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The public policy exception against the recognition and enforcement of European judgments

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Introduction

At the Tampere European Council in October 1999[1], the European Union (« EU ») launched the creation of an area of freedom, security and justice. As priorities for its action, the Council established better access to justice in Europe, mutual recognition of judicial decisions and increased convergence in the field of civil law. In this regard, the public policy exception, which allows a Member State to refuse the recognition and enforcement of a judgment returned by another State, appeared to be an impediment to the free movement of judgments.

European judicial cooperation in civil matters lies in the Treaty on the Functioning of the European Union («TFEU»)[2]. According to Article 67 of the TFEU « *the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters* ». The legislative concept is further explained by Article 81 TFEU according to which « *the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States* ». It clearly underlines that mutual recognition and free movement of judgments are crucial for the development of procedural law which has become a decisive area of policy action for the European Union.

European procedural law defines the applicable law in litigation between different courts by providing for rules on jurisdiction and law, as well as the recognition of foreign judgments. In this respect, the public policy clauses are a basis for the non-recognition of a foreign judgment. Public order plays a role in the recognition of judgments as well as the enforcement of decisions. It is often drafted as a general clause and refers to fundamental principles. Public policy operates as a safeguard against provisions of foreign law and as a protection for the fundamental values of European Member States only as a last resort. The origins of this exceptional characteristic lie in the implicit assumption that foreign law and foreign decisions have the same value as their domestic counterparts.

Public policy is a mechanism universally recognized in comparative international private law as an effective technique for disregarding a foreign rule or decision. It is consequently a particular public policy concept that should be distinguished from domestic public policy, which generally refers to rules that cannot be set aside by the will of the parties or the judge.

Regarding the content of the public policy exception, it is possible to draw a distinction between the negative definition - as defined by national law and limited by the European Court of Justice (« ECJ ») - and the positive one created by the Court. Usually, public policy exceptions operate in a negative way because they prohibit the recognition of a foreign judgment that is contrary to the fundamental rights of the *lex fori*.

[1] Tampere European Council 15 and 16 October 1999, Presidency conclusions.
[2] Consolidated version of the Treaty on the Functioning of the European Union signed on 13 December 2007.

The European Union pursues the objective of dealing with the situation of litigants in cross-border settings within the European judicial area in the same way as that of litigants in purely domestic cases. To this end, several regulations on civil law cooperation have been adopted based on the limited grounds for refusal. If, over the last few decades, the number of instruments of European civil procedure has significantly risen, public policy exceptions have considerably decreased in the same period of time. Henceforth, some European instruments are particularly concerned with public policy provisions such as the Brussels I Regulation[3] or the Brussels II bis Regulation[4], and the European Enforcement Order Regulation[5]. Throughout these regulations, the progressive abolition of *exequatur* in line with the free circulation of decisions has *prima facie* led to the reduction of public policy control. Yet, this is still an efficient instrument to fight against breaches of fundamental rights.

With this progressive abolition of *exequatur*, one may wonder how the free movement of judgments within the European Union may be reconciled with the respect for public policy in the Member States where execution or recognition is sought and in particular effective control over fundamental rights, as well as their effective exercise.

If the public policy exception appears as a shape-shifting concept opposed to the free movement of judgments and thus to the principle of mutual recognition within the European Union (I), the progressive reduction of public policy to its minimum along the lines of the abolition of *exequatur* should be envisaged (II). Consequently, a balance between the protection of fundamental rights and the free circulation of decisions needs to be reached along with the unification of a coherent framework for the application of public policy in European Member States (III).

I. The public policy exception: a changing concept opposed to the free circulation of judgments

If the free circulation of judgments within the European Union seems to have reached a high degree of performance (A), the public order exception appears to be a persistent obstacle to the European Union's ambitions (B).

A) Free circulation of judgments hampered by the public policy exception

Circulation of civil judgments within the European Union is at the top of the European institutions' agenda. Indeed, recognition and enforcement of judgments from one country to another is an aspiring aim of the European Union (1). However, public policy seems to be a tenacious impediment to the free circulation of judgments (2).

[3] Council Regulation (EC) No 44/2011 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[4] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.
[5] Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims.

1. Free movement of judgments: an ambitious goal for the European Union

The principles of mutual trust and mutual recognition. If the two concepts are relatively linked and interweaved, there are still distinct principles formulated in Article 67 of the TFEU and confirmed in Article 81 of the same Treaty. Mutual recognition of judgments presumes mutual trust. Mutual trust should possibly lead to mutual recognition. Originally, dating back to the *Cassis de Dijon* landmark case[6], mutual recognition is seen as a prohibition to establishing national controls and certifications in a Member State, if already carried out in the Member State of origin. In its judgment, the ECJ stated that the German provision was prohibited under Article 34[7] of TFEU, adding that in principle, « *there is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State* ». Along these lines, automaticity in Member State cooperation reveals that a national judgment will be enforced beyond the territory of the issuing State by another Member State in the area of freedom, security and justice. Thus, the requested Member State has limited grounds – such as the public policy exception - to refuse the request for cooperation. Unquestionably, the importance of the mutual trust principle, which is the reciprocal confidence of European Union Member States in each other's legal and judicial systems, has grown considerably following the abolition of *exequatur*.

Main purposes of *exequatur*. An *exequatur* procedure serves different objectives, including authorizing the enforcement authorities to act, instructing them how to act and reviewing the foreign judgment regarding the law of the addressed Member State. The first thing is to determine whether a decision granted in one Member State should be given extraterritorial effect and should be enforced in another State. When this is the case, there is no need to argue the dispute again in the court of another State. This concept prevents the enforcement of foreign judgments from violating fundamental rights, such as the right to a fair trial or judgments obtained by procedural fraud. The goal is also to make sure that the defendant has been served with the judgment in order to be able to contest it before his rights are irreversibly affected by enforcement measures.

Reasons for abolishing the *exequatur* procedure. Any application to execute a foreign decision must be examined by an additional procedure in order to get a declaration of enforceability. This procedure is obviously costly and time-consuming, as the applicant will spend time and money on translations, court fees, legal fees etc. The other reason for abolishing the *exequatur* procedure is political and linked to the creation of a genuine European area of justice. Indeed, the European Union grants its citizens and economic operators freedoms that imply free circulation of decisions and respected judgments within the Union. *Exequatur* was first abolished in the Order for Payment Regulation[8] and the Small Claims Regulation[9].

[6] ECJ, 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*.
[7] Article 34 states that « *quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*».
[8] Regulation (EC) No 1896/2006 of 12 December 2006 creating a European Order for Payment procedure.
[9] Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

To enhance its abolition, the European Commission promulgated the Brussels I Regulation which replaced the Brussels Convention of 1968 whose goal was to facilitate the free movement of judgments. Then, the European Union adopted the Brussels I bis Regulation in 2012. The major novelty of this Regulation's reform was the abolition of the *exequatur*.

Consequences of *exequatur* abolition. It implies that any judgment enforceable in a Member State must be enforceable in another State of the EU without any declaration of enforceability being required. Judicial control of the decision is « relocated » from the Member State of enforcement to the Member State of origin. The recast introduced by the Brussels I bis Regulation has also changed the balance of interests between debtors and creditors in favor of the latter. Under the Brussels I Regulation, a creditor who wanted to enforce a decision in another Member State had to go through the *exequatur* procedure in each and every country. Under the Brussels I bis Regulation framework, the judgment is enforceable across the European Union. From now on, it is up to the debtor to try to block its enforcement by triggering the « reverse *exequatur* » procedure. If the debtors do not launch any action within the deadline prescribed by national law[10], the decision becomes fully enforceable. Despite this *exequatur* abolition procedure, the public policy exception continues to be a tenacious impediment to the recognition and enforcement of judgments.

2. Public policy: a persistent obstacle to the free circulation of judgments

The public order exception: a protection of fundamental rights. The public policy rules intervene after a conflict of law analysis and when a foreign law is applicable. Observance by the State of origin of the Charter of Fundamental Rights of the EU (« EU Charter ») provisions is always required, regardless of the object of litigation, as mentioned in the *Denilauler* case[11]. Indeed, automatic enforcement of a foreign decision must not endanger the debtor's rights of defense. Even if each country has its own definition of public policy, there is no denying that European instruments give legal bases to this exception invoked by complainants. To this regard, Article 47 of the EU Charter protects principles that must be respected by all Member States (the right to an independent, impartial court previously established by law, the right to a fair trial, the right to a hearing organized within a reasonable time, the right to be advised, defended and represented). Among these principles, the right to a fair trial implies not only the respect of the rights of the parties in the original State but also the effectiveness of judgment enforcement[12].

The limited scope of the public policy exception in European legal instruments. There is consensus that the public policy exception has operated as an exception since the *Hoffmann v. Krieg* case[13].

[10] The Maintenance Obligations Regulation has an original rule for prescription according to Article 21.2 « *the competent authority in the Member State of enforcement shall, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action, either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period* » .

[11] ECJ, 21 May 1980, case 125/79. *Denilauer v. S.n.c. Couchet Frères*, The ECJ underlined that the Brussels I Regulation makes sure that « *proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed* ».

[12] See ECtHR, 19 March 1997, *Hornsby v. Greece*, n°18357/91.

[13] ECJ, 4 February 1988, C-145/86, *Hoffmann v. Krieg.*

According to the ECJ, within the scheme of the Convention, the public policy exception « *is intended to apply only in exceptional cases, which will be all the rarer in that from a statistical point of view judgments in property matters are unlikely to raise issues of public policy*[14]». Therefore, the provisions on public policy are considered narrowly and the reliance on the public policy exception must be verified. The exceptional nature of public policy is derived from the underlying assumption in procedural law that foreign law and foreign judgments have the same value as their domestic equivalents. Public policy clauses usually operate in a negative way as they prohibit the application of foreign law or the recognition of a foreign decision contrary to the fundamental values of the *lex fori*. In this respect, national public policy is used as a barrier preventing negative results from the *forum* of judgment. It is important to distinguish public policy from the so-called positive function of public policy as the competent courts may apply mandatory rules to a case in their own system, which is subject to foreign law.

B) Outline of the public policy concept used for the recognition and execution of judgments

European values may differ in the EU, even if many European Union instruments provide for a public policy exception, as public policy is still a national concept (1). However, European Union legislation as well as the European Court of Justice give some guidance as to the application of the public policy exception (2).

1. The concept of public policy defined by national jurisdictions

The lack of a common conception of public policy. Since all Member States share a common adherence to the fundamental rights laid down in the European Convention on Human Rights (« ECHR ») and the EU Charter, it could be assumed that the concept of public policy has more or less the same content in each of the Member States. This is, however, not the case yet, as the case-law of the European Court of Human Rights (« ECtHR ») and ECJ suggests. This was demonstrated during the debate on the proposal for the recast of the Brussels I Regulation[15]. The reference to « *fundamental principles underlying fair trial* » was understood as a limited public policy clause referring to procedural public policy. Its content was supposed to be determined by Article 47 of the EU Charter and not by the respective standards of the Member States. As long as there are discrepancies between national procedural laws with the risk of infringement of fundamental values, States will not be disposed to abandoning the public policy exception and will want to keep their national concept of public policy.

Procedural and substantive public policy. Since the *Krombach* case[16], it is understood that the public policy exception contained in EU regulations refers to substantive as well as procedural public policy.

[14] ECJ, 21 May 1980, *Denilauer v. S.n.c. Couchet Frères, op.cit.*.
[15] Similar discussions took place during the debate over the adoption of Rome II Regulation. The Parliament proposed to include a list with specific examples where the circumstances would allow the public policy exception to be invoked. The list referred to the ECHR, national constitutional provisions and international humanitarian law. This proposal was rejected because of too many variations between the public policies of the Member States.
[16] ECJ, 28 March 2000, Case -7/98, *Dieter Krombach v. André Bamberski*.

This difference is found in all national systems of Member States with the exception of Luxembourg[17]. However, in the practice of Member States, procedural public policy is of great importance, while substantive public policy does not play any considerable role. The limited importance of substantive public policy is mainly influenced by clauses in the EU instruments which expressly forbid any review of the substance of the foreign judgment. Thus, most case-law relates to procedural public policy (procedural fraud[18], information or even misleading information about the defense[19], violation of the rights of defense, unacceptably high litigation costs etc). Member States such as France, explicitly limit the review of public policy to the outcome of the foreign decision while other courts, such as Italian courts, do not recognize a foreign judgment if the foreign procedural law is considered to infringe their public policy. In some countries, such as Portugal, both categories exist[20].

The unquestionable integration of a European concept of public policy. According to the ECJ case-law, Member States are free to determine the content of their public policy. However, a comparative survey of the practice of Member States[21] demonstrates that most court decisions refer to the case-law of the ECJ and determine the content of public policy according to the standards of Article 6 ECHR. Thus, jurisdictions such as England, France, Luxembourg or Italy mainly refer to EU law when they apply the public policy exception. On the contrary, other Member States such as Germany, Greece or Hungary still refer to constitutional law and to general principles of their own procedural systems whereas the decisions of the ECJ on the public policy exception may also play a predominant role in their case-law. Interestingly, the courts of Spain, Poland and Lithuania interpret the public policy exception predominantly as a reference to their own system, though Polish courts refer also to the pertinent case-law of the ECJ. Furthermore, while some Member States do not require the debtor to exhaust remedies in the Member State of origin in order to cure procedural irregularity[22], other Member States decide this issue differently and require exhaustion of the relevant remedies in the Member State of origin[23]. Consequently, the assumption that the public policy exception is mainly determined by national courts of the EU does not entirely correspond to practice[24].

[17] Study by the European Parliament, Directorate General for Internal Policies, Policy Department C, *Interpretation of the public policy exception as referred to in EU Instrument of Private International Law and Procedural Law*, Brussels, 2011.
[18] For instance: Germany, BGH 12/10/2009, IX ZB 103/06; OLG Köln 11/17/2008, 16 W 27/08; OLG Frankfurt 12/7/2004, 20 W 369/04; OLG Karlsruhe 4/22/2009, 8 W 5/09; The Netherlands, Dordrecht, 5/242006, Nr. 60725/HA ZA 05-2282.
[19] For instance: Hungary: Pfv. XI.21.581/2008/11; Germany: OLG Köln 3/19/2004, 16 W 39/03, see also BGH 9/18/2001 IX ZB 104/00.
[20] RP of 22.09.2005, STJ 05B1782, Sumário N.3 in www.dgsi.pt. In theory, public policy is applied in its substantive meaning. The Supreme Court of Justice ruled that a « *refusal of the declaration of enforceability is only possible if the foreign judgment clearly violates public policy, which may be procedural in nature (severe lesion of the adversarial system etc.) or substantive (serious contradiction of rules of competition)* ».
[21] See European Parliament, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, op.cit.*
[22] This is the case of Belgium, Finland, Hungary, Luxembourg and Sweden.
[23] Austria, France, Germany, Greece, Italy, The Netherlands and the United Kingdom.
[24] Even in EU Member States with predominant constitutional guarantees, such as Germany, judicial practice is shifting from national procedural guarantees to European standards. It must be noted that these developments are not uniform, but appear differently from one European Member State to another.

2. Some indications in European Union instruments

The content of the public policy concept. Besides the guidelines given by ECJ[25]case-law, European Union instruments themselves on private international law give some guidance to national courts concerning what the notion of public policy refers to (both procedural and substantive). It may be pointed out that besides the EU instruments that include a general clause of public policy exception, a few regulations attempt to specify what public policy refers to. This is the case of the Insolvency Regulation[26] in Article 26[27]. Along the same lines, the Evidence Regulation[28] does not mention the term « public policy » but implicitly refers to it in Article 17[29].

Indications concerning substantive public policy. As already mentioned above, all EU regulations on private international law forbid a Member State from reviewing a decision rendered in another Member State as to its substance. However, it does not prevent the regulation from specifying some situations in which national courts may or may not agree to apply the public policy exception. This is for instance the case in Article 25 of the Brussels II bis Regulation[30] or the Succession Regulation[31] in recital 58[32].

Indications concerning procedural public policy. Over the last decade, the EU has adopted a multitude of specific instruments in European procedural law based on the concept of mutual recognition. These new instruments, with the exception of the Maintenance Obligation Regulation[33], contain specific provisions which address the most crucial procedural irregularities and establish minimum standards of procedural fairness. These specific provisions concern the content of the complaint, its service on the defendant, the information of the defendant regarding the initiation of proceedings and accessible remedies. The EU instruments further provide that the test of public policy may not be applied to the rules relating to jurisdiction.Public policy seems to be one of the last vestiges of the abolished exequatur procedure. It is now the most prevalent tool for Member States to preserve their authority. The content of public policy is rather intangible, as there are as many notions of it as there are Member States. However, the European regulation and case-law themselves have laid out the scope for this notion.

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[25] ECJ, *Krombach v Bamberski, op.cit.*: « *recourse to the public policy exception can be envisaged only where recognition and enforcement of a judgment in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State where the enforcement is sought or of a right recognized as being fundamental within that legal order* ».

[26] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

[27]Article 26 of the Insolvency Regulation: « *the public policy of the forum concerns in particular its fundamental principles or the constitutional rights and liberties of the individual* ».

[28] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[29]Article 17 of the Evidence Regulation: « *the central body or the competent authority may refuse direct taking of evidence only if (...) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State* ».

[30] Article 25 of the Brussels I bis Regulation states that "*the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts* ».

[31]Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[32]Recital 58 states that: « *the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination* ».

[33]Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

After a description of the content of public policy, the basis on which this notion could be applied should also be addressed.

II. Towards a progressive disappearance of the public policy exception

Some regulations do not admit refusal for recognition or enforcement of a decision by another Member State (A), whereas the majority of other regulations provides substantial grounds for non-recognition or non-enforcement, including the public policy exception, albeit restrictedly controlled by the ECJ (B).

A) Regulations excluding public policy exceptions

If some regulations have aimed at creating a European procedure, directed by a national judge, at the end of which a Europe-wide enforceable decision is taken (1), other regulations have more of a restricted purpose: giving Europe-wide enforceability and recognition to national judgments (2). Thus, the requested court has no alternative, which can be justified by the very nature of these regulations (3).

1. Regulations providing for a perfectly integrated European procedure

Regulations creating a European procedure. The Order for Payment Regulation and the Small Claims Regulation[34] are both concerned here. These procedures have had a European vocation since the commencement of litigation, which is justified by the need for resolution of cross-border cases. Disputes in which each party has the same *forum* are perfectly handled by national law. Thus, they reflect the strong integration of national courts, acting more as a European jurisdiction rather than a national jurisdiction.

Few national prerogatives in the judgment *forum*. In the Order for Payment Regulation and the Small Claims Regulation, national judges have very little room for appreciation because of non-flexible notions. For instance, in the Order for Payment Regulation, national jurisdictions have merely a certifying function: the only evaluation carried out is whether the pecuniary claim is well-founded (Art.11.1.b). This is maybe the only instance when the judge can use his power of appreciation. In the Small Claims Regulation, national courts have greater liberty in applying domestic law and therefore, their public policies. Consequently, intervention of public policy at the trial stage is minimal or non-existent. This may justify the lack of public policy exception clauses here.

Mandatory recognition and execution in the *forum* of performance. Both regulations contain the same wording of the mutual recognition principle and the abolition of *exequatur*: « [A decision] *shall be recognized and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition* ». There are legal grounds in these regulations for not enforcing another court's decision, raised by application from the defendant. The most relevant is the *res judicata* exception, *i.e.* irreconcilability with an earlier decision, which has nothing to do with national policy.

[34] Applicable for litigation up to 2,000 euros (5,000 euros from 14 July 2017).

2. A European extension of national decisions

Few prerogatives for the issuing court. The purpose of these regulations[35] is not to *judge*, but to *give enforceability* to a decision. Original decisions are made under a specific national procedure, aimed at producing national effects, and regulations give them European authority and enforceability.
In the Enforcement Order Regulation, certification by the court of origin consists only in checking the requirements of the regulation, including respect for minimum procedural standards (Art. 12 to 19). Furthermore, the Evidence Regulation will not be addressed here because of its nature of requesting the taking of evidence from one court to another, as it is not a *substantive* decision[36].

Mandatory recognition and execution in the *forum* of performance. Similarly, the Enforcement Order Regulation and the Maintenance Obligations Regulation provide the same provision: « *without the need for a declaration of enforceability and without any possibilities of opposing its recognition*[37]». In the Brussels II bis Regulation, judgments concerning rights of access (Art.41) and the return of a child (Art.42) are mandatorily recognized and enforceable in any Member State, when the court of origin has issued a certificate[38].

Very limited grounds for refusal of enforcement or execution, without a public policy exception. The Enforcement Order Regulation, the Maintenance Obligations Regulation and the Brussels II bis Regulation provide principally irreconcilability with a previous decision as the only ground for non execution, in the absence of a public policy exception. However, the Maintenance Obligations Regulation specifies that a decision modifying the amount of maintenance due to changed circumstances shall not be considered an irreconcilable decision[39].

3. Common reasons for excluding any public policy exception for recognition or enforcement

Scope. Without public policy exception, the principle of mutual trust is pushed to its limit: a judge cannot voluntarily obstruct a decision given by another European judge. One may see this as complete European integration or as a serious violation of Member State sovereignty.

The circumscribed stakes of these regulations. The absence of public policy exception can be easily justified: the scope of these regulations is very limited. It concerns small litigations or an order for payment which ends when opposition is lodged by the debtor. However, the importance of the Maintenance Obligations Regulation and the Brussels II bis Regulation could be addressed. When the return of a child or a regular maintenance payment is at stake, recognition or execution should be able to be hampered.

[35] The Evidence Regulation; the Enforcement Order Regulation, the Maintenance Obligations Regulation, for Member States bound by the 2007 Hague Protocol and the Brussels II bis Regulation.
[36] Albeit the Evidence Regulation includes possible obstruction of the direct taking by the requesting court when *fundamental principles of law* are challenged, the requested Member State is still obliged to execute the measure *of investigation* itself.
[37] Art.5 of the Enforcement Order Regulation and Art.17 of the Maintenance Obligations Regulation.
[38] Under the condition that the defaulting party was served and all parties, including the child (if old and mature enough), were given the opportunity to be heard.
[39] Art. 21.2 para. 3 of the Maintenance Obligations Regulation.

Nonetheless, it must be stressed that the debtor of a maintenance obligation can freely apply for a review of this obligation. This is particularly the case concerning the return of a child or rights of access, as the defendant must be given the possibility to be heard.

The mutual recognition decoy: a sovereignty transfer. The absence of a public policy exception could have serious effects on sovereignty. In fact, the issuing judge then has the ability to decide the settlement of a case, not only for his Member State, but also for all Member States in the EU. Thus, power is transferred from the receiving court to the original one. While the issuing court had only national authority when *exequatur* was the rule, it now *absorbs* all other Member States' sovereignty. The principle of mutual trust could be strongly affected by a blind and limitless automaticity in recognizing and enforcing a foreign judgment. Without any barrier or safeguard for refusing the free circulation of decisions, one court could be doomed to suffer unfair, illegal or unjustified decisions from another jurisdiction. Moreover, the judicial system also has to struggle to manage the execution of the decision and deal with the consequences of it on its soil, without any possibility of reviewing the decision as to its substance.

B) Regulations admitting the public policy exception

Many regulations explicitly admit public policy exceptions, and some of them are significant because of the large scope of their application[40]. Those regulations are submitted to a similar framework, where national courts are seemingly allowed to apply their national public policy (1). But the ECJ itself can control the extent of public policy, thus establishing a common framework (2).

1. A common basis for a variety of regulations

Scope. It is important to distinguish recognition from execution. Recognition often affects one Member State's sovereignty less, except if only recognition can be sought abroad. For instance, it is hard to comprehend what execution has to do with divorce: where personal status is involved, execution is often confused with recognition[41].

A unique provision regarding the recognition principle and non-recognition exception. In all regulations, *exequatur* has been abolished for the purpose of recognition, and all judgments shall be recognized *prima facie* by all Member States: « *A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required*[42]». It is interesting to note that the wording of the public policy exception for non recognition is also the same in all those regulations: « *A judgment relating to* [...] *shall not be recognized if such recognition is manifestly contrary to the public policy of the Member State in which*

[40] The Brussels I bis Regulation, the Brussels II bis Regulation and the Succession Regulation are principally concerned here.
[41] See, *e.g.*, Art.21 of the Brussels II bis Regulation which provides automatic modification of personal status national records and the absence of disposition about execution of divorce and legal separation matters in Art.28 and further.
[42] Art.23.1 of the Maintenance Obligations Regulation; Art.16.1 and 25.1 of the Insolvency Regulation, Art.36.1 of the Brussels I bis Regulation; Art.39.1 of the Succession Regulation; Art.21.1 of the Brussels II bis Regulation and Art. 22 of the Regulation (EU) No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

recognition is sought[43]».

Different processes of execution regarding the public policy exception. The Brussels II bis Regulation, the Maintenance Obligations Regulation and the Rome IV Regulation have not abolished *exequatur* procedures: « *A judgment relating to* [...] *given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there*[44]». It must be noted that the judgment given in a Member State shall be « *enforceable in that state* [45]». On the other hand, the Brussels I bis Regulation, the Account Preservation Order Regulation[46] and the Insolvency Regulation have abolished *exequatur* procedures[47]. However, an applicant can oppose this execution on one of the grounds provided for non-recognition, including public policy. It is also interesting to stress that the recast of the Insolvency Regulation of May 20th 2015 maintained the Article entitled « Public Policy », but other grounds to refuse execution or recognition have been removed[48]. This might prove the importance of public policy over the other usual motives.

***Exequatur* or not: the same effect of the public policy exception**. In the first type of regulation, recognition is due *prima facie*. In the second, recognition must go through a procedure which might be long[49]. Admittedly the suppression of *exequatur* is crucial for the purpose of better, faster, more efficient circulation of civil judgments between Member States. However, regarding the sole public policy exception, the effect is the same: in all cases, a judgment's recognition or execution can be refused on the ground of public policy. In both categories of regulations, refusal occurs likewise.

2. A public policy exception strictly controlled by the ECJ

Recourse to the public policy exception limited by the ECJ. In the context of the Brussels I Regulation, the ECJ has issued a series of significant decisions on public policy. As already mentioned above, the ECJ tends to interpret the public policy exception in a restrictive way. This rule is inferred in the *Hoffmann v. Krieg* case where the ECJ stated that the public policy exception « *ought to operate only in exceptional cases*[50]» and subsequently by the adverb « manifestly » included in all provisions relating to public policy[51].

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[43]Art.24(a) of the Maintenance Obligations Regulation, Art.45.1(a) of the Brussels I bis Regulation, Art.40(a) of the Rome IV Regulation and Art.22(a) and 23(a) of the Brussels II bis Regulation. Interestingly, Art.26 of the Insolvency Regulation specifies the notion of public policy : '*in particular its fundamental principles or the constitutional rights and liberties of the individual*'.

[44] Art. 28 of the Brussels II bis Regulation, Art. 26 of the Maintenance Obligation Regulation and Art. 43 of the Rome IV Regulation.

[45] This could be confronted with ECJ, 28 April 2009, C-420-07 *Apostolides v. Orams*,, where the ECJ stated that "*The fact that a judgment given by the courts of a Member State* [...] *cannot, as a practical matter, be enforced [in that Member State] does not constitute a ground for refusal of recognition or enforcement.*" (Para.71) This ruling can seem to be in contradiction with the regulation provision which specifies clearly that the decision must be enforceable in the issuing Member State. However, the ECJ made a subtle distinction between enforceability by law and enforceability in fact. If a decision could not be enforced as a practical matter, this is irrelevant regarding the enforceability by law of this decision within the issuing Member State.

[46] Regulation (EU) No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure, *op.cit.*

[47] Art.39 of the Brussels I bis Regulation, Art. 22 of the Account Preservation Order Regulation and Art.25.1 and 17 of the Insolvency Regulation.

[48] The Insolvency Regulation referred to the Brussels I Regulation, including a large list of grounds for refusal of execution. The Insolvency bis Regulation refers to the Brussels I bis Regulation but not to the listing of grounds for refusal for execution or enforcement.

[49]Especially in the Maintenance Obligations and the Succession Regulations, where public policy can only be opposed before the second judge.

[50] ECJ, *Hoffmann v.Krieg*, para. 21.

[51]*E.g*. Art. 34 of the Brussels I Regulation; Art.24(a) of the Maintenance Obligations Regulation, Art.45.1(a) of the Brussels I bis Regulation, Art.40(a) of the Rome IV Regulation and Art.22(a) and 23(a) of the Brussels II bis Regulation.

While it is not for the ECJ to define the content of public policy, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to the concept[52].

Discrepancies between national laws. Recognition of a judgment may not be refused solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and the one which would have been applied by the court of the State in which enforcement is sought[53]. Recourse to the public policy clause « *can be envisaged only where recognition of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle (...) the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order concerned or of a right recognized as being fundamental*[54]».

***Diageo Brands* case**. In the case of infringements of EU law, the public policy clause can only apply if that error of law means that the recognition of the judgment concerned would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of the Member State of execution[55]. With regard to the breach of procedural safeguards, the ECJ further held that, prior to a declaration of enforceability, « *save where specific circumstances make it too difficult or impossible to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available* [in the Member State of origin] *with a view to preventing a breach of public policy before it occurs* [in the State in which enforcement is sought] ». The Court has thus imposed a heavy burden on the person threatened with enforcement. The party against whom enforcement is sought may not wait impassively and count on being able to rely on procedural defects in the State of origin, possibly only in the context of his legal remedies in validation proceedings. Instead, he must take action himself when he is served with the judgment in question and challenge it using the legal remedies available in the Member State of origin.[56]

Lack of sufficient grounds. The ECJ confirms that the observance of the right to a fair trial requires that all judgments be reasoned in order to enable the defendant to understand why a judgment has been pronounced against him and to bring appropriate and effective appeal against such judgment[57].

Amount of the sum resulting from provisional and protective measures. When recognition and enforcement is sought for a decision concerning provisional and protective measures, the ECJ recalls that the concept of public policy is intended to prevent a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognized as fundamental within that legal order.

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[52] *Krombach v. Bamberski*, para.23; ECJ, 11 May 2000, C-38/98 , *Renault v. Maxicar*, para.28; *Apostolides*, para.57; ECJ, 6 September 2012, C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd.* Para.49 and ECJ, ECJ 23 October 2014, C302/13, *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, para.47.

[53] See *Krombach*, para. 36; *Renault v. Maxicar*, para. 29; *Apostolides*, para. 58; *Trade Agency*, para. 50; and *flyLAL-Lithuanian Airlines*, para. 48.

[54] *Krombach*, para.36; *Renault v. Maxicar,* para. 29; *Apostolides*, para. 59; *Trade Agency*, para. 51 and *flyLAL-Lithuanian Airlines* para. 49; ECJ, 4 February 2009, Case C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc.and CIBC Mellon Trust Company*, para. 27).

[55] ECJ, 16 July 2015, C-681/13, *Diageo Brands BV /Simirami.*

[56] To compare with the judgment of the ECtHR *Avotiņš v. Latvia*, 25 February 2014, in particular para. 51ff.

[57] *FlyLAL v. Lithuanian Airlines*, op.cit., para.51 ff.; see also *Trade Agency, op. cit.*

The concept of public policy seeks to protect legal interests which are expressed through a rule of law and not purely economic interests. The mere invocation of serious economic consequences due to the amount of the sum does not constitute an infringement of the public policy of the Member State in which recognition is sought[58].

The ECJ determines the content of the public policy. Though the content of the public policy should be determined by national courts, the ECJ still has a predominant influence on its interpretation as the *Krombach*[59] and *Gambazzi*[60] cases demonstrate. In *Krombach*, the ECJ clearly addressed the relationship between the ECHR and public policy and concluded that there was a manifest breach of the fundamental right to be heard. In the *Gambazzi* case, the ECJ even went a step further and developed a yardstick for the appropriate application of the public policy exception by the national court. The applicant did not comply with a disclosure order made by the English courts. He was therefore excluded from the proceedings. The ECJ held that the exclusion from the proceedings was a serious restriction of the rights of the defense but could be justified if it was a proportionate measure to ensure that proceedings were properly conducted. The Court then developed detailed guidelines for the referring court on how to apply the public policy exception in the given circumstances.

Uniform interpretation. Though these solutions refer to the Brussels I Regulation, they also apply to other regulations like the Insolvency Regulation[61] and the Brussels II bis Regulation given that the interest of the child must be taken into account[62]. It can be expected that it would apply to other regulations with public policy exception. The basis for public policy exception is narrow, even non-existent in regulations and ECJ case-law has made it even narrower. This narrow scope for applying public policy as to obstruct recognition or enforcement may produce inequity and lead to breaches in the protection of fundamental rights.

[58] F*lyLAL v. Lithuanian Airlines, op.cit.,* para.56-58.
[59] *Krombach, op.cit.*
[60] ECJ, *Gambazzi v DaimlerChrysler op.cit*.
[61] ECJ, 2 May 2006, case C-341/04 *Eurofood IFCS Ltd.*; ECJ, 21 January 2010, case C-444/07, *Mg Probud Gdynia sp. z o.o.*, spéc.para. 34.
[62] See recital 38; ECJ, 19 November 2015, case C-455/15 *P v. Q*, which repeats verbatim the solution adopted in *Diageo.*

III. Towards a better balance between the protection of fundamental rights and the free circulation of judgments

If reference to individuals' fundamental rights seems to be a limited corrective tool in the lack of public policy exception (A), some measures for improvement could be implemented to restore the balance between the effective exercise of essential principles and the free circulation of decisions (B).

A) Fundamental rights: a safety-valve in the absence of a public policy exception?

The free movement of judgments should not be implemented to the detriment of respect for fundamental rights[63]. However, once fundamental rights are sufficiently protected by EU legislation, the need to control a foreign decision by the *forum* of execution shall disappear (1). Nonetheless, the ECtHR reserves the right to check that the execution of the foreign decision complies with the ECHR (2).

1. No action in the *forum* of execution to invoke the violation of fundamental rights

EU legislation and fundamental rights. Fundamental rights, including civil rights, have gained significance in Europe, since the Lisbon Treaty made the EU Charter legally binding. For instance, the impact of EU legislation on fundamental rights is necessary when drafting rules. Thus, EU instruments point out that they observe fundamental rights as laid down in the EU Charter[64]. Some of them incorporate minimum standards concerning different aspects of procedural law[65]. As a result, there seems to be no need to keep a general public policy exception anymore as a ground to refuse recognition or enforcement. This assumption was a prerequisite for the abolition of *exequatur* and the removal of the public policy exception in EU regulations[66]. As aforementioned, several EU regulations provide for an automatic and mandatory recognition and execution of a foreign decision. Consequently, without an express clause of public policy exception, the *forum* of execution should not be able to oppose the enforcement of a judgment. However, whilst an EU regulation may ensure compliance with fundamental rights and a fair trial, it does not necessarily mean that a decision cannot infringe fundamental rights of the *forum* of execution in a concrete situation. In such a case, can the Member State of execution exceptionally refuse to execute the foreign decision?

***Aguirre Zarraga* case.** The ECJ had to look at this issue in the *Aguirre Zarraga* case[67] concerning the enforcement of an order for the return of a child wrongfully removed from one Member State to another under Article 42 of the Brussels II bis Regulation. The German court asked the ECJ whether a court may exceptionally oppose the enforcement of a judgment ordering the return of a child in circumstances where its issue amounted to a serious violation of fundamental rights, notably Article 24 of the EU Charter.

[63] See *e.g.* ECJ *Denilauler*, *op.cit.*, n.13.
[64] See *e.g.* the Brussels II bis Regulation, recital 33; the Brussels I bis Regulation, recital 38; the Enforcement Order Regulation, recital 11; the Small Claims Regulation, recital 9.
[65] See *e.g.* the Enforcement Order Regulation; the Order for Payment Regulation; the Small Claims Regulation.
[66] *E.g.* the Brussels II bis Regulation concerning rights of access and the return of a child; the Enforcement Order Regulation, the Order for Payment Regulation; the Small Claims Regulation; the Maintenance Obligations Regulation.
[67] ECJ, 22 December 2010, C-491/10, *Aguirre Zarraga v. Simone Pelz.*

The judgment ordering the return had been certified on the basis of Article 42 of the Brussels II bis Regulation by the Spanish court, stating that it had fulfilled its obligation to hear the child before handing down its judgment on the award of custody rights.

Decision of the ECJ. Firstly, the ECJ recalled that the system set up by the Brussels II bis Regulation relied on the principle of mutual trust. The ECJ appears to suggest that the EU Charter provides a sufficient basis for mutual trust which, in turn, justifies removal of the public policy exception between Member States. In the realm of fundamental rights, this means that it is presumed that all national courts provide an equivalent and effective level of judicial protection. Secondly, when issuing a certificate on the basis of Article 42(2) of the Brussels II bis Regulation, it is for the court of the Member State of origin to examine whether hearing the child is, in light of Article 24 of the EU Charter, in his or her best interests. Thirdly, the ECJ noted that it is « *within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of the Brussels II bis Regulation to be challenged* »[68]. It seems to result from this case-law that when execution of a judgment is requested on the basis of an EU regulation which does not provide for an express public policy exception, the Member State of execution cannot refuse to execute the judgment even if execution would be contrary to its fundamental rights. This solution is doubly unsatisfactory: it does not respect the public policy of a Member State but even more so, might imply a violation of the ECHR which may lead to the liability of the Member State of execution and of origin. Nonetheless, caution should be exercised, as this solution concerns the specific case of the return of a child under the Brussels II bis Regulation.

2. Limited control by the ECtHR over the respect of fundamental rights

Execution must respect the ECHR. If mutual recognition is based on the assumption of mutual trust in each other's protection of fundamental rights, it cannot go so far as obviating responsibility under the ECHR for States automatically giving effect to judicial decisions of other Member States. The ECtHR expects them to control the regularity of the foreign judgment in light of the requirements of a fair trial pursuant to Article 6.1 ECHR[69]. However, shall the State, which is bound to execute the decision of another Member State pursuant to an EU regulation without the possibility of controlling the regularity of the decision, still be liable under the ECHR?

ECtHR mitigates its control. In order to prevent a Member State from facing the dilemma between respecting the rights and freedoms guaranteed by the ECHR and the commitments it assumes as a Member of an international organization such as the EU, the ECtHR accepted in the well-known *Bosphorus* case to mitigate control when the international organization is not party to the ECHR.

[68] *Ibid*. para.70 ff.
[69] ECtHR, 26 June 1992, *Drozd and Janousek v. France and Spain*, req. 12747/87; EctHR, 20 July 2001, *Pellegrini v. Italy*, req. 30882/96.

It considered that there is a presumption of compatibility of EU law with the ECHR if the court where the execution is requested has no discretionary power and, that within that organization; fundamental rights receive an equivalent protection. This presumption can be rebutted « *if, in the circumstances of a particular case, it is considered that the protection of the ECHR was manifestly deficient* »[70].

No margin for appreciation. This obviously applies to regulations which do not provide for an *exequatur* and prevent the Member State of origin from opposing execution if the defendant fails to challenge the decision. Nevertheless, the ECtHR recently considered that it also applied to the Brussels I Regulation[71] which gives a very limited margin for appreciation to the Member State of origin[72]. This solution might be challenged, since the case was referred to the Grand Chamber and is still pending.

Equivalent presumption of fundamental rights. In the *Michaud* case[73], the court specified the "*Bosphorus* presumption". Whereas a party requested the referral of a question to the ECJ regarding the compatibility of a Directive with the EU Charter, the Conseil d'Etat refused to defer the question[74]. The ECtHR drew consequences from this and noted that the Conseil d'Etat had acted « *without the full potential of the relevant international machinery for supervising fundamental rights - in principle equivalent to that of the* [ECHR] *having been deployed* ». Therefore the « *Bosphorus* presumption » could not apply.

***Povse* case**. A few months later, in the *Povse case*[75], the ECtHR found that the Austrian court had no discretion when it ordered the enforcement of the return order of a child based on Article 42 of the Brussels II bis Regulation. Contrary to the *Michaud* case, the Austrian court had duly made use of the control mechanism provided for in EU law by asking the ECJ for a preliminary ruling. In its ruling, the ECJ had made clear that if the court of the State of origin of a wrongfully removed child had ordered the child's return and had issued a certificate of enforceability, the courts of the requested State could not review the merits of the return order, or refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change of circumstances since the delivery of the certified judgment. Thus, within the framework of the Brussels II bis Regulation, it was for the courts of the Member State of origin to protect the fundamental rights of the parties. Consequently, the ECtHR could not find any dysfunctioning in the control mechanisms for the observance of the applicants' ECHR rights. The « *Bosphorus*-presumption » could therefore apply as Austria had simply fulfilled its obligation under the Brussels II bis Regulation. The ECtHR validates herewith the abolition of *exequatur*. It further appears that the national court can implement the control mechanism of the equivalent protection offered by EU law.

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[70] EctHR (GC), *30 June 2005, Bosphorus Hava Yollari turizmve ticaret anonim sirketi v. Ireland,*, req. 45036/98, para.156.
[71] ECtHR, *Avotins v. Lettonie*, *op.cit.*
[72] The ECtHR noted that the Brussels I Regulation was « *based on the principle of « mutual trust in the administration of justice » in the European Union, which implies that the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise on its own motion any of the grounds for non-enforcement provided for by this Regulation* ».
[73] ECtHR, 6 December 2012, *Michaud v. France*, n°12323/11.
[74] In the *Bosphorus* case, the ECJ had already checked the respect of fundamental rights by the Regulation.
[75] ECtHR, 18 June 2013, *Povse c. Austria*, n°3890/11.

Where national courts apply EU law seriously, especially ECJ case-law, the ECtHR considers a request inadmissible[76] or manifestly unfounded[77].

Far from undermining the system of mutual recognition, the ECtHR has a useful role to play in reminding the EU and Member States that, when they act within the scope of EU law, mutual recognition may be good for European integration. Nonetheless, it should not diminish core values on which it is founded: respect for the minimal rights contained in the ECHR.

B) Suggestions for improvement

To ameliorate the protection of fundamental rights, a special legal remedy could be put in place (1). At the same time, unification in the application of the public order exception within the EU could be considered (2).

1. Creating a specific remedy in the case of violation of fundamental rights

No recourses in the forum of execution. Means for not executing a judgment manifestly contrary to human rights are very thin, even non-existent. Where regulations provide a public policy way out, ECJ case-law, as seen above, strictly restricts this use. Where regulations provide mandatory execution and regulation, the only effective remedy is in the Member State of judgment. Yet the liability of the Member State executing a decision manifestly contrary to fundamental rights could be sought under the ECHR and the EU Charter. This might seem a bit disproportionate and unfair, both for the executing jurisdiction and the injured party. As no remedy can be found in the forum of execution, apart from a narrow public policy exception, can we not consider the creation of specific recourse before the ECJ in the case of, for instance, violation of the right to a fair trial? Indeed, if fundamental rights are superior to the judicial cooperation mechanism[78], it should be possible to invoke them when they are manifestly breached, despite equivalent protection.

All recourse in the *forum* of judgment, albeit limited. The ECJ considers that every Member State should respect and enforce fundamental rights when it applies an EU regulation which itself observes the fundamental rights of the EU Charter. If there is nonetheless violation thereof, an appeal can be lodged before the court in the Member State where the decision has been issued. But appeal may not always be possible. Moreover, in the Enforcement Order Regulation for instance, the court of origin would probably certify the judgment if the defender cannot demonstrate that his defaulting is not due to his negligence or any extraordinary circumstances, given that he must act promptly[79]. Therefore, the court of execution can experience difficulties in enforcing a decision where, according to its understanding of fundamental principles, the certification should not have been granted in the first place.

[76] ECtHR, *23 October 2012, Ramaer and Van Willigem v. The Netherlands*, n° 34880/12.
[77] *Povse v. Austri*a, *op. cit*.
[78] See, *e.g.*, ECJ, 11 juin 1985, C-49/84 *Debaecker and B. Plouvier c. Cornelis Gerrit Bouwman*..
[79] Art.19 of the Enforcement Order Regulation. The same mechanism exists in the Small Claims Regulation (Art.18).

But the executing judge is bound by the certifying judge, and regulation provides for limited grounds for withdrawing certification[80], given that no appeal is possible against it[81]. Additionally, the same court is competent in judging a case as to it substance, giving certification and withdrawing it. It is the same in the Brussels II bis Regulation. Therefore, it could also be considered as giving competence to another authority within that same Member State for issuing or reviewing the certificate. Indeed, it is hard to comprehend how a judge or a court can retrospectively assess its own decision in order to give enforceability to it abroad. Thus, it might be more coherent regarding the ECtHR case-law on Article 6-1 ECHR, especially regarding impartiality and the exercise by the same judge of different judicial functions[82].

2. Unify a coherent framework for the application of public policy exception

Integrating public policy jurisprudence within regulations. The situation of the public policy exception today is infinitely more complex than when *exequatur* procedures were the rule. It may be wondered whether ECJ case-law should not be transposed in future regulations. For instance, if public policy is indeed exceptional and should be triggered only in cases where there was a manifest violation of fundamental rights subsidiary to any other grounds, should this matter not be the fruit for debate between European legislators and also be integrated in European international law? Moreover, discrepancies in variating public policy clause wording should be corrected, and uniform wording should be enforced, except when the nature of the regulation commands the implementation of specific public policy provisions, such as in the Brussels II bis Regulation. Finally, explicit references to Article 47 of the EU Charter and Art. 6 ECHR would allow the full integration of the developments of ECtHR case-law within European regulations.

A European definition for public policy. The provisions of regulations themselves can be considered as European public policy. As seen above, regulations provide for minimal standards of procedure, sometimes with unexpected accuracy. For instance, the Maintenance Obligations Regulation specifies an original ground for refusal of enforcement: the extinguishing of the right to enforce a decision. Some of these provisions exist in all regulations, such as the *res judicata* exception, or the prohibition to review a judgment as to its substance. By consecrating European case-law, the European legislator could specify the content of public policy more explicitly, by drawing an indicative or limited list of public policies. As was previously mentioned, this proposal was refused when recasting the Brussels I Regulation. But it appears that if public policy exceptions are an obstacle to further European judicial cooperation, and if Member States do not want to concede more of their sovereignty, the most efficient way of reducing this conflict of authority would be to frame the use of public policy on a European scale. Moreover, this would increase the legal certainty of the matter. However, this achievement will largely depend on the will of the European Council.

[80] Art. 10.1 of the Enforcement Order Regulation.
[81] Art. 10.4 of the Enforcement Order Regulation
[82] See *e.g.*, ECtHR, 29 July 2004, *San Leonard Band Club v. Malta*, n°77562/01, for a breach of Art.6 ECHR because *« the trial judges were called upon to assess and determine whether their own application of the law had been adequate and sufficient »*.

Conclusion

Public policy clauses are a ground for the non-recognition of a foreign decision of a Member State domestic court. In practice, public policy is often invoked but rarely applied. This is owing to the exceptional nature of the public policy exception only used in cases of manifest contradiction to fundamental values. The assumption according to which this exception to judgment enforcement is an obstacle to free circulation of judgments needs to be nuanced.

If the public policy exception tends to disappear from more and more regulations, European instruments are still a sovereignty guideline for Member States, given that some of them allow for the obstruction of recognition or enforcement. Those differences in accepting public policy clauses mostly rely on political agreements between Member States, not on the matter addressed within those regulations. Indeed, it is hard to justify, from a purely legal perspective, why maintenance obligations are subjected to mandatory enforcement whereas the Brussels II bis regulation allows for the public policy exception. Certainly, this difference of treatment between similar matters can do harm to a unified and coherent cooperative system of circulation of judgments.

As a matter of fact, a clearer definition of the public policy exception is needed in order for that notion to play a key role in the free movement of judgments at European level. This could be implemented thanks to integration of the abundant European case law in regulations. However, this implementation should be the fruit of a political consensus, *i.e.* among governments within the European Council. The case law of the ECJ is not almighty, and real progress in correcting the past mistakes and current tribulations of public policy can only come from European legislation.

Regarding procedural public policy, the ECJ has clearly elaborated that the constitutional guarantees are not unlimited, but can be restrained by public interests. Nonetheless, any restriction of essential rights must be proportionate. In this context, the ECJ underlines that all Member States are bound by the European Convention on Human Rights and that the courts of one Member State can trust that these guarantees are respected by all courts in the European Judicial Area. This theory of equivalent protection can be seen as challenging the role of public policy as provided for within the regulations. Asking ourselves the question of maintaining public policy clauses or implementing more of them is wondering whether the European judicial cooperation should be pursued further or restrained. In this regard, the upcoming turn of this notion shall be perceived as a signal for an enhanced mutual trust between judges, or to the contrary, as a new rise for judicial protectionism.