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About this paper

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The ECtHR´s Bosphorus Presumption and the European Union´s principle of mutual trust

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Summary: 1. Introductory remarks; 2. The *Bosphorus* presumption; 3. The *Povse* Case; 4. Opinion 2/13; 5. The *Avotiņš* Case; 6. Conclusions

Abstract: The construction of the European area of freedom, security and justice is based on the principles of mutual trust and automatic recognition of judicial decisions, the free circulation of judgments and the need of certainty and security that creates a tension between the EU ambitious project of deeper integration and the protection of human rights. So, the question arises whether the guarantee of human rights can become a frontier to the European area of freedom, security and justice and a limit to a deeper integration. To answer this question, it is important to analyze the compatibility of the EU principles of mutual trust and automatic recognition of judicial decisions with the European Convention of Human Rights (ECHR), topic that already drew the attention of the European Court of Human Rights (ECtHR).

Keywords: *Bosphorus* Presumption; presumption of equivalent protection; the European Union´s principle of mutual trust, European Convention of Human Rights; automatic recognition of decisions; human rights.

1. Introductory remarks

The protection of fundamental rights is guaranteed in the EU (European Union) treaties. Article 6 of the TEU (Treaty of the European Union) establishes that the EU is founded on the values of respect for human rights. As a consequence, Article 6, Section 1, of the TEU acknowledges that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties, which means that EU legislation, also in the field of judicial cooperation in civil matters, has to respect the catalogue of rights and guarantees established in the Charter. In addition, Article 6, Section 3, recognizes fundamental rights as general principles of EU law, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States. So, it is possible to say that those are the constitutional grounds on which the guarantee of human rights in the EU and by EU law is based.

It is true that, the need of the EU´s law to respect human rights results from the constitutional Treaties. However, the construction of the European area of freedom, security and justice, based on the principles of mutual trust and automatic recognition of judicial decisions, the free circulation of judgments and the need of certainty and security, creates a tension between this EU ambitious project of deeper integration and the protection of human rights. So, the question arises whether the guarantee of human rights can become a frontier to the European area of freedom, security and justice and a limit to a deeper integration[1]. To answer to this question, it is important to

[1] Question already posed by A. Di Stasi, *Lo spazio europeo di libertà, sicurezza e giustizia*, in A. Di Stasi (a cura di), *Spazio europeo e diritti di giustizia. Il Capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, 2014, Cedam, pp. 40-43.

analyze the compatibility of the EU principles of mutual trust and mutual recognition of judicial decisions with the European Convention of Human Rights (ECHR), topic that already drew the attention of the European Court of Human Rights (ECtHR).

2. The *Bosphorus* presumption

There is a presumption of compliance of the European Union law with the European Convention of Human Rights and when a Member State implements European Union law, insofar as the latter leaves no discretion to States, since the protection of fundamental rights by the European Union is considered to be equivalent to the protection established in the European Convention of Human Rights[2]: this is known as the presumption of equivalent protection or the *Bosphorus* presumption.

This presumption of compliance was set out in the *Bosphorus Hava Yolları Turizm vs Ticaret Anonim* Şirketi case, where it was decided that State actions in fulfillment of their obligations towards an international organization are justified, provided that it is recognized that international organization protects fundamental rights in a manner equivalent to that established by the European Convention of Human Rights, not only in terms of the guarantees offered, but also in the mechanisms which control their observance[3]. If equivalent protection is deemed to exist within that organization, it is presumed that the State has complied with the European Convention of Human Rights, when it fulfills the legal obligations arising from its membership to that organization[4]. However, this presumption may be rebutted if, in the light of the circumstances of the case, the protection of the rights established in the European Convention of Human Rights is manifestly defective, in which case «the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights»[5].

In the *Bosphorus* case, the ECtHR considered that the protection of fundamental rights by the European Union was in principle equivalent to that of the European Convention of Human Rights, both in the context of substantive guarantees and in the framework of mechanisms for monitoring compliance with it, thanks to the role played by the ECJ (European Union Court of Justice)[6]. Later, the *Michaud* judgment clarified two requirements for the application of the presumption of equivalent protection: the absence of any margin of maneuver on the part of domestic authorities when deciding; the exploitation of the full potential of the supervisory mechanism provided by the European Union[7]. In presence of both requirements in a specific case, the presumption of equivalent protection of European Convention of Human Rights or the *Bosphorus* presumption will apply.

The *Bosphorus* presumption was used in the *Povse* case and the *Avotiņš* case to assess the compatibility of the system of mutual recognition of decisions under EU law and the European Convention of Human Rights.

3. The *Povse* Case

The *Posve* case is about, on one hand, the right to respect for private and family life, set in Article 8 of the ECHR, and the Brussels IIa[8] system of automatic recognition in situations of removal or retention of children, on the other hand.

The system of the Brussels IIa Regulation gives priority to the decision of the court of the habitual residence of the child, whose assessment of the case prevails over judgment of the court of the place where the child has been

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[2] European Court of Human Rights, judgment of 18 June 2013, *Sofia Povse and Doris Povse v. Austria*, Appl. No. 3890/11, para. 74.

[3] European Court of Human Rights, judgment of 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim* Şirketi *v. Ireland*, Appl. No. 45036/98, para. 155.

[4] *Idem*, *ibidem*, para. 156.

[5] *Idem*, *ibidem*, para. 150-151.

[6] *Idem, ibidem.*

[7] European Court of Human Rights, 6 December 2012, *Michaud v France*, Appl. No. 12323/11, para. 113-115.

[8] Regulation 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.

wrongfully retained. The court of the habitual residence of the child, facing a decision of retention of the child rendered on the ground of Article 13 of the Hague Convention by the court of the place of abduction may order the return of the child, in which case this last decision will prevail. Under Article 11, Section 8 of the Brussels IIa Regulation, the decision of return is automatically recognized and enforceable in another Member State without the need for any subsequent declaration of enforceability in the country where it is intended to be enforced (abolition of *exequatur*) and cannot be contested. To that end, it is necessary for the judge of the Member State of the habitual residence of the child to issue the certificate provided for in Annex IV to the Regulation, whose conditions are set in Article 42, Section 2.

In the *Posve* case, the ECtHR referred to the *Bosphorus* case to consider that there is a presumption of compliance with the ECHR when a Member State complies with EU law, since the protection of fundamental rights by the EU is equivalent to the protection established in the ECHR[9]. The ECtHR considered that the protection of fundamental rights by the Union was in principle equivalent to that of the ECHR, both in the context of substantive guarantees and in the framework of the mechanisms for monitoring compliance with the ECHR, in this case by the ECJ[10]. To that extent, there was a presumption of compliance with the ECHR when the Austrian courts, having no margin of discretion, enforced the decision of the Italian court in accordance with Article 47, Section 2 of the Brussels IIa Regulation.

It was also held that there was no evidence in the present case to rebut the presumption, since the court which ordered the return, the Italian court, had to consider whether the return of the child constituted a serious risk for the child[11], which effectively was verified in accordance with the system of the Regulation itself. This system obliges the court of habitual residence of the child to weigh the decision of retention of the court of the place where the child is, and related documents, as well as the observations of the parties, according to Article 11, Sections 6 and 7.

In addition, the ECtHR stressed that the Austrian Supreme Court used the supervisory mechanism which ensures the application of the rights set out in the Regulation, the preliminary ruling procedure before the ECJ, which made clear that the Austrian courts could do nothing more than enforce the Italian decision and that any change in circumstances should be raised before the Italian courts, which could suspend implementation of the decision[12].

4. Opinion 2/13

In 2014, analyzing the draft agreement on the EU´s accession to the ECHR, the ECJ found several incompatibilities between that agreement and the EU Treaties, namely and among others, regarding the role of the principle of mutual trust in the construction of the European area of freedom, security and justice. In the opinion 2/13, the Court considered that the principle of mutual trust between Member States is a constitutional principle that holds the EU´s area of Freedom, Security and Justice[13]. This principle implies that Member States, save in exceptional circumstances, consider that all the others are complying with the fundamental rights recognized by EU law, which means that: they cannot demand a level of protection of fundamental rights from another Member State higher than the one established in EU law; nor may they verify whether another Member State has in fact, in a particular case, observed the fundamental rights guaranteed by the EU, save in exceptional circumstances[14]. So, the Court considered that the accession to the ECHR would likely upset the underlying balance of the EU and undermine the autonomy

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[9] European Court of Human Rights, *Sofia Povse and Doris Povse v. Austria*, cit., para. 74.

[10] *Idem, ibidem,* para. 77-78.

[11] *Idem, ibidem,* para. 80.

[12] *Idem, ibidem*, para. 81.

[13] Court of Justice, Full Court, *Opinion 2/13 of the Court*, 18 December 2014, ECLI:EU:C:2014:2454, Para. 191. About the principle of mutual trust as constitutional principle of the area of Freedom, Security and Justice, see L.R. Glas/J. Krommendijk, *From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, in *Human Rights Law Review*, 2017, 0, p. 7; K. Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *The Fourth Annual Sir Jeremy Lever Lecture*, University of Oxford, 2015, p. 6-7, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [accessed 10 November 2017].

[14] Court of Justice, Full Court, *Opinion 2/13 of the Court*, 18 December 2014, ECLI:EU:C:2014:2454, Para. 191-192.

of EU law, insofar as far the ECHR would entail that a Member State would verify that another Member State has observed fundamental rights, although the obligation of mutual trust between Member States required by EU law[15].

The position of the ECJ in the opinion 2/13 and the arguments used were strongly criticized, as it was seen as a way of frustrating the enhancement of protection of human rights in the EU, by raising the power and position of the ECJ in its constitutional role[16]. The *Avotiņš* case decision was the answer of the ECtHR.

5. The *Avotiņš* Case

The *Avotiņš* case is related with the right to a fair trial set in Article 6 of the ECHR, and the system of automatic recognition of Brussels Ia Regulation[17]. Article 39 of the Brussels Ia Regulation establishes that a judgment given in a Member State and enforceable therein may be enforced in another Member State without the need for a prior declaration of enforceability. Therefore, such decisions must be treated as national decisions of the Member State where enforcement is sought, since, in accordance with Article 41, Section 1, 2nd part, "a judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed". However, the person against whom enforcement is sought, according to Article 46, may make a request for refusal of enforcement based on the grounds set forth in Article 45.

In spite of the system of simplified and fast recognition and enforcement arising from the Brussels Regulations, along the years, the protection of fundamental rights as a ground for non recognition and enforcement of decisions, in the Brussels system recognition, has been acknowledged by the ECJ. The ECJ has stated that fundamental rights are a part of the general principles of law that the Court ensures, and those rights also result from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties, like the ECHR[18]. About the similar wording of 45 (b) in the Brussels Convention, the ECJ has stated that while it is true that there is an objective of simplifying the formalities of recognition and enforcement of judgments in the Union, that objective cannot be attained by undermining in any way the right to a fair hearing[19]. So, the right to a fair trial was recognized as a fundamental right by the ECJ in several cases[20].

In the *Avotiņš* case, the Grand Chamber considered that the conditions of the presumption of equivalent protection were fulfilled. Article 34 (2) of the Brussels I Regulation did not give any discretionary powers of assessment to the court from which the declaration of enforceability was sought. It was also considered that the supervisory mechanism put into place in the EU was equivalent of that provided by the Convention and was deployed in the

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[15] *Idem*, *ibidem*, para.194.

[16] For such critical perspective, see, for example, C. Kreen, *Autonomy and Effectiveness as Common Concerns: A Path to the ECHR Accession after Opinion 2/13*, in *16 German Law Journal*, 2015, n. 1,, pp. 147-167; P. Eeckhout, *Opinion 2/13 on EU accession to the ECHR and judicial dialogue: autonomy or autarky?*, in *Fordham International Law Journal*, 2015, Vol. 38, n. 4, pp. 955-992; J. Odermatt, A *Giant Step Backwards - Opinion 2/13 on the EU's Accession to the European Convention on Human Rights*, in *New York University Journal of International Law and Politics*, 2015, Vol. 47, n. 4, pp. 783-797; A. Lazowski; R. A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR,*in *German Law Journal*, 2015, Vol. 16, n. 1, pp. 179-212. With a different view, considering that Opinion 2/13 must be considered "sign of endorsement of the ECtHR´s positive approach towards the principle of mutual trust", see K. Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *The Fourth Annual Sir Jeremy Lever Lecture*, University of Oxford, 2015, p. 8, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [accessed 10 November 2017].

[17] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[18] Court of Justice, judgment of 28 March 2000, *Dieter Krombach and André Bamberski*, Case C-7/98, para. 25. See also, Court of Justice, First Chamber, Judgment of 6 September 2012, *Trade Agency Ltd v Seramico Investments Ltd*, Case C-619/10, para. 42.

[19] Court of Justice, Fourth Chamber, judgment of 11 June 1985, *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v Cornelis Gerrit Bouwman*, Case 49/84, para. 10; Court of Justice, Sixth Chamber, judgment of 3 July 1990, *Isabelle Lancray SA, whose registered office is at Neuilly-sur-Seine (France), and Peters und Sickert KG, whose registered office is at Essen (Federal Republic of Germany)*, Case C-305/88, para. 21; Court of Justice, *Trade Agency Ltd v Seramico Investments Ltd*, para. 42.

[20] For example, Court of Justice, Judgment of 17 December 1998, *Baustahlgewebe GmbH v Commission of the European Communities*, Case C-185/95, para. 20-21; Court of Justice, Judgment of 11 January 2000, *Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities*, Joined cases C-174/98 P and C-189/98, para. 17.

case[21]. However, considering itself a Constitutional instrument of European public order in the field of human rights, the Court made some remarks about the mutual recognition system, based on the principle of mutual trust. Despite acknowledging the essential role of the principle of mutual trust in EU legislation, the remarks made by the ECtHR can have an influence in future decisions of the Court about this topic and change the Court´s benevolent attitude towards this mechanism.

Recognizing that this system is essential to the construction of the area of freedom, security and justice in Europe, the ECtHR also states that the methods used to accomplish this project must not infringe the fundamental rights of the persons affected and the aim of effectiveness of some of these mechanisms brings forth a "tightly regulated or even imitated" observance of fundamental rights[22]. The Court considered that, limiting the power of the State of recognition to review the observance of fundamental rights by the State of origin to exceptional cases, "could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient"[23].

Moreover, the court states that the presumption of equivalent protection and the mutual recognition mechanisms cannot be a cause of deficient protection of human rights provided by the Convention, therefore the principle of mutual recognition cannot be applied in such way as to automatically and mechanically impair human rights[24]. As a conclusion, if the court where the recognition is sought is called to comply with the system of mutual recognition, and the rights protected by the Convention are not at risk, it should do so. Nevertheless, if there is a "serious and substantiated complaint" raised before them that there is a Convention right whose protection is "manifestly deficient" and that EU law does not have a mechanism to remediate it, "they cannot refrain from examining that complaint on the sole ground that they are applying EU law"[25].

After these statements, the Court concluded that in the case at hand there was not a manifestly deficient protection of fundamental rights, namely the adversarial principle and the principal of equality of arms, components of the right to a fair hearing. Notwithstanding the applicant's argument that he was not summoned in the requested State and, for that reason, the judgment should not be recognized, the fact is that he could have challenge the judgment in the court of origin of the decision[26]. However, although the law of the country of origin of the judgment allowed the applicant to appeal of the decision, based on the grounds that the applicant was not summoned, he decided not to do so. Therefore, there were means at the disposal of the applicant that would have allowed him to enforce his right to a fair hearing in the country of origin of the judgment, but the applicant did not use them.

6. Conclusions

In spite of the outcome of the *Avotiņš* case - deciding that that was not a breach of Article 6 of the ECHR -, the truth is that the ECtHR sounded a serious warning to the EU and to the project of construction of the European area of freedom, security and justice, taking upon itself the role of guardian and Constitutional instrument of European public order in the field of human rights[27]. It is true that EU law's respect for human rights has its grounds in the constitutional Treaties of the EU, but the *Povse* and the *Avotiņš* cases made clear that there is a tension between

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[21] European Court of Human Rights, Grand Chamber, judgment of 23 May 2016, *Avotiņš v. Latvia*, appl. no. 17502/07, para. 105-112.

[22] *Idem*, *ibidem*, para. 114.

[23] *Idem*, *ibidem*.

[24] *Idem*, *ibidem*, para. 116.

[25] *Idem*, *ibidem*.

[26] *Idem*, *ibidem*, para. 121-122.

[27] Also considering that in *Avotiņš* the ECtHR wanted to show its discontent with Opinion 2/13, see L.R. Glas/J. Krommendijk, *From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, cit., pp. 11-20. According to the Authors, despite having considered "that the presumption could not be rebutted, it needed no less than nine paragraphs to arrive to that conclusion and, for the first time, came close to conclude that the protection had been manifestly deficient»: *idem*, *ibidem*, p. 19. See also, G. Biagioni, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual recognition of Judgments and protection of Fundamental Rights*, in *European Papers*, 2016, Vol. 1, No 2, pp. 582-583.

the principles upon which the construction European area of freedom, security and justice lays and the protection of human rights.

From the *Povse* to the *Avotiņš* case there seems to be an evolution in the position of the ECtHR, evolution in which Opinion 2/13 probably had some influence. Although acknowledging the principle of mutual and automatic recognition and the abolition of the *exequatur* as a mechanism of effectiveness of the EU legal order, the ECtHR clearly states that the principle of mutual recognition cannot be applied automatically and mechanically without safeguarding human rights and that the court of recognition cannot excuse itself with the EU automatic recognition system, when a serious and substantiated complaint about a manifestly deficient protection of a right protected by the Convention is raised before it. In this situation, the court of recognition cannot rely solely on the presumption that there was a sufficient protection of fundamental rights in the State of origin, and has the duty to examine that complaint.

Although the EU has progressively retained an increasingly passive role for the courts of the country of recognition, as can be seen in the recent recast to the Brussels I Regulation or the Brussels IIa Regulation in situations of wrongful retention or removal of children, according with the ECtHR´s position in the *Avotiņš* case, that role cannot be so passive when the protection of fundamental rights established in the ECHR is at stake. Ultimately, and following the reasoning of the ECtHR, it is possible to accept that the court of the State of recognition retains the power to review a judgment originating in another Member State, exceptionally, as a control against manifest deficient protection of fundamental rights even when EU law does not allow it.

According to the ECtHR, the full elimination of the power of control by the State of enforcement is not admissible, because that State cannot renounce their responsibility to adjudicate complaints about a manifestly deficient protection of a right protected by the Convention[28]. This reasoning implies "that the courts of the Member Sate of enforcement should always enjoy an extraordinary power of review, in order to ensure that the protection of Convention rights is not impaired, even when no provision to that effect is contained in the applicable EU act"[29].

Of course, this solution would jeopardize the treatment of foreign judgments purely as national ones in the EU, and any ambition of the EU of abolition of all controls on foreign judgments. However, reading the position of the ECtHR in all its consequences, a Member State may be condemned for not complying with its international obligations when, although complying with EU law, it refrains from examining serious and substantiated complaints about deficient protection of human rights protected by the Convention.

It is true that the *Bosphorus* presumption is still alive, but it is possible to consider the *Avotiņš* decision as an answer by the ECtHR to the position of the ECJ in Opinion 2/13, stating clearly that the ECtHR will not renounce its responsibility as the guardian and Constitutional instrument of European public order in the field of human rights, independently of the constitutional role that the ECJ assumes in EU law. The *Avotiņš* decision can also be considered as a sign by the ECtHR "that the presumption of equivalent protection should not be taken as given"[30], that means that it can be rebutted in the future, for the first time, if the ECtHR concludes in a case that there is a deficient protection human rights. Additionally, the exceptional power of revision of the court of the State of recognition over a judgment originating in another Member State, as a control against manifest deficient protection of fundamental rights, even when EU law does not allow it, can be seen as a solution to reconcile the protection of human rights in the EU and the principle of mutual trust, that underlies the system of mutual recognition of decisions in civil and commercial matters[31].

It is uncertain whether the ECJ will accept any exceptional power of revision. Consequently, the question is whether the ECtHR will maintain the *Avotiņš* decision when deciding a case in which the court of the country of enforcement does not have, according to the EU law, any power to refuse the recognition and enforcement of a judgment coming from a Member State, as in the *Posve* case in application of the Brussels IIa, where the foreign de-

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[28] G. Biagioni, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual recognition of Judgments and protection of Fundamental Rights*, in *European Papers*, 2016, Vol. 1, No 2, p. 589.

[29] *Idem*, *ibidem*, p. 591.

[30] L.R. Glas/J. Krommendijk, *From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxemburg and Strasbourg Courts*, cit., p. 20.

[31] Which is also the aim of the *Bosphorus* presumption.

cision must be treated as a national one, where a serious and substantiated claim exists about a manifestly deficient protection of a right protected by the Convention. Maybe the ECtHR decides to move backwards, but the warning to the EU was clearly made: the protection of fundamental rights will not yield to the political projects of deeper integration of the EU and the ECtHR will not resign from its role as Constitutional instrument of European public order in the field of human rights. The answer to this question will also determine whether the protection of human rights will be a constitutional barrier to the development of the European area of freedom, security and justice and to a deeper integration.