4. Krombach cases¹⁰

4.1. CJEU

4.1.1. What happened?

Krombach was the stepfather of a 14-year-old French girl who was found dead after the night that *Krombach* gave him an injection generally used as treatment to anaemia.¹¹ The German preliminary investigation was closed and found *Krombach* innocent in the girls' death. However the girls' father, Bamberski was not satisfied at all with the German procedure thus he started a case against *Krombach* in France. The *Cour d' Assises de Paris* condemned *Krombach* to imprisonment and decided also on the civil claim, it ordered *Krombach* to pay compensation to Bamberski. The *Cour d'Assises de Paris* made the decision by applying the contempt procedure. So because *Krombach* was ordered to appear in person, but he did not attend the hearing, the court refused to hear his defence counsel. *Gambazzi* tried to enforce the decision on the civil claim in Germany, and *Krombach*, after his appeal was rejected brought an appeal on a point of law before the Bundesgerichtshof. *Krombach* complained that he had been unable to defend himself effectively. The Bundesgerichtshof asked the CJEU in a preliminary ruling if the circumstances of the case, more specially the fact that the legal representative of *Krombach* was not heard in the procedure can be taken into account in the meaning of the public policy exception of the Brussels Convention.

4.1.2. What was decided?

The CJEU decided that the state of enforcement could consider the fact that the defendant who was prosecuted for an intentional offense could not have his defence presented unless he appeared in person. It also stated that *“recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR.”*¹²

Besides, the CJEU also made some important statements about the right to fair trial and the protection of fundamental rights under the scope of the Brussels Convention. The Courts emphasized that recourse to public policy

¹⁰ C-7/98, 28 March 2000, application no. 29731/96, 13 May 2001.

¹¹ „The daughter, K. B., was fourteen years old and a French national. On 9 July 1982 she spent the day wind surfing. On her return she complained that she felt tired and was not as tanned as she would have liked. As he had done several times in the past, the applicant injected her at about 8.30 p. m. with a ferric preparation that was sold under the brand name Kobalt-Ferrcelit and was in principle intended for the treatment of anaemia.” Case *Krombach v. France*, paragraph 10.

¹² *Krombach* paragraph 44.

must be exceptional,¹³ when an infringement of a fundamental principle, or of an essential rule of law, or a breach of a fundamental right is at stake. The Court also stated that the right to be defended is an important factor in the organization of a fair trial, and that the refusal to hear the defence of a person who is not present constitutes a “*manifest breach of a fundamental right*”.¹⁴ More importantly the Court has also held in paragraph 43, that it is not permissible to achieve the aim of the Brussels Convention, the simplification of formalities, by undermining the right to a fair hearing.¹⁵ This is an important rule of community law since the *Debaecker* case.¹⁶

4.1.3. What are the consequences?

In consequence of this judgement, it become possible to deny the enforcement by recourse to public policy if special procedural rights of the defendant were not respected at the court of origin. Even though this case concerned a civil decision made in penal procedure, because of the wording of paragraph 10 of *Debaecker* and paragraph 43 of *Krombach*, judges, practitioners, but also the Community legislator must bear in mind that the simplification of formalities, such as the abolition of internal measures, cannot be achieved by undermining the right to fair trial.

4.2. ECHR

4.2.1. What was the complaint and what was decided?¹⁷

Before the ECtHR *Krombach* complained among others that he was denied legal representation at his trial and the *Cour d'Assises de Paris* condemned him in his absence under article 630 of the Code of Criminal Procedure. *Krombach* referred to article 6 (1) and (3) (b) of the ECHR. The Court considered that penalising that the applicant was not present before the *Cour d'Assises de Paris* by imposing a prohibition of not hearing his legal representative, is manifestly disproportionate. In paragraph 84 the ECtHR laid down

¹³ The Court of Justice held In paragraph 23 of the *Krombach* case, and affirmed in paragraph 26 of *Gambazzi* case that while it is not for the Court to define the content of the public policy, it is none the less required to review the limits within which the courts may have recourse to that concept. As to the exceptional character of public policy, the CJEU emphasized in *Renault* judgement that „[...] *Article 27 of the Convention must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 20, and Krombach, paragraph 21). With regard more specifically to the clause on public policy in Article 27, point 1, of the Convention, the Court has made it clear that it may be relied on only in exceptional cases (Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 21, and Case C-78/95 Hendrikman and Feyen v Magenta Druck & Verlag [1996] ECR I-4943, paragraph 23).*” *Renault* case paragraph 26.

¹⁴ *Krombach* paragraph 37–40, especially paragraph 40.

¹⁵ *Krombach* paragraph 43.

¹⁶ Case 49/84 *Debaecker and Plouvier v Bouwman* [1985] paragraph 10.

¹⁷ http://sim.law.uu.nl/SIM/CaseLaw/hof_nsf/1d4d0dd240bfee7ec12568490035df05/40a8c57e96f944aec12569f9003dfe99?OpenDocument.

that „...the fact that the defendant, in spite of having been properly summonsed, did not appear, could not – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 (c) of the Convention to be defended by counsel.” The ECtHR acknowledged the right to be defended by a lawyer as a fundamental aspect of a fair trial.¹⁸

4.2.2. What are the consequences?

Party states of the ECHR are obliged to respect the defendant’s right to be heard, if not present by his or her legal counsellor. That means that any other practice by courts is incompatible with the right to fair trial in the meaning of article 6 of the ECHR, and constitutes a breach of obligation under the convention, and states are liable for such a non conformity of their international obligation.

4.3. The impact of Krombach cases on the EU’s plan

All two judgments acknowledged the right to be heard as part of the right to fair trial, and the right to fair trial as an effective fundamental right in the community and in the ECHR legal order as well. From the point of view of the planned abolition of *exequatur*, the most important “*acquis*” of the CJEU ruling is that the integration and facilitation of free movement of judgments cannot be done to detriment of the fundamental rights.¹⁹ Fundamental rights thus have priority over community aims. At this point the integrationalist logic ceases to work, because the community interest has to retreat before individual interest.

As to the ECtHR judgment, the most important observation for this matter is that the protection and the guarantee of the right to fair trial is the duty of all signatories, and that those who let such a right to be breached are liable under the ECHR.

5. Gambazzi Case²⁰

5.1.1. What happened?

The claimants, Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company, started a procedure against *Gambazzi* in England. During this procedure *Gambazzi* did not, at least fully, comply with the disclosure order, then

¹⁸ „Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.” paragraph 89.

¹⁹ The abolition of *exequatur* proceeding without any safeguard would prioritise free movement of judgments over fundamental rights. See: Paul Beaumont – Emma Johnston: Abolition of the *Exequatur* in Brussels I: *Is a Public Policy Defence Necessary for the Protection of Human Rights?* In: *IPRax*, 2010/2, p. 106.

²⁰ C- 349/07, 2 April 2009.

with the unless order, the English court hence held him to be in contempt of court and excluded him from the procedure (debarment order). The court gave a judgment without hear *Gambazzi* or his legal representative, and ordered the defendant to pay damages to the claimants. The claimants tried to enforce the judgement in Switzerland, but the attempt failed. The Federal Supreme Court of Switzerland affirmed the previous decision of the Court of Appeal of the Canton of Ticino which refused to recognize and enforce the decision because its contrariety to public policy on the basis of article 27 point 1 of the Lugano Convention.

The claimants then tried to enforce the English judgments in Italy. The first instance declared them enforceable in Italy. *Gambazzi* appealed against this order, he alleged that the English judgments were made in breach of the rights of defence and the adversarial principle. The Court of Appeal of Milan asked the CJEU if the fact that the original court decided without hearing the defendant or his legal representative can be taken into account with regard to article 27 point 1 or the Brussels Convention.

5.1.2. What was decided?

The CJEU emphasized in its decision that fundamental rights, as the rights of the defence are not prerogatives without barriers and they may be subject to restrictions which/that must answer to special conditions. They must correspond to objectives of public interest and must not constitute a manifest or disproportionate breach of the fundamental right. In this case the United Kingdom invoked the fair and efficient administration of justice, as the objective of public interest that justify the restriction to the rights of the defence, the exclusion of *Gambazzi* from the proceedings. The Court estimated that such an objective is capable of justifying a restriction. But as to the sanction, they could not be manifestly disproportionate to the purpose.²¹ The Court called the attention to the fact that the exclusion from the procedure is the most serious restriction possible on the rights of the defence.²² Hence it must satisfy very exact requirements or it will constitute a manifest and disproportionate infringement of the fundamental rights. The CJEU ruled that it is to national courts to assess the specific circumstances and to take into account “*the proceedings as a whole in the light of all the circumstances*”.²³

²¹ Cuniberti is if the opinion that the „right to be heard and the right to be imposed only proportionate sanctions are distinct and autonomous. Sanctions ought to be proportionate irrespective of whether they result in a violation of the right to be heard.” Gilles Cuniberti: *Debarment from Defending, Default Judgments and Public Policy*. In: *IPRax*, 2010/2, p. 153. Sanctions really have to be proportionate to the act committed. I am however convinced that the CJEU considered the proportionality from another angle, it set out the proportionality requirement on the score of all fundamental rights and as to the aim pursued. As the *Gambazzi* judgment is reasoning: „restrictions [...] must not constitute, with regard to the aim pursued, a manifest or disproportionate breach of the rights thus guaranteed.” *Gambazzi* judgment, paragraph 29.

²² „With regard to the sanction adopted in the main proceedings, the exclusion of Mr *Gambazzi* from any participation in the proceedings, that is (...) the most serious restriction possible on the rights of the defence. Consequently, such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.” *Gambazzi* judgment, paragraph 33.

²³ This is the rule since the *Eurofood IFSC* case (case C-341/04 [2006] paragraph 68).

Thus, the court decided that national courts have the right to esteem the exclusion from the procedure as a breach of fundamental rights and an offense to public policy. The CJEU however did not decide if it happened in *Gambazzi's* case or not, it merely gave some instruction to national courts, some considerations to think about.

5.1.3. What are the consequences?

The *Gambazzi* ruling made emphasize on the fact that, despite that the right of defence is one of the fundamental rights, it is not sacrosanct. So it can have restrictions, but only justified and proportionate ones. As to decide that a sanction is possible, national courts have to assess the situation with regard to all circumstances of the case.

From point of view of the abolition of *exequatur*, and the erase of the grounds of refusal, a question has to be asked. European legislator should decide, if public interest of facilitation of free movement of judgments is sufficient to justify the suppression of the recourse to public policy that cause problem in the guarantee of fundamental rights and can constitute a very strong restriction of the right to fair trial. This restriction would be not only severe, but also a general one which would deprive national courts of their discretion.

5.1.4. The impact of CJEU case law on the EU's plan

The two decisions testify that recourse to public policy as a mean of protection of the right to be heard in the stage of enforcement and /or recognition is acknowledged in the EU. In the mean time courts are entitled to consider all circumstances of the case to decide if there was a breach to the right to be heard. As it could be seen from the *Gambazzi* and *Krombach* cases, article 27 of the Brussels Convention, as well as article 34 of the Brussels Regulation is sufficient enough on the one hand to ensure the respect of fundamental human rights in a procedure, on the other hand to maintain a delicate balance between public and individual interest. The main question is whether there are other means of protection which are able to guarantee the right to fair trial without the recourse to public policy. If the EU, in the creation of an automatic system of recognition and enforcement, abolishes the *exequatur* procedure by erasing the grounds for refusal, public policy has to be substituted by other institution, or at least Member States have to accept minimal standards of procedural rights in order to ensure the right to fair trial.²⁴

6. Genuine European Area of Justice²⁵

The aim of the EU is to create a genuine European area of justice in civil matters. Since 1993 and the entry into force of the *Treaty of Maastricht*, the judicial co-operation in civil matters is a field of common interest for EU Member

²⁴ And in the case of the EU and its member states, this minimum standard could not be above the standard of the ECHR.

²⁵ http://ec.europa.eu/justice/policies/civil/policies_civil_intro_en.htm

States. The *Treaty of Amsterdam* made judicial co-operation in civil matters a full-scale European Community policy linked to the free circulation of people. The EU justifies its plan of abolition of *exequatur* and the creation of the European Area of Justice with the aim to facilitate the everyday life of EU citizens and businesses. As the EU emphasize, EU citizens would circulate freely if they had access to justice in each Member State with the same conditions, and they did not had to undergo additional difficulties when exercising their rights. The EU gives reason for the abolition of *exequatur* and acts as it would have been an obvious aim from the beginning of the creation of the European Area of Justice. It is thus worthy to take a look on the Programmes published over the past 10 years of endeavour.

As some scholars emphasize, the *Tampere Conclusions*²⁶ did not yet “...specifically require the abolition of intermediate measures in relation to Brussels and certainly did not require the abolition of the “grounds for refusal and enforcement” in Brussels 1.”²⁷ However for others it is evident that since the Tampere meeting the suppression constitutes an objective of high priority.²⁸

A programme of the general abolition of *exequatur* has been envisaged in 2001.²⁹ But this programme also emphasized the importance of setting of minimal standards on civil procedure, at least for certain types of claims (uncontested claims, small claims, maintenance claims) in order to assure the right to fair with respect to the ECHR.³⁰

The *Hague programme*³¹ thought of the European Area of Justice as an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions. The Programme was envisaging the laying down of measures which build confidence and mutual trust among Member States. It especially emphasized the importance of creation of minimum procedural standards and planned to ensure high standards of quality of justice systems, in particular as regards the rights of defence.

The European Parliament and the Council adopted the “*Civil Justice*“ programme³² on 25 September 2007, which aims the creation of a genuine area of

²⁶ http://www.europarl.europa.eu/summits/tam_en.htm.

²⁷ Beaumont–Johnston p. 105, same conclusion was made by Schlosser p.101.

²⁸ For example see Marie-Laurre Niboyet: *Audition devant la Commission des affaires juridiques du Parlement européen sur la révision du règlement (CE) n° 44/2001 du 22 décembre 2000 (le 5 octobre 2009)*, texte définitif à publier sur le site de la commission des affaires juridiques du Parlement européen (lundi 5 octobre 2009), and Oberhammer p. 200.

²⁹ Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. 2001/ C 12/01 (15 January 2001).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0001:0009:EN:PDF>.

³⁰ The Conclusions of the Tampere European Summit made the same type of recommendations in point B.5. http://www.europarl.europa.eu/summits/tam_en.htm.

³¹ Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice /* COM/2005/0184 final and Action Plan implementing the Hague Programme - COM(2006) 331. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML>.

³² Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007–2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:257:0016:0022:EN:PDF>.

freedom, security and justice, an area of justice without borders. The elimination of obstacles to cross-border litigation is a specific aim of the Programme³³ in order to improve the daily life of EU citizens by enabling them to assert their rights throughout the EU.

The more recent *Stockholm Programme* is very broad and one cannot conclude that general abolition of *exequatur* is aimed at the near future, as the Programme speaks about the continuation and not the termination of the abolition of internal measures.³⁴

As it can be seen from the *annual work programme for 2011* of the “Civil Justice” programme, the purpose of the EU is to facilitate the movement of judgements within the EU, to eliminate the obstacles of a cross-border civil procedure, to help the individuals to assert their rights throughout the EU, and to enhance the cooperation between judicial authorities.³⁵

Contrary to the hardly evident wording of programmes and the conclusions of scholars, it is clear from the *Green Paper*³⁶ on the modification of Brussels 1 and the *Report*³⁷ on the application of the Brussels 1, that the Commission made the conclusion in favour of the abolition.³⁸ The Commission states that in

³³ „eliminating obstacles to cross-border litigation created by disparities in civil law and civil procedures and promoting the necessary compatibility of legislation for that purpose” Article 3 (a)(iii).

³⁴ „As regards civil matters, the European Council considers that the process of abolishing all intermediate measures (the *exequatur*), should be continued during the period covered by the *Stockholm Programme*. At the same time the abolition of the *exequatur* will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules.”

<http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf> see also Schlosser p. 101

³⁵ 1.2. General objectives

The general objectives of the programme are:

- (a) to promote judicial cooperation with the aim of contributing to the creation of a genuine European area of justice in civil matters based on mutual recognition and mutual confidence;
- (b) to promote the elimination of obstacles to the good functioning of cross-border civil proceedings in the Member States;
- (c) to improve the daily life of individuals and businesses by enabling them to assert their rights throughout the European Union, notably by fostering access to justice;
- (d) to improve the contacts, exchange of information and networking between legal, judicial and administrative authorities and the legal professions, including by way of support of judicial training, with the aim of better mutual understanding among such authorities and professionals.

http://ec.europa.eu/justice/funding/civil/awp_2011_en.pdf.

³⁶ It is evident from the formulation/drafting of questions. „**Question 1:** Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of *exequatur*)? If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of *exequatur*? And if so, which ones?” 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, p.3, 21 April 2009

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>.

³⁷ „...the main objective of the revision of the Regulation should be the abolition of the *exequatur* procedure in all matters covered by the Regulation.” 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, 4. p.4, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0174:FIN:EN:PDF>.

³⁸ „[...] applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused....” Green Paper, p. 2.

an internal market without borders, where recognition and enforcement are almost always successful³⁹ it is illogic to burden the businesses and the citizens with the expenses of costs and time to assert their rights, and thus the abolition of „*exequatur procedure in all civil and commercial matters should be realistic*“.⁴⁰ But because abolition would apply to contested claims, safeguards of fundamental rights seem to be necessary.⁴¹

The EU, in order to abolish the *exequatur*, envisaged to suppress the grounds for refusals of article 34.⁴² By the total erase of article 34 from Brussels 1 maybe a real genuine European Area of Justice would made, but the question is: to what price? As the right to fair trial is now protected by the procedural public policy, this article cannot be removed without serious doubts about the future guarantee of fundamental rights. Moreover the ECtHR case law points out clearly to what extent states are obliged to ensure the protection of these rights.

7. Pellegrini case⁴³

7.1.1. What happened?

After her petition made in 1987 the applicant, *Pellegrini*, get a separation judgment from the Rome Court of First Instance in 1990. The Court ordered Gigliozzi, former husband, to pay her monthly maintenance. During this procedure Gigliozzi also started a case before the ecclesiastical court. In 1987 the applicant was summoned to appear before the Latium Regional Ecclesiastical Court in the Vicariate of Rome “*to give evidence in the matrimonial case of Gigliozzi-Pellegrini*”. After a hearing *Pellegrini* received a decree of nullity of her marriage. The applicant appealed against this judgment to the Tribunal of the Roman Rota. She complained about the breaches of her defence rights and of the adversarial principle in that she had been summoned to appear before the ecclesiastical court without first being informed of the nullity petition or of the grounds, moreover, she had not been assisted by a lawyer. The appeal was unsuccessful. Then Gigliozzi requested the enforcement of the judgment of the Roman Rota before the Florence Court of Appeal. Even though the applicant drew the Florence Court’s attention to the infringement of her defence rights, the Court issued an authority to enforce the judgment. The applicant appealed to the Court of Cassation, but in 1995 the Court of Cassation dismissed her appeal.⁴⁴ Before the ECHR the applicant complained of a violation of Article 6 of

³⁹ Green Paper p. 2, Report, p.4.

⁴⁰ Green Paper, p. 2.

⁴¹ Green paper p. 2, „*As to public policy, the study shows that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant.*” Report p. 4., „*It should therefore be reflected whether a more harmonised review procedure might not be desirable.*” Green Paper p. 3.

⁴² As it was emphasized by Oberhammer the two abolitions do not necessary mean the same. Oberhammer, p. 199.

⁴³ application no. 30882/96, 20 September 2001.

⁴⁴ It stated that the adversarial principle had been respected by the ecclesiastical courts. It added that the applicant could have sought legal assistance.

ECHR, because the Italian courts had granted the enforcement of the decree of nullity of marriage despite that she alleged that her defence rights had been infringed in the original proceedings.

7.1.2. What was decided?

The Court noted firstly that the Vatican had not ratified the ECHR and the application was against Italy, thus the Court's task was not to examine the ecclesiastical proceedings. The ECHR have to consider if Italian courts had duly verified whether the right to a fair hearing had been respected in the original procedure before deciding on the enforceability.⁴⁵ The Court held unanimously that Italian courts violated Article 6 § 1,⁴⁶ because they did not ensure that the applicant had had a fair hearing in the ecclesiastical proceedings.

The ECHR therefore laid down / established the control of foreign judgment as an obligation to the state of recognition and enforcement as follows:

„[i]n these circumstances the Court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law. There has therefore been a violation of Article 6 § 1 of the Convention.”⁴⁷

7.1.3. What are the consequences?

The ECHR's decision means that even if the right to fair trial was breached in the original procedure, the courts of the state in which recognition or enforcement is sought by recognising the judgment or declaring enforceable it did not ensure the respect of fundamental rights guaranteed by the ECHR. Thus these courts infringe the ECHR, no matter that the original procedure was in a party state of the ECHR or not, and the state of recognition or enforcement can be condemned by the ECtHR for the violation of the ECHR. The passivity or the ignorance of the court of recognition or enforcement constitutes an indirect infringement of a fundamental right.

⁴⁵ The ECHR ruled that it is inherent in the right to adversarial process, that parties have the opportunity to examine and contest any evidence or observation submitted to the court, and this could not be denied on the ground that the applicant had no defence, because the decision is based on an undisputed objectively verifiable fact (as here was the consanguinity for the decree of nullity). The ECHR emphasized that it is solely for the parties to decide whether any evidence or any witness is calling for a response. In opposition to the Italian Court of Cassation, the ECHR decided that parties have to be afforded an opportunity to seek assistance from a lawyer and that in this special case the ecclesiastical courts had had an obligation to inform the applicant of her right to request a lawyer before she came to court for the first time.

⁴⁶ *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”* Article 6 paragraph 1. of ECHR

⁴⁷ paragraph 47 and 48.

Some professionals are doubtful about the reason and existence of this kind of obligation. This obligation however was not invented by the judges of the *Pellegrini* case, but it can be deduced from three articles of the ECHR. Article 1⁴⁸ provides the possibility of an extraterritorial application⁴⁹ of the ECHR. The wording “*everyone within their jurisdiction*” is wide enough to imply also the parties of a recognition or enforcement stage. As the ECHR held it, Article 6.1⁵⁰ is an adequate ground to institute such obligation.⁵¹ Finally, the general wording of Article 13⁵² make possible to ensure the right to remedy before the courts of each party state to every individual whose right were violated in another state.⁵³

7.1.4. The impact of ECHR case law on the EU’s plan

The evolution of the practice of the ECHR can have serious effects on the plan of abolition of the *exequatur* procedure.⁵⁴ Without the *exequatur* a Member State will be denied of the means for ensuring the protection of right to fair trial, but in the mean time this state can be sued before the ECtHR for the indirect infringement of the ECHR. Moreover, since the EU is also signatory of the ECHR, the Convention constitutes a legal obligation also toward the EU. Accordingly the EU legislator is not in the position to suppress the procedural guarantees of Article 34 without providing for satisfactory substitution beforehand.

7.1.5. Conditions of abolition of *exequatur*

However the Commission states that *exequatur* is no use,⁵⁵ as answers to the Commission’s Green Paper show, the abolition of all intermediate measures can cause several practical problems. The Commission is arguing with the success of the Regulation (CE) n° 805/2004 (uncontested claims) and Regulation

⁴⁸ „*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”

⁴⁹ Clare Ove–Robin C White: *The European Convention on Human Rights*, Oxford University Press, Oxford, 2006, p. 189–190.

⁵⁰ „...*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”

⁵¹ The obligation can have two types of justification. The first states that the reception itself of a decision made in an erroneous proceeding constitutes the infringement, because by receiving such foreign decision, the infringement of procedural rights will be repeated in the state of recognition or enforcement as the original breaches infringe the decision. See Pierre Mayer: *Droit au procès équitable et conflit de juridictions*, in : *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme*, Nemesis Bruylant, Bruxelles, 1996. p. 129. The second justification sees this obligation as a autonomous and distinct one. See Laurence Sinopoli: *Droit au procès équitable et exequatur: Strasbourg sonne les cloches à Rome*, In: *Gazette du Palais*, 21–23 juillet 2002. p. 1160.

⁵² „*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...*”

⁵³ Fabien Marchadier: *Les objectifs généraux du droit international privé à l’épreuve de la Convention européenne des droits de l’homme*, Bruylant, Bruxelles, 2007. p. 582–585.

⁵⁴ Niboyet.

⁵⁵ Because of the low number of “problematic” judgments, as recognition and enforcement is very rarely refused. Green Paper p. 2–3.

(CE) n° 4/2009 (maintenance claims), but it is yet too premature to evaluate their results.⁵⁶ The abolition would generally provide benefits to the claimant without any specific reason.⁵⁷ As the control of the decision will be at the original court⁵⁸ (which is otherwise chosen by the claimant), the defendant has to support all cost and irregularities of a cross-border litigation. In such a case defendant would run all the risks: costs, need of time, and lack of information resulting from the physical distance of defendant from the court, language barrier, and legal dissimilarities. Moreover, because abuse in these proceedings⁵⁹ is quite easy, defendants have to be protected. The most powerful argument against the abolition is the concern about fundamental rights. Although all EU Member States are part of the ECHR, they interpret differently the right to an effective defence, and additionally any European jurisdiction is free from the infringement of right to fair trial.⁶⁰

Outside of these practical considerations, the EU has also some principles to follow in the reformation of the European recognition and enforcement system. The EU would like to constitute an area of freedom, security and justice, but in the mean time to ensure the protection of fundamental rights this area. In the creation of this area of justice without borders, the EU wants to respect different legal systems and traditions of the Member States too.⁶¹ As it could be seen from the analyzed judgments, the right to be heard have different interpretations throughout the EU. Could the setting out of unified standard of fair procedure means the unification of the divergent interpretations and thus be irrespective of different legal traditions?⁶² If the answer is yes, the EU will have considerable difficulties in the creation of a genuine European Judicial Area. We can somehow suppose that a very minimal level of protection of fundamental rights is ensured by all Member States on the level of the ECHR. If necessary procedural means are available for judges, the minimal standard could enable the abolition of the grounds for refusal and the *exequatur*, and could also constitute the core of a European Civil Procedure. In order to abolish the *exequatur* or the EU has to decide on obligatory minimal standard of fair process, and on their tools of application, or it has to protect the procedural rights in cross-border litigation by setting out of guarantees in the revised Brussels 1 regulation.

⁵⁶ Moreover the outcome of a sectoral regulation cannot be easily generalized anyway.

⁵⁷ Schlosser is convinced that the existing system successfully strikes a balance between the interests of the judgment creditor (justice) and debtor (fairness). Schlosser p. 103.

⁵⁸ „Il faut bien comprendre en effet que l'enjeu de la suppression de l'exequatur n'est pas l'élimination de toute procédure de contrôle - objectif impossible à atteindre pour les raisons qui seront exposées ci-après - mais la concentration de tous les recours devant le juge d'origine.” Niboyet p.2.

⁵⁹ Corruption and fraud are delicate problems to deal with in cross-border litigations. Beaumont – Johnston: Abolition p. 110. One can for example think of the erroneous presentation of facts to the judge. At this time *exequatur* is often demanded without the proper notification of the defendant of the procedure, or without that the judgment would be enforceable in the state of origin. Marie-Laure Niboyet– Géraud de Geouffre de la Pradelle: *Droit international privé*, LGDJ, Paris, 2009. p. 577, and also Niboyet p. 2.

⁶⁰ Niboyet de la Pradelle p. 578.

⁶¹ Art. 67. 1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. [...] 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

⁶² The analysis of the question of what standard to choose is beyond the aim of this paper. For detailed and theoretical study see Weiler p. 102–129.

8. Actual state of modification of Brussels 1

The Commission published the plan of the revision of Brussels 1 Regulation on 14 December 2010. As this document shows, the abolition of *exequatur* is beyond question. The new regulation would differentiate between judgments for which a declaration of enforceability is required (on a transnational basis)⁶³ and judgments for which no declaration of enforceability is required. As to the first type, the new article 48 corresponds with the actual article 34 Brussels 1 (system of quasi automatic enforcement). As to other judgments, Article 38 abolishes the *exequatur*.⁶⁴ However the EU ensures the protection of the procedural rights in Article 46 by permitting to apply for a refusal:⁶⁵

„1. In cases other than those covered by Article 45, a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial.”

The revision proposes detailed rules about this possibility of application, all of them are to protect the interests of the defendant. The court which will have jurisdiction over such applications is the court of the domicile of the defendant, so that of the Member State of enforcement. The governing law of this procedure will be the law of the Member State of enforcement, too. The legal consequence of a justified application will be the refusal of recognition or enforcement.

9. Conclusions

The fundamental right to be heard needs judicial protection. This right is of great importance, however is not absolute, it can be limited by justified restriction of public interest. The general abolition of *exequatur* as a restriction to the right to be heard can be justified by the public interests as access to justice, facilitation of free movement of people, the well-being of EU citizens, arguments underlying the free movement of decisions. But the requirement of proportionality is jeopardised by the total abolition of grounds for refusals without any substitution. The actual wording of the modification plan of Brussels 1 finds a good balance and the abolition becomes acceptable to defenders of the abolition as to those whose opinion is very adversarial. It reflects a compromise which was not made on account of fundamental rights. Thus the EU seems to overpass the difficulty of protection of fundamental rights in the stage of recognition and enforcement, and surpasses the *exequatur* but at the same time guarantees the right to fair trial.

⁶³ judgments in defamation cases and judgments given in collective compensatory proceedings.

⁶⁴ „1. Subject to the provisions of this Chapter, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required and without any possibility of opposing its recognition.

2. A judgment given in one Member State which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.”

⁶⁵ Thus public policy will be replaced by a „European fair trial test”. Oberhammer p. 202.