

Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments

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Abstract

The article covers a topic of an unconditional automatic recognition of foreign judgments within the European Union. Thus far, a different method in case of foreign judgments has been used. Certain regulations of the EU require exequatur and contain grounds for refusal of recognition and in certain regulations both the exequatur and grounds for refusal of recognition have been abolished. First, the paper deals with the principle of mutual trust (what mutual trust is and in what to trust). Subsequently, the article points out the differences between the principle of mutual trust and the principle of mutual recognition. Finally, it discusses the notion of automatic recognition in the context of free movement of judgments within the EU.

Keywords

Mutual Trust; Mutual Recognition; Automatic Recognition; Foreign Judgment; Refusal of Recognition; Public Policy; European Union.

1 Introduction

For illustrative purposes, imagine a house with a roof and rooms with doors. The roof represents the European Union (“EU”) and its legislative acts concerning the recognition and enforcement of foreign judgments. Rooms act as EU Member States that are legally obliged to respect and implement the legislative acts, the principle of mutual recognition of judgments included. Doors can be either wide open or half-open, or even completely closed. The same applies to mutual recognition of decisions within the EU.

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It depends on whether regulations of the EU require an exequatur and contain grounds for refusal of recognition (and enforcement). If that is the case, doors are closed until the declaration that a judgment is enforceable has been made. However, they can stay closed in case there is a reason for a recognition refusal. This is the strictest form of treatment of a foreign decision among Member States. Less strict are regulations dealing with areas where the exequatur has been abolished but the grounds for refusal of recognition remain. I liken this situation to a half-open door. Finally, the most responsive are regulations where both the exequatur and grounds for refusal of recognition have been abolished. The door is wide open. The last model constitutes an altogether free movement of judgments.¹

Generally, in the private international law, there are two theoretical concepts related to the issue of recognition and enforcement of judgments – the concept of territoriality and the concept of universality. The former is closely linked with sovereignty of each country, the latter denies such sovereignty and is based on the existence of generally applicable legal rules that are superior to individual states.² Nowadays, the concept of territoriality prevails.³ It means that a foreign judgment has its effects exclusively in a territory of the country of origin and it depends on the individual states (addressed states) how they may treat such foreign decision.⁴ Said treatment of a foreign judgment can take three forms – transformation, registration and exequatur.⁵ As I described above, the treatment of a foreign decision is much more accommodating among Member States of the EU because the exequatur represents the strictest form.

¹ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 57.

² Steiner, V. Některé teoretické koncepce řešení otázky uznání a výkonu cizího rozhodnutí. *Časopis pro mezinárodní právo*. 1970, p. 241.

³ Valdhans, J. Uznání a výkon cizích rozhodnutí. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, p. 268.

⁴ Heyer, J. Výkon cizozemských rozsudků. *Zprávy advokacie*. 1963, p. 112. Transformation is a method during which a new domestic judgment based on a foreign one is issued. Registration requires a foreign judgment to be registered with a domestic court. Exequatur means a declaration of enforceability in the State of enforcement.

⁵ *Ibid.*

However, what is the basis of this treatment of a judgment given by a court of a Member State in another Member State? Is it nowadays essential to recognize foreign decisions or does it suffice to only enforce them? In other words, should be the recognition unconditional? Does it mean that there should be a prevalent concept of universality among the Member States? And lastly, is there a distinction between domestic and foreign decisions of courts?⁶

To answer these questions, first, the following article deals with the principle of mutual trust. I shall answer questions what mutual trust is and in what to trust. Subsequently, I will point out the differences between the principle of mutual trust and the principle of mutual recognition. Finally, I shall discuss the notion of automatic recognition in the context of free movement of judgments within the EU.

2 What is mutual trust? And what to trust in?

Both questions are rather difficult to answer. First, there is no widely accepted definition of mutual trust in the context of the EU law,⁷ particularly in civil matters.⁸ Second, it cannot be simply stated whether mutual trust is a legal or a political concept. Both approaches are feasible. Arenas Garc a defines mutual trust on the one hand as a legal obligation, on the other hand as a fact. The former means that all authorities of a Member

⁶ In the past, especially in the first half of the 13th century, there was no such distinction between domestic and foreign decisions. It was a consequence of the concept of universality. Judgments of judicial authorities were derived from the power of the emperor and the Pope. Such judgments had a universal effect in other states. See Steiner, V. Některé teoretické koncepce řešení otázky uznání a výkonu cizího rozhodnutí. *Časopis pro mezinárodní právo*. 1970, p. 240; Valdhans, J. Uznání a výkon cizích rozhodnutí. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, p. 267.

⁷ Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 218; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

⁸ Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 364.

State trust the authorities of another Member State. The latter refers to the issue of whether Member States genuinely trust each other.⁹

At a general level, to trust someone entails a policy decision by a state in which a judgment's recognition is invoked, not out of comity among states but due to the individual's right to access to justice.¹⁰ In the case of regional integration, the EU level included, the trust goes even further.¹¹

An interesting question is “what to trust in”. Mutual trust in the administration of justice in the EU could be seen as the answer because this wording is explicitly mentioned in the recitals of some EU regulations (however, not in all)¹² and in the case law of the Court of Justice of the European Union (“CJEU”) that reproduces this wording as well.¹³ This answer seems common. The CJEU defined this vague term in some cases, for instance, as a trust in legal systems and judicial institutions.¹⁴ In another case (concerning the Brussels II bis Regulation¹⁵), the CJEU ruling stated that it is mutual

⁹ Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

¹⁰ Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, p. 70.

¹¹ Ibid. For more information on Recognition and Enforcement of Sister-State judgments see Mehren, A. T. von. Recognition and Enforcement of Foreign Judgements – General Theory and the Role of Jurisdictional Requirements. In: *Recueil des courses 1980*. Vol. 167. Alphen aan den Rijn: Sijthoff & Noordhoff, 1981, p. 90 et seq.

¹² Recital 26 Preamble to the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I bis Regulation”); Recital 27 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (“European Payment Order Regulation”); Recital 18 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims (“European Enforcement Order Regulation”). Other regulations, which contain the principle of mutual trust in their recitals, do not embody trust in the administration of justice.

¹³ See for example Judgment of the Court of Justice (Grand Chamber) of 4 May 2010, Case C-533/08, para. 54; Judgment of the Court of Justice (Third Chamber) of 15 November 2012, Case C-456/11, para. 36 and many others.

¹⁴ Judgment of the Court of Justice (First Chamber) of 16 July 2015, Case C-681/13, para. 63.

¹⁵ 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, repealing Regulation (EC) No 1347/2000.

trust in national legal systems that are able to provide “*an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.*”¹⁶ The most debated topic remains the relationship between mutual trust and the protection of fundamental rights.¹⁷ Member States should trust that fundamental rights are adequately protected throughout the EU.¹⁸ However, the respect for fundamental rights has not gone unchallenged.¹⁹ The CJEU had to assess the protection of fundamental rights in the EU system based on mutual trust. That is not only the issue of civil law, but also of criminal and asylum law.²⁰ Mutual recognition which is based on mutual trust, as I will discuss below, cannot breach fundamental rights.²¹ Similarly, Weller emphasizes, besides other things, fundamental rights and the values on which the EU was founded as areas built on mutual trust.²²

The question that could arise is if it is trust in justice or in legislation. It seems, according to the above-mentioned practice of the CJEU, trust in justice is the issue. Available literature comes to a similar conclusion – Member States should trust in legal systems of other Member States and their courts, especially in courts in the application of EU law, not in the application of national law.²³ As Dickinson states (concerning the Brussels I bis

¹⁶ Judgment of the Court of Justice (First Chamber) of 22 December 2010, Case C-491/10 PPU, para. 70.

¹⁷ Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, No. 1, p. 81.

¹⁸ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 235.

¹⁹ Mitsilegas, V. The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 371.

²⁰ *Ibid.*, pp. 35–36 et seq. and the case-law cited therein.

²¹ Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 221.

²² Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, p. 74.

²³ Dickinson, A. Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling. In: Lein, E. (ed.). *The Brussels I Review Proposal Uncovered*. London: The British Institute of International and Comparative Law, 2012, pp. 141–142; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, pp. 364–365.

Regulation), mutual trust would prevent “*any review of the jurisdiction of the court of origin*” and it would preclude “*any challenge to the judgment based on a failure by the court of origin to apply EU law correctly.*”²⁴ Nevertheless, mutual trust cannot preclude review on grounds unrelated to EU law (public policy of the addressed Member State).²⁵ Thus, it is trust in justice, particularly in the national courts that they apply law properly. Mutual trust will reach a higher level than it is if more cases with cross-border elements are decided by unified or harmonised EU law rules.

Perhaps, it might be said that trust in legislation is a prerequisite or an initial stage of trust in justice. The courts of Member States apply rules determined by legislators. There is a shared competence between the EU and the Member States in an area of freedom, security and justice.²⁶ It means that both the Union and the Member States may legislate and adopt legally binding acts in this area.²⁷ The European Parliament and the Council adopt regulations, directives and decisions for developing judicial cooperation in civil matters for ensuring the mutual recognition and enforcement of judgments and decisions in extrajudicial cases among the Member States.²⁸ As a result, we can distinguish between trust in legislation and trust in justice (that applies legislation).

Another question is what the legal effect of mutual trust is. The principle of mutual trust has no legal effect on its own. The principle is applied in relation with provisions of the EU secondary law. It serves as an interpretation of provisions or as a contextual argument for interpretation.²⁹ The principle of mutual trust is explicitly mentioned in some recitals of the regulations of the European Parliament and of the Council. In the normative part of the regulations (enacting terms), there is not used this principle. Moreover, the principle is not mentioned in all EU regulations that are most relevant to the private international law (its procedural part). See the table below.

²⁴ Dickinson, A. Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling. In: Lein, E. (ed.). *The Brussels I Review Proposal Uncovered*. London: The British Institute of International and Comparative Law, 2012, pp. 141–142.

²⁵ *Ibid.*, p. 142. More about public policy – see Chapter 4.3.

²⁶ Art. 4 para. 2 letter j) Treaty on the Functioning of the European Union (“TFEU”).

²⁷ Art. 2 para. 2 TFEU.

²⁸ Art. 81 para. 1 and 2 TFEU, Art. 289 TFEU.

²⁹ Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, No. 1, p. 79.

Regulation	Does it contain the principle of mutual trust?
Brussels I bis Regulation	Yes, Recital 26
Brussels II bis Regulation	Yes, Recital 21
European Payment Order Regulation	Yes, Recital 27
European Enforcement Order Regulation	Yes, Recital 18
Small Claims Procedure Regulation	No
Insolvency Regulation Recast	Yes, Recital 65
Maintenance Regulation	No
Matrimonial Property Regulation	No
Property Consequences of Registered Partnerships Regulation	No
Succession Regulation	No

But is it the basis for all EU regulations, or only for regulations in which mutual trust is embodied? Does it mean that mutual trust is the principle just for certain regulations? I will answer these questions in the following chapter (Chapter 3) where I argue why this is not the case.

Finally, the purpose of mutual trust remains to be discussed. If the recitals are perceived as interpretative tools that can be useful in explaining the purpose and intent of the regulations,³⁰ the principle of mutual trust also has this function. Another function, in my opinion more abstract, is that mutual trust allows for the creation and sustainability of an area without internal borders.³¹ Mutual trust (or the level of confidence) is the basis for the area of freedom, security and justice.³² The goal of that area is to achieve mutual trust on such a level that Member States will accept foreign judgments more willingly.³³

³⁰ Baratta, R. Complexity of EU law in the domestic implementing process [online]. *19th Quality of Legislation Seminar. 'EU Legislative Drafting: Views from those applying EU law in the Member States'*. Brussels, 3 July 2014 [cit. 20. 10. 2019]. https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf

³¹ Judgment of the Court of Justice (Grand Chamber) of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, para. 78; repeated Judgment of the Court of Justice (Second Chamber) of 9 March 2017, Case C-551/15, para. 51.

³² Judgment of the Court of Justice (Second Chamber) of 9 March 2017, Case C-551/15, para. 53.

³³ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 393.

I would like to emphasize that the paper is about mutual trust within the EU. The paper does not deal with the non-EU countries. The level of mutual trust is lower in relation to third countries (due to non-existence of harmonised or unified procedural rules). The so-called double-exequatur (when a Member State recognizes a judgment of a non-Member State and other Member States recognize that judgment accordingly as said Member State) is not accepted. As Kegel aptly expresses – we trust friends, but not necessarily friends of friends.³⁴

In the following chapter, I will discuss the relation between mutual trust and mutual recognition and why the principle of mutual trust is embedded in all EU regulations in the table, despite not being explicitly mentioned.

3 Mutual trust and mutual recognition

Mutual trust is considered a basic principle that is linked with the principle of mutual recognition. Nowadays, we can say that mutual recognition presupposes mutual trust³⁵, or even that mutual recognition means the practical application of mutual trust.³⁶ García (refers to Gardeñes Santiago) points out that mutual trust is a factual and political reason for the implementation of mutual recognition.³⁷ Weller perceives mutual trust differently, as a result of mutual recognition rather than a justification of mutual recognition.³⁸ In my view, it can be true from the view of the development of the European integration as well.

³⁴ Kegel, G. Exequatur sur exequatur ne vaut. In: Dieckman, A. et al. (eds.). *Festschrift für Wolfram Müller-Freienfels*. 1986, p. 392. Cit. according to: Franzino, P. L'universalisation partielle du régime européen de la compétence en matière civile et commerciale dans le règlement Bruxelles I bis: une mise en perspective. In: Guinchard, E. (ed.). *Le nouveau règlement Bruxelles I bis*. Bruxelles: Bruylant, 2014.

³⁵ Storskrubb, E. Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice. In: Brouwer, E., Gerard, D. (eds.). *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law. EUI Working Paper MWP 2016/13*. San Domenico di Fiesiole: European University Institute, 2016, p. 16.

³⁶ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

³⁷ Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 361.

³⁸ Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, pp. 74–75.

While mutual trust has been considered since the turn of the millennium, mutual recognition as an important part of private international law can be found in the Treaty establishing the European Economic Community (“TEEC”), signed in 1957, in the Art. 220. The aim of the article was “*the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards.*”³⁹ The first regulation governing the reciprocal recognition among Member States was the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (“Brussels Convention”).⁴⁰ The rules for judgment enforcement and recognition had been of a convention nature until the Treaty of Amsterdam was adopted⁴¹ (signed in 1997). The Treaty of Amsterdam established an area of freedom, security and justice and regulated mutual recognition in the Art. 65.⁴² The EU was given jurisdiction to adopt regulations and directives in civil matters. This was the moment when the European private international law changed over from treaty law to unilateral universalism because conventions were transformed to regulations and the new regulations in various areas were adopted.⁴³

The meeting in Tampere regarding the creation of the area of freedom, security and justice took place in 1999. The European Council endorsed the principle of mutual recognition there. They proposed a further reduction of the intermediate measures in the process of the recognition and enforcement of judgments in civil matters. They also suggested an abolishment of intermediate measures in the area of small consumer or commercial claims and of certain judgments in family law. Last but not least, they

³⁹ Art. 220 TEEC, later as Art. 293 Treaty establishing the European Community (“TEC”).

⁴⁰ See Brussels Convention.

⁴¹ Fallon, M., Kruger, T. The Spatial Scope of the EU’s Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G.P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 4.

⁴² Art. 65 TEC (“*improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases*”).

⁴³ Fallon, M., Kruger, T. The Spatial Scope of the EU’s Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G.P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 16.

proposed an automatic recognition of judgments. It means that recognition of judgments does not require any intermediate proceedings and the grounds for refusal of enforcement does not exist. However, the minimum standards of civil procedural law must be set.⁴⁴ Since the Tampere European Council, the principle of mutual recognition has been regarded the main principle of judicial cooperation and of the area of freedom, security and justice,⁴⁵ or it has been viewed as a nuclear argument for the abolition of intermediate measures.⁴⁶ Although the principle of mutual trust was not explicitly mentioned in the Presidency Conclusions of the Tampere European Council, it was apparent that it was to play a significant role.

Confidence-building and mutual trust were underlined in The Hague Programme 2004 (the multiannual programme for years 2005–2009). The Council emphasized that both the strengthening of mutual trust and the founding of mutual confidence on access to a judicial system meet high standards of quality. It required an improved mutual understanding between judicial authorities and legal systems.⁴⁷

The Stockholm Programme 2010 (the multiannual programme for years 2010–2014) referred to The Hague Programme 2004, as far as mutual trust was concerned. It laid on the need for the continuation of trust enhancement in legal systems, put emphasis on the horizontal importance of e-Justice, training of judges and the creation of a genuine European law enforcement

⁴⁴ Presidency Conclusions [online]. *Tampere European Council. 15 and 16 October 1999* [cit. 20.10.2019]. <https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf>

⁴⁵ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 19; Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 209.

⁴⁶ Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 360.

⁴⁷ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. 2005/C 53/01 [online]. *EUR-lex*. Published on 3 March 2005, para. 3.2 [cit. 20.10.2019]. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01)&from=EN)

culture.⁴⁸ Since the Stockholm programme, no similar programme has been published by the European Council. European Commission published The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union. The Commission has determined further strengthening of trust as one of the challenges. The aim is to ensure trust in judicial decisions irrespective of the Member State where the judgments have been decreed. The independence, quality and efficiency of the judicial systems and the respect for the rule of law are necessary. Of essential importance for strengthening trust according to this The EU Justice Agenda are upholding fundamental rights, judicial training, operational co-operation (fast and secure exchange information) and codification of existing laws and practices.⁴⁹

Nowadays, while the principle of mutual recognition has still its explicit basis in the primary EU law, in civil matters the Art. 67 para. 4 and the Art. 81 of TFEU,⁵⁰ the principle of mutual trust does not. Prechal contemplates that mutual trust could be subsumed to the principle of sincere (loyal) cooperation. Such principle is expressed in the Art. 4 para. 3 of the Treaty on European Union (“TEU”).⁵¹ Kramer also points to the link with the Art. 4 para. 3 of TEU, but in conjunction with mutual respect.⁵² Should they be correct, the principle of mutual trust would be indirectly embedded in the primary law of EU.⁵³ Moreover, the article above presents an objective

⁴⁸ The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens. 2010/C 115/01 [online]. *EUR-lex*. Published on 4 May 2010, para. 3 et 4.2.1 [cit. 20.10.2019]. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>

⁴⁹ The EU Justice Agenda for 2020–Strengthening Trust, Mobility and Growth within the Union COM(2014) 144 final [online]. *EUR-lex*. Published on 11 March 2014 [cit. 20.10.2019]. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0144&from=EN>

⁵⁰ See Art. 67 para. 4 and Art. 81 TFEU.

⁵¹ Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, No. 1, pp. 91–92.

⁵² Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 364.

⁵³ The Art. 4 para. 3 TEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

for the EU and all such objectives must be respected by regulations of the European private international law.⁵⁴

It is noteworthy that the above-mentioned regulations (in the table) explicitly refer to The Tampere European Council in their recitals, besides the Brussels I bis Regulation and the Insolvency Regulation Recast. Regulations take over a conclusion of the Tampere European Council which is most appropriate for a given type of regulation. The principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area or for judicial cooperation in civil matters (as the conclusion of the Tampere European Council stated) is introduced in European Enforcement Order Regulation⁵⁵, Succession Regulation⁵⁶, Matrimonial Property Regulation⁵⁷, Property Consequences of Registered Partnerships Regulation⁵⁸ and in the Brussels II bis Regulation.⁵⁹ The establishing of common procedural rules to simplify and accelerate the settlement is set in Small Claims Procedure Regulation⁶⁰ and Maintenance Regulation⁶¹, similarly in European Payment Order Regulation.⁶²

⁵⁴ Fallon, M., Kruger, T. The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 17.

⁵⁵ Recital 3 Preamble to the European Enforcement Order Regulation.

⁵⁶ Recital 3 Preamble to the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession ("Succession Regulation").

⁵⁷ Recital 3 Preamble to the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ("Matrimonial Property Regulation").

⁵⁸ Recital 3 Preamble to the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships ("Property Consequences of Registered Partnerships Regulation").

⁵⁹ Recital 2 Preamble to the Brussels II bis Regulation.

⁶⁰ Recital 4 Preamble to the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure ("Small Claims Procedure Regulation").

⁶¹ Recital 4 Preamble to the 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 ("Maintenance Regulation").

⁶² Recital 3 Preamble to the European Payment Order Regulation.

Most of these regulations also refer to a programme (common to the Commission and to the Council) of measures for implementation of the principle of mutual recognition of decisions (of 30 November 2000).⁶³ Some of the regulations also refer to The Hague Programme, including regulations that do not contain the principle of mutual trust in their recitals; namely Small Claims Procedure Regulation, Succession Regulation, Maintenance Regulation, Matrimonial Property Regulation and Property Consequences of Registered Partnerships Regulation.⁶⁴ Because one of the goals of The Hague Programme was the strengthening of mutual trust, the consequence is that regulations not explicitly containing the principle of mutual trust but referring to The Hague Programme, respect the principle of mutual trust.

Mutual trust as well as mutual recognition are two leading principles in judicial cooperation in civil matters. In my opinion, it does not matter whether mutual trust serves as a justification of mutual recognition or if it is a result of mutual recognition. It is clear that the principle of mutual recognition was explicitly pressed for much earlier than the principle of mutual trust. From this perspective, mutual trust seems to be rather a result of recognition. From another point of view, it is a justification of mutual recognition. If we trust in the proper application of (EU) law, this constitutes a reason for mutual recognition.

4 A step further – truly automatic recognition

4.1 The notion of automatic recognition

A judgment has effects in the territory of the State where the judgment was given. It is a manifestation of the State sovereignty. In the areas of freedom,

⁶³ Recital 4 Preamble to the Succession Regulation, Recital 5 Preamble to the Maintenance Regulation, Recital 4 Preamble to the Matrimonial Property Regulation, Recital 4 Preamble to the Property Consequences of Registered Partnerships Regulation, Recital 5 Preamble to the Small Claims Procedure Regulation, Recital 4 Preamble to the European Enforcement Order Regulation, Recital 4 Preamble to the European Payment Order Regulation.

⁶⁴ Recital 5 Preamble to the Succession regulation, Recital 6 Preamble to the Maintenance Regulation, Recital 5 Preamble to the Matrimonial Property Regulation, Recital 5 Preamble to the Property Consequences of Registered Partnerships Regulation, Recital 5 Preamble to the Small Claims Procedure Regulation.

security and justice, there are systems of recognition that create extraterritoriality. Extraterritorial effects of judgments require a high level of mutual trust between the authorities of Member States.⁶⁵ The foreign decision must be recognized (and enforced) in the addressed state in order to have such extraterritorial effects. Mutual trust justifies the principle that “*judgments given in a Member State should be recognised in all Member States without the need for any special procedure*”.⁶⁶ This is stated in Recital 26 of the Brussels I bis Regulation. The fact, that a judgment given in Member State shall be recognised in other Member States without any special procedure being required, is embedded in the normative part of certain regulations. They are Brussels I bis Regulation, Brussels II bis Regulation, Succession Regulation, Matrimonial Property Regulation, Property Consequences of Registered Partnerships Regulation and Maintenance Regulation for decisions given in a Member State not bound by the 2007 Hague Protocol.^{67,68} In practice, it means that the judgment is recognized within another procedure, for instance in enforcement proceedings. Similar wording (recognition and enforcement without the need for a declaration of enforceability and without any possibility of opposing its recognition) is embodied in European Payment Procedure Regulation, Small Claims Procedure Regulation, European Enforcement Order Regulation, likewise in Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.⁶⁹ The slightly different wording is in Insolvency Regulation Recast.⁷⁰

The recognition without any special procedure is common to all EU regulations discussed in this paper. However, the procedures in case of foreign decisions are different. Some regulations require the exequatur and contain

⁶⁵ Mitsilegas, V. The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 322.

⁶⁶ Recital 26 Preamble to the Brussels I bis Regulation.

⁶⁷ Protocol of 23 November 2007 on the law applicable to maintenance obligations.

⁶⁸ Art. 36 Brussels I bis Regulation, Art. 21 Brussels II bis Regulation, Art. 39 Succession Regulation, Art. 36 Matrimonial Property Regulation, Art. 36 Property Consequences of Registered Partnerships Regulation, Art. 23 Maintenance Regulation for decisions given in a Member State not bound by the 2007 Hague Protocol.

⁶⁹ Art. 19 European Payment Order Regulation, Art. 20 Small Claims Procedure Regulation, Art. 5 European Enforcement Order Regulation, Art. 17 Maintenance Regulation.

⁷⁰ Art. 19 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (“the Insolvency Regulation Recast”).

grounds for refusal of recognition – Succession Regulation, Matrimonial Property Regulation, Property Consequences of Registered Partnerships Regulation and most matters according to Brussels II bis Regulation. In the Brussels I bis Regulation, the exequatur has been abolished but the grounds for refusal of recognition remain. The exequatur and the grounds for refusal of recognition are not required for European Payment Procedure Regulation, Small Claims Procedure Regulation, European Enforcement Order Regulation, Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol, and in some circumstances in the Brussels II bis Regulation.⁷¹

In the last-mentioned group of regulations, the refusal grounds have been replaced with the minimum standards which take different forms.⁷² The aim of the article is not to discuss the recognition of individual regulations in detail. In short, it can be said that the minimum standards ensure procedural proceedings and the right to a fair trial in a Member State in which the judgment has been given. There is no possibility to oppose the recognition in the Member State in which enforcement of judgment is sought.

Such an approach means that the level of mutual trust among Member States is different in various areas regulated by individual regulations. The public interest can serve as one explanation of the various levels of mutual trust.⁷³ The public interest (which means the social interest) lays down areas where the handling of a foreign decision is less strict. Unfortunately, I have not found the answer why in some cases or matters the public interest is considered to such a degree for the exequatur to be abolished. Of course, in some matters the interest is more urgent (e.g. the rights of access with a child or return of a child according to the Brussels II bis Regulation).⁷⁴ Apart from this, there are other reasons for abolishing the exequatur – namely, a successful declaration of enforceability, the costs and the expenses, the formalities,

⁷¹ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 57.

⁷² *Ibid.*, p. 105.

⁷³ See Mitsilegas, V. The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 332 for the public interest in the Brussels II bis Regulation and child abduction.

⁷⁴ See Art. 40-45 Brussels II bis Regulation.

the fact that the process is time-consuming and incompatible with an area of justice as far as civil matters are concerned.⁷⁵ It prevents free movement of judgments which is a goal of the area of freedom, security and justice.

It is not only the exequatur that constitutes an obstacle to a free movement of judgments. In certain regulations, there are grounds for refusal of recognition that prevent such circulation as well. In these instances, the recognition of foreign judgments cannot be automatic as it is often called.⁷⁶ This is connected to “*the principle of full respect for another Contracting State’s judgments.*”⁷⁷ The second principle linked to non-existence of procedural obstacles, is “*the principle of a swift and simple procedure for recognition and enforcement of another Contracting State’s judgments.*”⁷⁸ These two principles are forms the principle of free movement of judgments.

Nowadays, we can talk about a semi-automatic recognition because of the way a foreign judgment’s recognition can be refused. Mutual trust cannot

⁷⁵ Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 355; Dickinson, A. The Revision of the Brussels I Regulation. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 254; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 347; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 46.

⁷⁶ See for example Presidency Conclusions [online]. *Tampere European Council. 15 and 16 October 1999*, p. 4 [cit. 20.10.2019]. <https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf>; Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 357; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, pp. 18, 62; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, pp. 355, 364; Zilinsky, M. Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work? *Netherlands International Law Review*. 2011, p. 116 et seq.

⁷⁷ Pontier, J. A., Burg, E. *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters*. The Hague: T. M. C. Asser Press, 2004, p. 28.

⁷⁸ *Ibid.*

be fully utilized. Siehr points out that it is an automatic recognition until it has been decided that the foreign judgment cannot be recognised.⁷⁹ Automatic recognition thus means that we can rely on a foreign judgment without necessarily undergoing some formal procedure or register the foreign judgment.⁸⁰ However, it does not mean that there is no difference between foreign and domestic judgments (the treatment is different).⁸¹

In the following part of the paper, I will introduce two regulations that are closest to automatic recognition and thus to the free movement of judgments.

4.2 The Insolvency Regulation Recast and the Maintenance Regulation

First, there is the Insolvency Regulation Recast. In its Recital, the notion of automatic recognition is directly mentioned and clarified. “*Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust.*”⁸² This explicitly refers to the immediate recognition of judgments.⁸³ It implies that recognition is mandatory⁸⁴ or direct without intermediate steps.⁸⁵ The consequence is that a judgment has the same effect in any other Member State as in the State of the opening proceedings.⁸⁶ Because of such effects, we talk about the universality of main

⁷⁹ Siehr, K. Art. 21. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels Ibis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

⁸⁰ Wautelet, P. Article 35. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels Ibis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2016, p. 818.

⁸¹ Ibid.

⁸² Recital 65 Preamble to the Insolvency Regulation Recast.

⁸³ Ibid.

⁸⁴ Veder, M. Article 19 and 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 307, 316.

⁸⁵ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 50 and there Hess, Pfeiffer et Schlosser, 2007; Hess, Oberhammer et Schlosser, 2013, p. 384.

⁸⁶ Art. 20 para. 1 Insolvency Regulation Recast.

insolvency proceedings⁸⁷ (the so-called extension model).⁸⁸ The mechanism of automatic recognition serves as a guarantee of the principle of the universality.⁸⁹ The practical consequence is that a foreign judgment has the same effect as if it was a domestic judgment.⁹⁰ It should be noted that automatic recognition impacts the judgment's opening insolvency proceedings. The decisions concerning the course and closure of insolvency proceedings and compositions approved by the court are also recognized without further formalities.⁹¹

However, an automatic recognition does not mean there are no conditions or control. In particular, the conditions laid down by the regulation (as in the Art. 19 and 32) must be fulfilled.⁹² For instance, the international jurisdiction of the courts must be respected.⁹³

The regulation provides only one ground for refusal of recognition insolvency proceedings – public policy.⁹⁴ Through the literature concerned with insolvency proceedings, the exceptionality of the application of public policy is accentuated due to its violation of the mutual trust principle.⁹⁵ One of the conditions of its application is that the effects of the recognition or enforcement would be manifestly contrary to the public policy of the addressed state. Namely and demonstratively, if it is contrary to its fundamental principles or the constitutional rights and liberties of the individual,⁹⁶ including the right to a fair

⁸⁷ This applies to the main insolvency proceedings alone (not to the secondary or territorial insolvency proceedings). See Páchl, L. Nařízení Rady (ES) o úpadkovém řízení. In: Kozák, J., Budín, P. *Insolvenční zákon a předpisy související. Komentář*. Praha: ASPI, 2008, p. 1045.

⁸⁸ Veder, M. Article 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 317.

⁸⁹ Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 63.

⁹⁰ *Ibid.*, p. 64.

⁹¹ Art. 32 para. 1 Insolvency Regulation Recast.

⁹² Veder, M. Article 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 313.

⁹³ Art. 19, Art. 3 Insolvency Regulation Recast.

⁹⁴ Art. 33 Insolvency Regulation Recast.

⁹⁵ Oberhammer, P. Article 33. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 387; Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 72.

⁹⁶ Art. 33 Insolvency Regulation Recast.

trial among other things.⁹⁷ The application of public policy presents discretion of authorities of the addressed state. This is the reason why this ground for refusal should be applied as little as possible and should be interpreted restrictively.⁹⁸ As Hazelhorst points out (with reference to The Heidelberg Report, see Chapter 4.3), although the public policy is often invoked in the context of the Insolvency Regulation, its application is usually denied.⁹⁹

The second regulation that should be mentioned is the Maintenance Regulation. There are two groups of judgments – decisions given in a Member State (1) bound by the 2007 Hague Protocol and (2) not bound by that Protocol. The latter is applied to decisions given in the United Kingdom and Denmark.¹⁰⁰

The majority of Member States follow the first route. It means there is no requirement for any special procedure for recognition of a judgment and there is no possibility of opposing its recognition and no need for a declaration of enforceability.¹⁰¹ It constitutes an automatic recognition, a free movement of decisions in other words. Needless to say, there is a right of a defendant to apply for a review of the decision under certain circumstances.¹⁰² However, there is no ground for refusal of recognition, including the public policy exception. Hence there are missing means of how a violation of the fundamental rights can be prevented. That is why the public policy exception should be introduced.¹⁰³ Different treatment is applied to decisions given in a Member State not bound by the 2007 Hague Protocol (there are grounds of refusal of recognition).¹⁰⁴

⁹⁷ Bork, R. Recognition and Enforcement. In: Bork, R., Mangano, R. *European Cross-Border Insolvency Law*. Oxford: Oxford University Press, 2016, p. 188; Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 69.

⁹⁸ Bork, R. Recognition and Enforcement. In: Bork, R., Mangano, R. *European Cross-Border Insolvency Law*. Oxford: Oxford University Press, 2016, p. 184.

⁹⁹ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 93.

¹⁰⁰ Walker, L. *Maintenance and Child Support in Private International Law*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 97.

¹⁰¹ Art. 17 Maintenance Regulation.

¹⁰² Art. 19 Maintenance Regulation.

¹⁰³ Walker, L. *Maintenance and Child Support in Private International Law*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 144.

¹⁰⁴ Art. 24 Maintenance Regulation.

Public policy, already being mentioned several times in this article as a ground for refusal, is ought to be discussed in detail in the following chapter.

4.3 Public policy

Aside from the Insolvency Regulation Recast and the Maintenance Regulation, the public policy clause is also included in some other regulations. See the table below:

Regulation	Does it contain the public policy exception about the recognition of a foreign judgment?
Brussels I bis Regulation	Yes, Art. 45
Brussels II bis Regulation	Yes, Art. 22 (judgments relating to divorce, legal separation or marriage annulment) and Art. 23 (judgments relating to parental responsibility)
European Payment Order Regulation	No
European Enforcement Order Regulation	No
Small Claims Procedure Regulation	No
Insolvency Regulation Recast	Yes, Art. 33
Maintenance Regulation	Yes, Art. 24 (only decisions given in a Member State not bound by the 2007 Hague Protocol)
Matrimonial Property Regulation	Yes, Art. 37
Property Consequences of Registered Partnerships Regulation	Yes, Art. 37
Succession Regulation	Yes, Art. 40

4.3.1 Regulations that do not contain the public policy clause

The public policy clause is not included in European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation.¹⁰⁵ These regulations lay down the minimum standards

¹⁰⁵ See these regulations.

intended to protect debtor's right to a fair trial,¹⁰⁶ for example the service of documents.¹⁰⁷ Full compliance with the minimum standards is necessary in the Member State of origin because there is no control in the Member State addressed.¹⁰⁸ While the Brussels I Regulation and the Brussels II bis Regulation require the exequatur in the State addressed, some regulations – European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation – contain the control by the State of origin based upon the minimum standards.¹⁰⁹ The latter regulations introduce harmonised civil procedural rules with cross-border elements by the minimum standards.¹¹⁰ However, there is no possibility to apply the public policy clause in the State of enforcement. Mutual trust is essential because both the judgment is given and the control of the minimum standards is executed by the courts of the same Member State.¹¹¹

There is a need to consider whether the effort to avoid violations of fair trial is better in the State of origin than the effort to remedy them in the State addressed (the State of enforcement).¹¹² The uncertainty or perhaps disadvantage is that the minimum standards need not to be followed in practice despite the presence of the harmonised procedural rules.¹¹³ Nevertheless, the minimum standards can help to achieve mutual trust.¹¹⁴ Among other sources, Action Plan Implementing the Stockholm Programme from

¹⁰⁶ Drličková, K. Kapitola IV. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhan, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 289.

¹⁰⁷ Art. 13-15 European Enforcement Order Regulation, Art. 13-15 European Payment Order Regulation, Art. 13 Small Claims Procedure Regulation.

¹⁰⁸ Drličková, K. Kapitola IV. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhan, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 289 and the European Enforcement Order Regulation, the European Payment Order Regulation, the Small Claims Procedure Regulation.

¹⁰⁹ Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 212.

¹¹⁰ Ibid.

¹¹¹ Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, p. 84.

¹¹² Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 222.

¹¹³ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 393.

¹¹⁴ Ibid.

European Commission (as discussed above) affirms that mutual trust requires the minimum standards like procedural rights and a different understanding of the legal traditions and methods.¹¹⁵

If the Member States have no guarantee that the minimum standards are respected in the State of origin, then the public policy could serve as a safeguard to the State of enforcement. Of course, as it has already been argued, if there is a ground for refusal of recognition, then the recognition cannot be fully automatic. Needless to say, we have to consider the nature of public policy.

4.3.2 The nature of public policy

Almost all states over the world incorporate the public policy clause in their legal orders.¹¹⁶ The public policy clause should be used restrictively, that is in cases when a recognition of a judgment is *manifestly* contrary to public policy (basic principles) in the Member State addressed. The word “manifestly” just refers to the restrictive application of this mechanism.¹¹⁷ The public policy exception can be used only exceptionally. Therefore, it is referred to it as means *ultima ratio*¹¹⁸ or *ultimum remedium*.¹¹⁹ Regulations containing the public policy exception are listed in the table above. The manifest contradiction (a breach of an essential rule of law or a breach of a fundamental right in the legal order of State of enforcement) is stated in the practice of the courts related to recognition of judgments as well.¹²⁰ These are the conditions for the application of the public policy exception.

¹¹⁵ Action Plan Implementing the Stockholm Programme 2010. COM(2010) 171 final [online]. *EUR-lex*. Published on 19 April 2010, pp. 4 et 8 [cit. 20.10.2019]. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>

¹¹⁶ Lagarde, P. Public Policy. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1991, pp. 6–7; Kučera, Z., Pauknerová, M., Růžicka, K. et al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplňek, 2015, p. 191.

¹¹⁷ Mosconi, F. Exceptions to the Operation of Choice of Law Rules. In: *Recueil des cours 1989*. Vol. 217. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1990, pp. 64–65.

¹¹⁸ Pauknerová, M. § 4. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 39.

¹¹⁹ Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des cours 2010*. Vol. 348. Leiden/Boston: Martinus Nijhoff Publishers, 2011, p. 170.

¹²⁰ See for example Judgment of the Court of Justice (First Chamber) of 6 September 2012, Case C-619/10, para. 51; Judgment of the Court of Justice of 28 March 2000, Case C-7/98, para. 37.

The public policy clause is contained in most of the mentioned regulations. The role of the public policy is to remedy any irregularities in the State addressed that have occurred in the State of origin. Although the aim of European instruments is the coordination of differences in the process of settling disputes among the courts of Member States and thus harmonisation of the legal systems with common values, the differences persist. This is the reason why there is a place for the public policy clause despite the similarities in intra-community situations and common values of Member States.¹²¹

There is a remarkable study from 2011, known as The Heidelberg report, on the factual application of the public policy exception in the European instruments of private international procedural law. Authors of that report conclude that “*public policy is often invoked, but seldom applied*”¹²² and that there is a lack of case-law. This is shown in detail in the examined regulations. There are three main reasons why there is not so much case-law: 1) a cross-border enforcement of judgments where there is a weaker party is unusual, for the provision of instruments is implemented in the residence of that weaker party; 2) there is no possibility of substantive review of a foreign judgment; 3) it does not happen in case of the conflicts concerning matters of sovereignty of EU Member States due to the limited scope of EU instruments.¹²³

Although the report is 9 years old and I have not examined the application in the last years, I think that the conclusion is clear – the public policy clause in the EU instruments fulfils the intended function. It serves as a safeguard that could be used in very exceptional cases when a recognition of a foreign judgment is manifestly contrary to public policy in the State of enforcement. Thus, on the one hand, we have the minimum standards that must be met in the State of origin and no control in the State addressed, or more precisely, no grounds for refusal of recognition and no declaration

¹²¹ Hess, B., Pfeiffer, T. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law [online]. Directorate-General for Internal Policies. Published in 2011, p. 20 [cit. 20.10.2019]. [http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET\(2011\)453189_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf)

¹²² Ibid., p. 18.

¹²³ Ibid., pp. 13–14.

of enforceability. On the other hand, we have the public policy exception that a State of enforcement could apply if conditions for the application of that mechanism are fulfilled.

The public policy exception may be considered as a double-edged sword. On the one hand, it is an intruder to the principle of mutual trust as it provides a way for refusal of recognition of a foreign judgment. On the other hand, it can strengthen the principle of mutual trust since the Member States distrust each other. They lack the confidence that the minimum standards are abided. If a possibility to apply the public policy clause for the State of enforcement exists, then a Member State can genuinely trust other Member States because there is a way how a recognition of a foreign judgment could be occasionally refused.

The other grounds for refusal of recognition should be abolished [as in the Brussels I bis Regulation recognition the grounds in the Art. 45 para. 1 letters b)–e)]. Some of these grounds should be replaced by the minimum standards provided in European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation. Moreover, not all grounds for refusal in the Brussels I bis Regulation recognition are compatible with the principle of mutual recognition,¹²⁴ and thus with the principle of mutual trust.

5 Conclusion

Why is it important to talk about mutual trust? There is no doubt that mutual trust among the EU Member States is an important part of the European judicial area. If it did not exist, “the life” of foreign judgments would be more complicated.

Unfortunately, there is no definition of what mutual trust is. Yet, there has been continuous debate about the need for mutual trust, how it could be strengthened and how we could achieve it. I believe that the competent

¹²⁴ See Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 364 et seq.

authorities of the EU should clearly define the concept of mutual trust first. Were a definition to exist, we could work with it. So far, we have been reliant on quite vague definitions, especially those provided by the CJEU.

In this paper, among others, I explain the approach of Arenas García. He considers mutual trust as a legal obligation that means that authorities of a Member State trust the authorities of another Member State. He also points out that mutual trust is a fact, so it is a question of genuine trust.¹²⁵ I follow both approaches as they reflect the reality of recognition of foreign judgments in the European private international law.

Mutual trust as a legal obligation is laid down explicitly or indirectly in the recitals of the regulations that I have followed in this paper. It does not matter whether the principle of mutual trust is the precondition or the consequence of the principle of mutual recognition. It is important that mutual trust is embodied in the EU regulations as the secondary law of EU. Nevertheless, it is not directly embedded in the primary law of EU.

Mutual trust as a fact is more complicated. On the one hand, the regulations allow grounds for refusal of recognition (except for European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation). The consequence is that Member States can use such grounds and refuse to recognize a foreign decision. On the other hand, the application of the public policy clause, which is contained in most of the regulations, is not often used in practice (as The Heidelberg Report proved). We can talk about different levels of mutual trust. At its highest level, it means there are no obstacles and no formal procedures required for a recognition and no grounds for a recognition refusal. It results in a completely free movement of judgments. Such level has not been achieved yet due to the existence of grounds for refusal of recognition (or even the declaration of enforceability). Sometimes we can find indications such as “controlled

¹²⁵ Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

free movement of judgments”,¹²⁶ or that the recognition is automatic until it has been decided that the foreign judgment cannot be recognised.¹²⁷ From the last part of the previous sentence it could be deduced that the recognition is conditional. Neither can we assert that there is no distinction between domestic and foreign decisions of courts. The territoriality is still a prevalent concept in the area of recognition of foreign judgments.

The notion of automatic recognition does not mean that recognition of a foreign judgment is truly automatic or unconditional. The notion varies from regulation to regulation. The Insolvency Regulation Recast is the closest to truly automatic recognition due to the immediate extraterritorial extension of the effects of the decision. Needless to say, there is still the possibility to apply the public policy clause.

I fully agree that the public policy clause can be perceived as a means of reducing trust as well as increasing it. Because of the nature of the public policy (each state has its own values and principles as a part of the public policy), it undermines genuine trust and hence should be abolished.

As long as the grounds for refusal of recognition or even the exequatur persist, it does not matter whether mutual trust is genuine among Member States. The legislators (at the EU level) allow for distrust by determining such grounds (or the exequatur). In the upshot, it must be the EU legislators who revise the existing regulations and thus abolish the exequatur and the grounds for recognition of judgments. This is the first step to unconditional automatic recognition. In this way, mutual trust will be achieved as a legal obligation.

But can the EU legislators do so easily? Of course not. The analysis of everyday reality is needed. Some types of evaluations have been carried

¹²⁶ Hess, B., Pfeiffer, T. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law [online]. *Directorate-General for Internal Policies*. Published in 2011, p. 26 [cit. 20.10.2019]. [http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET\(2011\)453189_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf)

¹²⁷ Sieh, K. Art. 21. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL)*. *Commentary Brussels IIbis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

out.¹²⁸ However, evaluations of certain regulations could not have been carried out, especially of those that have been in force for a short time (for instance the Succession Regulation – has been in force since 2015,¹²⁹ the Matrimonial Property Regulation and the Property Consequences of Registered Partnerships Regulation – have been in force since 2019). One of the possible outcomes in these instances could be a proof of the redundancy of *exequatur*.

In order to carry out further analysis, it is necessary to realize what to believe in. And that is where we come across the problem of the missing universal definition of mutual trust. The idea is to trust in justice, more precisely in national courts that apply the EU law properly. This requires harmonised or unified procedural rules within the EU in all areas with a cross-border element. This has not been the case so far, thus nowadays it is still more about trust in national system of law.

One way or another, we should have confidence in courts. The question, which arises, is whether to have courts (or chambers within courts) specializing in cases with cross-border elements or not. This could lead to a higher level of trust among Member States and likely to mutual trust as a fact.

To conclude, the recognition of foreign judgments is still developing and moving forward within the European judicial area. However, neither legislation (EU regulations) nor the reality of recognitions imply an unconditional recognition of judgments. The steps mentioned above must be taken into consideration. If I go back to the introduction, the roof of a house must be appropriately changed. Then the doors could stay wide open.

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¹²⁸ Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 49 and there the results of Study on the assessment of the Brussels II bis Regulation.

¹²⁹ *Ibid.*, p. 50.

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