



NETWORK OF THE PRESIDENTS
OF THE SUPREME JUDICIAL COURTS
OF THE EUROPEAN UNION

RÉSEAU DES PRÉSIDENTS
DES COURS SUPRÊMES JUDICIAIRES
DE L'UNION EUROPÉENNE



President
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Editorial

Our Network held for the first time a tripartite meeting with the Court of Justice of the European Union and the European Court of Human Rights. This event which was held in Helsinki last September at the kind invitation of Ms Pauliine Koskela, President of the Supreme Court of Finland, not only allowed a fruitful exchange between the participants but also established a dialogue between the Presidents of the Supreme Courts of the European Union and the Presidents and several Judges of the two European highest courts. We hope that such exchanges will continue in the future. This Newsletter reproduces the opening statement delivered by President Koskela and the statements of Judge Rüdiger Pamp (Bundesgerichtshof), Vice-President Nina Betetto (Supreme Court of Slovenia) and by President Branko Hrvatin (Supreme Court of Croatia).

Opening Statement by President Pauliine Koskela (Helsinki, September 5-6, 2013)

I wish you all most welcome in Helsinki. I am very pleased to see you all here. This is the first time the network organises a joint conference of this kind, namely a meeting between the presidents and other members of both of the European courts and the Network. Mostly, the Network convenes internally, but in 2011 we already had a round table in Luxembourg between members of the Court of Justice and the Network, which I think was quite useful. We are happy now to be able to enlarge these contacts by extending them also to the European Court of Human Rights.

Great pleasure for our court and myself to receive you here on this occasion, and I thank you all for coming. In particular, I would like to express my thanks to both presidents of the European courts: President Skouris, President Spielmann, thank you for your interest and your availability for this meeting. Without your support and your presence, we would not have been able to arrange this conference. Thank you for being here with us. For us as national judges, especially at the Supreme Court level, European law plays a very central and essential role in our daily work. It therefore goes without saying that we feel a real need for contacts and a dialogue between the courts and judges on issues of European law. I hope that this meeting can serve us not only as an opening for "tripartite" contacts but also as an inspiration for similar contacts in the future. I am convinced that we would mutually benefit from that.

Our conference will deal with some topical themes. On the one hand, we will talk about mutual recognition, on the other hand about fundamental rights. Between these topics, there are links, even close links. This is because mutual recognition within the EU can function in a fair and effective manner only if rule of law and the quality of justice are assured throughout the union, in all the countries concerned,

and not just on paper or at the level of principles and rhetoric, but in actual reality. This is an important and continuous challenge, especially in the difficult conditions that prevail in the economic sphere but sometimes also in the political sphere.

As regards fundamental rights, the topic is of course wider, it is very big and profound indeed. In most of our countries, there are today three sources of fundamental rights to respect, there are the conventions dealing with human rights, above all the European convention together with the voluminous case-law of the Strasbourg court, there are the fundamental rights guaranteed by our national constitutions, and last but not least there is the Charter of fundamental rights at the EU level.

All this – the wide range of issues that arise and the multiplicity of sources – bring us complex preoccupations and very important responsibilities. With and within these multiple sources, there is a search for coherence, but there may also be a risk of divergence or tension, differences of approach and sometimes even contradictions.





Ultimately, there is only one remedy, I think, not miraculous but promising, and that is dialogue, a true dialogue, critical where needed but always constructive.

In case of conflicts between different sources of law, it is we, the national judges, who find ourselves at the focal point of such issues. It may even happen that we are confronted with so called “wicked problems” (I am borrowing a term used in social sciences). We therefore have a strong interest in a dialogue between eminent actors in the field.

Here in the Nordic countries there is a centuries old maxim saying that a land must be built up by law. Today, we have law everywhere, and the challenge is perhaps to manage a balance between the way in which law evolves and the way in which society needs to evolve.

The protection of fundamental rights – the European Charter, the European Convention on Human Rights and the national constitutions

by Judge Rüdiger Pamp (Bundesgerichtshof)

[...] Hearing that this meeting takes place in Helsinki, the first idea might be: Finland is a good place to talk about this issue - since it is the country a Swedish fisherman named Hans Åkerberg Fransson sold his fish to. Nevertheless, as we all know, he probably made his best catch not out at sea, but on the mainland in Luxemburg where the Court of the European Union decided that, according to European law (Art. 50 EU Charter - *ne bis in idem*), he cannot be punished twice for tax evasion.

But what has the protection of fundamental rights got to do with fishing?

As well as you feel more comfortable when you know that the coast guard is on duty while you are out on the sea for fishing, you are better off when you have effective judicial protection of your fundamental rights. And so the issues at stake are confidence and trust.

As Franklin Roosevelt said: *“Confidence thrives on honesty, on honour, on the sacredness of obligations, on faithful protection and on unselfish performance. Without them it cannot live”*.

Who guarantees this “faithful protection”, or in other words: who cares for you, when you are out fishing? As a rule, it is the courts that are prepared to rescue if there is distress out there while you are steering your boat through the fishing grounds.

But, what happens if a number of different coast guard vessels are similarly close to your awkward position? As long as you have sufficient reason to believe that they are all equally well equipped to catch you out of the water before if it is too late - I guess, you would not care about this question. If they are not, the situation may become uncomfortable for you - and probably even more uncomfortable if a dispute arises amongst the coast guard captains over the question who is responsible for your case. In that situation, you may hope that clear rules exist telling the coast guard personnel which of the vessels is competent for a particular case.

Now, let us have a look at the different equipment of the various vessels that are prepared to give you a helping hand. As a citizen of a European Union member state you can rely on three relevant sets of fundamental rights that have to be taken into account by the national courts when adjudicating a case:

- first, the fundamental rights of the national constitutions,
- secondly, the fundamental rights of the European Convention on Human Rights (ECHR),
- and, finally, the fundamental rights of the European Charter.

Generally speaking, these instruments are considered to be equally useful and can be assumed to provide for more or less the same level of protection of human rights. However, the interaction between these sets of fundamental rights is not always clear and in some cases not easy to determine, given that the hierarchy of norms is open to dispute and taking into account that a number of different courts are in a position to claim jurisdiction with regard to a specific set of rules.

Against this background, I would like to focus on the interrelation between these different rules. First, I will try to look at the relation between the European Charter and the European Convention on Human Rights. I will then briefly turn to the interaction between the European Convention and the national laws before I will highlight some aspects of the relationship between the national laws and the European Charter.

Let us begin with the relation between the European Convention on Human Rights and the EU Charter: According to Article 6 (3) Treaty of the European Union (TEU) fundamental rights recognised by the European Convention constitute general principles of European Union law - although they do not constitute a legal instrument formally incorporated into EU law.

In order to ensure consistency between the Charter and the European Convention, Art. 52 (3) EU Charter requires rights contained in the Charter - which correspond to rights guaranteed by the Convention - to be given the same meaning and scope as those laid down by the European Convention. In line with this the ECJ usually looks at the Strasbourg Court’s case law when construing meaning and scope of the Charter’s fundamental rights.



However, Art. 52 EU Charter does not refrain from providing for a more extensive protection. The level guaranteed by the Convention therefore only serves as minimum standard at level of EU law.

And what is the perspective of the European Convention? The European Court of Human Rights has held that actions taken by a Contracting State under certain circumstances are presumed not to be in breach of the Convention. To invoke this - rebuttable - presumption the relevant international organisation has to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. The level of protection should be comparable, however not necessarily identical.

With regard to EU law the ECHR generally assumes that it provides such an equivalent level of protection. Thereby, the Strasbourg Court is willing to defer jurisdiction. Given that, conflicts between the EU Charter and European Convention's fundamental rights as well as between the Strasbourg and the Luxembourg Court are rather unlikely to appear.

However, in a recent case, the European Court of Human Rights has identified an important situation, in which the presumption of equivalent protection is rebutted. In *Michaud* the Strasbourg Court held, if the interpretation of EU law with respect to a certain question is unclear, and the ECJ had not yet the opportunity to examine this question and moreover, the national court refuses to make use of the preliminary ruling procedure according to Art. 267 Treaty of the Functioning of the European Union (TFEU) - in situations like these the Court will assume that the level of protection does not correspond with that of the Convention. Thus, it will examine the national law in the light of the rights guaranteed by the Convention.

The decision underlines the significance of judicial enforcement in general and - more specifically - the importance of the preliminary rulings proceeding according to Art 267 TFEU.

Let us now turn to the question how the European Convention and the fundamental rights guaranteed by the national constitutions cohabitate. There are different approaches as to how the contracting states incorporate the Convention's fundamental rights into their national laws: Austria has chosen the most integrative approach: the rights guaranteed by the Convention form an integral part of the Austrian constitution. In other countries,

such as France and Spain, the Convention overrides national statutes, and in other countries like Germany the convention has the same effect like ordinary formal statutes, however, at the same time the Convention rules serve - similar to the ECJ approach - as an important tool for the interpretation of the fundamental rights guaranteed by the national constitutions. In that frame, the Convention serves as minimum level of protection.

Given that, and taking into account that the Strasbourg Court's case law is in fact and to a large extent incorporated into the national laws, conflicts between the national constitutional courts and the ECHR are unlikely to appear.

The same is generally true for the relationship between the EU Charter and the fundamental rights guaranteed by the national constitutions. However, the situation appears to be a little bit more sophisticated, at least from a German perspective. In this respect, one may have perhaps the impression as if there are some coast guard vessels cruising through the European seas who tend to have conflicting perceptions on their respective area of competence.

These different views have recently been articulated in the context of the EU Charter's scope of application.

According to its Art 51 (1) the EU Charter is addressed to the institutions, bodies and agencies of the Union and - to the Member States - but only when they are implementing Union law. Section 2 underlines that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union.

Within this scope of application the principle of primacy of EU law prevails. According to the ECJ, a national court which is called upon to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation. Moreover, it is not necessary for the national court to request or await the prior setting aside of such provision by legislative or other constitutional means.

As the ECJ stated in *Melki*:

"The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court [...] to refer to the Court of Justice questions concerning the interpretation or validity of EU law [...]"

Since Art 6 (1) of the Treaty of the Functioning of the European Union (TFEU) declares the European Charter to have the same effect as primary EU law the prerogative of that law also extends to national constitutional law. It follows that national courts - supreme courts as well as constitutional courts - are obliged to make a reference to the ECJ for a preliminary ruling once it is unclear under EU law whether or not a certain act is in line with the rights guaranteed by the European Charter - even if national constitutional law provides a clear answer to that question.

Moreover, national courts (including the Member State's constitutional courts) are bound by EU law to refrain from applying national constitutional law if that law would undermine the effectiveness of primary or secondary EU law, even if the national constitutional law provides for a higher level of protection than the European Charter - as the ECJ in *Melloni* recently held with regard to the European arrest warrant. The primacy rule also extends to situations where member states enjoy some discretion how to implement EU law into their national laws. However, and that is worth mentioning, they may not choose an interpretation of national fundamental rights that would adversely affect the obligations under EU law.



Now, what is the German perspective or - to be more precise the perspective of the German Constitutional Court (Bundesverfassungsgericht)?

Over the years, the Bundesverfassungsgericht has developed a nuanced approach to the interaction between EU and national law - one that allows the Court to claim jurisdiction over national acts enforcing EU law and - at the same time - to defer jurisdiction and refrain from applying German Constitutional Law - as part of a cooperative relationship between the courts.

In general, the Bundesverfassungsgericht accepts the prerogative of EU law, stating that the German constitution is EU-friendly and assuming that EU law protects fundamental rights more or less at a comparable level as the national constitutional law does.

However, in its decision on the Lisbon Treaty it has stipulated two major exceptions that can be described as "red lines". Once the EU institutions (obviously including the European Court of Justice) would pass one of these lines the Bundesverfassungsgericht sees itself bound by German constitutional law to disobey to the principle of primacy of EU law.

According to the Bundesverfassungsgericht it is willing to pull the "emergency break" once it finds

- 1) That EU institutions act ultra vires, or
- 2) If they act within their powers, but the application of EU law endangers the identity of the German constitution.

The second red line - the concept of constitutional identity - perhaps seems to be of minor relevance in the fundamental rights context. Since the European Charter is in line with the European Convention of Human Rights and the Convention itself is accepted by the Bundesverfassungsgericht to form an important tool for construing national fundamental rights, it may be suggested, that there is no need to be afraid of any lack of constitutional identity - at least with regard to the protection of human rights.

So, let us turn to the ultra vires situation as highlighted by the Bundesverfassungsgericht: First, it must be borne in mind, as mentioned before, that from an EU law perspective the prerogative of Union law - including the primacy of fundamental rights guaranteed by the European Charter - does only apply as long as the matter of fact governed by national law also falls within the scope of European Union law. So, where is the problem?

The most relevant question in this context is the following: What are the criteria that make an act of EU institutions or one of a member state to be considered to "implement" European Union law? And furthermore: Who decides whether or not this is the case? The recent debate between the Bundesverfassungsgericht and the ECJ directly points at this question.

In a very recent decision the Bundesverfassungsgericht saw itself challenged to reiterate its ultra vires doctrine - explicitly in response to the Åkerberg Fransson decision. The German constitutional court stated in a rather clear wording that - in the light of a cooperative relationship between the ECJ and the Bundesverfassungsgericht - this decision must not be read in a way that it could be construed as an apparent ultra vires act.

What had the ECJ done that triggered such a strong reaction? Obviously, in Åkerberg Fransson the ECJ appears - from the point of view of the Bundesverfassungsgericht - to have adopted a rather far reaching approach. In contrast to what the Advocate-General, the Commission and a number of member states had proposed it held - as you all know - that a provision of Swedish tax law imposing a tax surcharge in the event of VAT evasion fell within the scope of EU law and, thus, within the scope of the European Charter.

This result apparently did not comply with the understanding of the Bundesverfassungsgericht. In its press release it was ready to offer a restrictive understanding of the ECJ's ruling saying that it assumes in Åkerberg Fransson the court had only ruled on specific aspects of tax law but not in deviation of its general approach to the interaction between the European Charter on the one hand and the national constitutions on the other.

Although this wording does not appear in the reasoned decision itself, the Bundesverfassungsgericht made clear what it was not willing to accept: It stated that Åkerberg Fransson must not be interpreted in a way that would allow the scope of EU law - and more specifically that of the Charter's fundamental rights - to be extended to situations where there is only a theoretical link to or some factual effect on EU law. In other words: The criterion of "implementing EU law" is not fulfilled, if the connection between a certain regulation of national law and a provision of EU law is mainly of theoretical nature or if there is only a factual relationship in between.

I suppose the ECJ would not disagree. But to be clear: whether or not a case at hand falls within the scope of EU law is a question of EU law itself. And according to the Treaty it is the ECJ that is exclusively competent for the interpretation of EU law. To keep the picture: it is the ECJ that acts as an emergency helpline competent to decide whether its own vessels with EU equipment are on duty or whether it is the national coast guard that should handle the case.

For the latter, including the Supreme Courts, the task should be to seriously consider the option of making a reference to the ECJ and ask for a preliminary ruling according to Art 267 TFEU - in order to give the ECJ the opportunity to elaborate on the meaning of "implementation of EU law" as provided by Art 51 EU Charter and, at the same time, informing the ECJ on the understanding of the Member State's tradition with regard to fundamental rights.

The preliminary ruling proceeding can thus serve as an effective instrument for cooperation between the European Courts thereby enhancing a faithful protection of human rights based on mutual trust. Fortunately, and at this point I would like to come to an end, there is sufficient ground to believe that all the courts are equally well equipped for a strong judicial protection of fundamental rights.



Recognition And Enforcement Of Foreign Judgements The Slovenian Experience *by Vice-President Nina Betetto (Supreme Court of the Republic of Slovenia)*

1. INTRODUCTION:

One of the classic subjects of international civil procedure law is the international jurisdiction, recognition and enforcement of judgments in civil and commercial matters as well as in family matters. This report focuses on the scope of the Brussels I Regulation (1) from the perspective of a Slovenian judge and Slovenian experiences in this field.

The Brussels I Regulation is by far the most prominent and the most applied cornerstone of European civil procedural law (hereinafter ECP law). Its imminence could be easily ascertained by every practitioner even remotely concerned with cross-border work in Europe. Often quoted phrase of a English lawyer Sir Peter North „There is a clear evidence that the main arena of dispute has moved from choice of law to jurisdiction and recognition,“ seems to be confirmed by a large number of cases, in which the Brussels I Regulation is used. The Brussels I Regulation is heir to the Brussels Convention, which has proven its immeasurable and incomparable value for over thirty years. The European Court of Justice (hereinafter ECJ) and the national courts of the Member States have produced an abundance and a treasure of judgments interpreting the Brussels Convention and now the Brussels I Regulation. Its importance has been still rising, and the advent of the so-called “second generation” of European regulations has not diminished it. The ECJ is producing judgment after judgment, opinions of Advocate-Generals have reached another level in recent years (with A-Gs Trstenjak and Kokott taking the lead), and developments at the level of national courts have unearthed many gems and many new aspects.

Despite that being said, according to reports of new Member States, which entered into the EU community in 2004, reported data on the general application of the Brussels I Regulation are too sparse as to allow a comprehensive assessment. However, the figures clearly indicate that for most judges in the European judicial area, the application of the Brussels I Regulation is not an everyday business. Although it is a well-known and renowned instrument of private international law in general it might appear arcane to practitioners. Many judges are confronted with the application of the Brussels I Regulation only two or three times a year, if at all. Accordingly, they do not dispose of much experience in this field.

A distinction must be made between the jurisdiction rules on the one hand and the rules on recognition and enforcement of judgments on the other hand. In general, according to the report of the European Commission the regulation is mostly applied in economic centres and border regions. The jurisdiction rules generally apply in a relatively small number of cases, ranging from less than 1% of all civil cases to 16% in border regions. The rules on recognition and enforcement are more frequently applied but it has not been possible to obtain comprehensive data on the number of declarations of enforceability delivered by the courts. The numbers range from very low (e.g. 10 declarations in 2004 in Portugal) to higher (e.g. 420 declarations in 2004 in Luxembourg) with again a peak in border regions (e.g. 301 declarations in the courts of the Landgericht Traunstein in Germany, located near the Austrian border). In Slovenia, for the moment around 30 cases can be found in the database of the Supreme Court of the Republic of Slovenia (hereinafter the Supreme Court).

As already mentioned the Brussels I Regulation has been revised recently. The important changes concern abolition of exequatur, choice-of-court clauses, lis pendens and weaker party protection (consumer transactions). The purpose of these amendments is to facilitate and expedite the circulation of judgments in civil and commercial matters within the EU, in line with the principle of mutual recognition and the Stockholm programme guidelines.

The recast Brussels I Regulation is supposed to substantially simplify the system put in place by the Brussels I Regulation, as it will abolish exequatur, i.e. the procedure for the declaration of enforceability of a judgment in another Member State. According to the new provisions, a judgment given in a Member State shall be recognised in the other Member States without any specific procedure and, if enforceable in the Member State of origin, shall be enforceable in the other Member States without any declaration of enforceability.

Furthermore, the recast regulation forbids the application of national rules of jurisdiction by Member States in relation to consumers and employees domiciled outside the EU. Such uniform rules of jurisdiction shall also apply in relation to parties domiciled outside the EU in situations where the courts of a Member State have exclusive jurisdiction under the recast regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.

Another important change is the international lis pendens rule which allows courts of a Member State, on a discretionary basis, to stay the proceedings and eventually dismiss the proceedings in situations where a court of a third state has already been seized either of proceedings between the same parties or of a related action at the time the EU court is seized.

2. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS IN SLOVENIA

2.1 Rules applicable in the absence of a Treaty (national procedure)

National procedure in Slovenia is regulated by the Private International Law and Procedure Act, which entered into force on 29 July 1999 (hereinafter PILPA).

A creditor who is in possession of a foreign judgement, has two options, how to have it enforced in Slovenia. The first option is to seek recognition (exequatur) of the judgement in a separate proceeding and after the recognition is granted, enforcement proceeding may be initiated in the same manner as if it was conducted on the basis of a Slovenian judgement. District courts have jurisdiction to decide in separate proceedings of recognition of a foreign judgement.



The district court first decides in ex parte proceedings. If the exequatur is granted, the opponent may file an objection against the decision of the district court, on which it is decided in adversarial procedure at the same court. Against the decision on this legal remedy (as well as for the claimant if the recognition is refused) an appeal is admissible to the Supreme Court. Procedure on recognition of a foreign judgement is decided upon in accordance with rules, applicable to non-contentious procedures (Article 111, PILPA).

If the applicant in the proceedings of recognition or declaration of enforceability does not state otherwise it is considered that he or she is applying for a recognition (or declaration of enforceability) of the foreign judgement as a whole and against the person, against whom the application was filed (the opposite party must be stated in the application). It may also be worth mentioning, that pursuant to the PILPA it is only possible to initiate proceedings for recognition of a foreign judgement, but not for a declaration that the foreign judgement should not be recognized.

In Slovenia the creditor, however does not need first to obtain an exequatur in order to have a foreign judgement enforced in Slovenia. According to the regulation in the PILPA, in case the recognition of a judgement is raised as an incidental question in any court proceedings, that court may determine the pertinent issue. Thus, it is not necessary for the creditor first to engage in a separate proceeding for recognition of a foreign judicial decision. The possibility of incidental recognition applies also to the enforcement procedure. The creditor can in Slovenia directly move to enforcement proceedings just on the basis of a foreign judgement. In the course of enforcement proceedings, the court shall examine whether the foreign judgement fulfils criteria for recognition as a preliminary question.

The system seems on the one hand creditor-friendly because it does not oblige creditor to go through a separate procedure to obtain exequatur. However, on the other hand, it can contribute to a complication of enforcement proceedings, as it imposes on the court, that is responsible for enforcement, a burden to deal with the question, whether the conditions for recognition are met. These questions are often complex and demand knowledge of specific field of international private law and as such unsuitable for adjudication by the court, which deals with enforcement proceedings.

Concerning substantive conditions for recognition, the Slovenian law is rather liberal. It is clearly based on the principle of *contrôle limité* and a foreign judgement may not be reviewed as to its substance (no revision *au fond*).⁽²⁾ Grounds of non-recognition are limited to the examination: 1) whether the subject matter of the foreign judgement does not concern dispute, for which exclusive jurisdiction of a Slovenian court is reserved; 2) the violation of public policy; 3) the violation of the right to be heard. A condition is also the existence of reciprocity; however the factual reciprocity is sufficient and its existence is presumed.

Concerning the international jurisdiction, upon motion of the defendant, recognition shall also be denied if the foreign court disrespected a prorogation agreement in favour of the Slovenian court and furthermore, if a foreign court based its jurisdiction on the grounds, which count as excessive jurisdictions.

It should be stressed out that only judgements, which are *res iudicata* in the country of origin, could be recognised and enforced in Slovenia. So the creditor is obliged to attach to the request for recognition not only the proof that the judgement is enforceable in the country of origin, but also that it is a *res iudicata* (Article 95, PILPA).

2.2 EU Regulations and our experience

Judgements given in other EU Member States concerning civil and commercial matters are recognised and enforced in Slovenia pursuant to the Brussels I Regulation (from January 2015 pursuant to the Brussels I recast), judgements concerning parental responsibility and matrimonial disputes are recognised pursuant to the Brussels IIa Regulation (3). Both systems are based on principle of mutual trust and provide for almost automatic recognition and enforcement.

It should be noted, that in Slovenia a creditor, whose judgement is subject to the regime of the aforementioned EU regulations, unlike the creditor who is the subject to the national regime, may not directly move for an enforcement procedure. Prior to that, he must in separate proceeding obtain declaration of enforceability (exequatur). This should however be issued virtually automatically after purely formal checks of the documents and forms supplied. The court has no possibility to invoke on its motion any of the grounds for non-recognition.⁽⁴⁾

Brussels I Regulation and Slovenian courts

There is no specific EU law office organised at the Supreme Court, as it is expected that all judges and advisers are familiar with the basic principles of EU law with special attention to EU law and practice in their narrower professional fields. As already mentioned in the introduction around 30 cases applying the Brussels I Regulation can be found in the database of the Supreme Court. The dilemmas Slovenian judges were facing in these cases are not particularly different from those that arose using other instruments of EU law.

Whereas the European legal theory and the ECJ continue to build the principles of efficiency and equivalence of EU law national courts in new and sometimes also in old Member States resort to the “strategy of avoidance” of EU law. The use of EU law is not simple, as it means that the national court must not only apply primary and secondary legal sources, but also the case law of the ECJ in the sense of precedents. Even though national courts are obliged to apply EU law, the analysis of the Slovenian case law shows that courts reluctantly refer to EU law. As far references for preliminary ruling are concerned the search engine Curia shows that the statistics of some new Member States is the following: Hungary 75, Poland 55, Czech Republic 32, Slovakia 22 and Slovenia 5. After the initial reluctance shown by the 10 new Member States, when they referred only a few percent out of all references for preliminary ruling, this share rose in 2011 to 81 questions or almost 19% out of all references.



Obviously there are different factors that effect this figure as the size of the country, the number of citizens and the number of cases that national courts have to deal with, as well as the connections of local companies with international trade and the presence of foreign investments. Despite all the listed factors we can conclude that the number of references for preliminary ruling made by Slovenian courts remains relatively low. Different reasons can be given for that. On the one hand Slovenia as one of the states in transition remains for various systemic and historical reasons strongly bound to legal positivism. It remains true that the prevailing legal mentality leads judges who are generally reserved to changes to follow strictly the legal norm and to preserve the status quo. On the other hand we have to admit that, excluding some exceptions, judges and lawyers were not that familiar with EU law. However, the winds of change have been sweeping across Slovenian courts – with new generations of lawyers more and more judgements and submissions contain references to EU law and case law. This shift is strongly influenced by courses on EU law at law faculties in Slovenia, by the formation of students at foreign universities as well as extensive courses on EU law for judges and lawyers. This inner relation to EU law will, without a doubt, reflect on the way courts work and shall work in the future.

This brings me to the question of “discipline” of national courts to make a reference. The ECJ set the bar very high for a national judge. The CILFIT test postulates a superhuman capacity to envisage what may or may not seem obvious to all other courts of the EU. In a way, this is not in the nature of judges who are trained to make up their own minds. Consequently, some final courts have not been as enthusiastic as others about making references. Nonetheless, in my opinion there have been cases when Slovenian courts did not make a reference when they should have done so, or at least did not give sufficient reasons for such decision.

I now turn to a few specific points relating to the application of Brussels I Regulation and ECP law in general that characterized the work of Slovenian courts in the last decade.

Implementation of the regulation(s) of civil procedural law

Personally I am convinced that a major obstacle in the way of more distinguished presence of ECP law in Slovenia is the inadequate implementing legislation or a complete lack thereof.

Although the regulations of ECP law are directly applicable, many aspects are left to (national) domestic law. The ECJ recognizes the need for full and effective implementation of regulations, even when European law itself does not require national law to adopt certain procedural rules in national law. Moreover, such an implementation is not only admissible, but for reasons of legal certainty necessary. Due to the diversity of legal systems of the Member States certain issues were knowingly left open by the European legislator. It goes without saying that such implementation should not compromise the aim of the regulation.

Germany, for example adopted a special law regulating the recognition and enforcement of judgments and certain aspects of international family law are governed by a special law. The entire area of judicial cooperation with the EU (service, taking of evidence, legal aid, European enforcement order, European order for payment, procedure for small claims) is covered by a separate chapter ZPO (§ 1068-1109). The legislator also used other methods to ensure the uniform application of European law, such as ZPO § 1087, which governs exclusive jurisdiction of a single court of first instance, which is competent to issue the European payment order (5) and all proceedings relating to it.

In contrast to Germany, Slovenia did not adopt any implementing legislation concerning the above mentioned regulations. The existing legal regulation does not provide reliable answers to many specific issues regarding the procedure for recognition and declaration of enforceability.

The Slovenian legislator has taken a „minimalist approach“(6) Means of implementation are more or less coincidental. For example, some provisions regarding the European enforcement order (7) were placed in the Execution of judgments in civil matters and insurance of claims act (Articles from 42 a to 42 c), following Article 42, which governs the certification of enforceability as plain technique. Such placement can be misleading. In other cases, not even such a highly fragmented legislation was adopted. Absence of specific provisions in this regulation leaves the "user" no other choice than subsidiary application of the relevant procedural provisions of domestic law. She or he is forced to find answers in (sometimes ambiguous) messages from the annexes of the Brussels I Regulation (8), provided by our country, and as the last option there are notifications to the respective regulations with questionable legal nature.

Ratione temporis of a European civil procedural law - the Brussels I Regulation

Slovenia acceded to the EU on 1 May 2004. Slovenian courts like some courts in other new Member States had difficulties with ratione temporis of the Brussels I Regulation (which entered into force on 1 March 2002) or to be more specific with the application of Article 66. (9)

The question of retroactivity of the Brussels I Regulation in Slovenia arose in proceedings for recognition and enforcement of judgments issued in old Member States prior to Slovenia's accession to the EU. As a general rule, Member States are bound to apply EU law immediately after accession. They are not allowed to apply any exceptions for non-application of the EU law or for its improper application merely because they have just become a new Member State (10). An argument in favour of the retroactive application of the Brussels I Regulation in proceedings for recognition and enforcement of judgments issued in other Member States prior to Slovenia's accession to the EU could also derive from distinction between procedural and substantive rules. According to the consistent case-law of the ECJ procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. (11)



The Slovenian case law in most cases followed the aforementioned principle regarding the time at which procedural rules take effect. (12) In my opinion based on the CILFIT case criteria, the Supreme Court should have referred a question for a preliminary ruling to the ECJ on the point of temporal scope of the Brussels I Regulation. Instead, the Supreme Court of the Czech Republic took a step in the right direction and asked the question. The ECJ held that the second paragraph of Article 66 of the Brussels I Regulation must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed. (13)

The ECJ pointed out that from the provisions of the Regulation the close bond between the rules on jurisdiction and the rules on the recognition and enforcement of judgments is seen. Use of simplified rules on recognition and enforcement, which protect the claimant especially by enabling him to obtain the swift, certain and effective enforcement of the judgment delivered in his favour in the Member State of origin, is justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction, which protect the interests of the defendant. (14)

Some other decisions of Slovenian courts dealing with the question of temporal scope of the Brussels I Regulation in proceedings for recognition and enforcement of judgments suggest that Slovenian judges were not always comfortable in the shoes of national judges being “first judges of the EU”. As mentioned above, the Regulation entered into force on 1 March 2002. According to Article 66 (2)(a), if the proceedings in the Member State of origin were instituted before the entry into force of the Regulation, only judgments given after that date shall be recognised and enforced in accordance with Chapter II of the Regulation. In my opinion, the decision of the Supreme Court dealing with recognition of a judgment of an Austrian court, issued in 1998, is therefore questionable or at least lacking grounds of decision. Given the constraints of Article 66 of the Brussels I Regulation should not have been applied unless the conditions of Article 66 (2)(b) had been fulfilled (if jurisdiction had been founded upon rules which accorded with those provided for in Chapter II of the Brussels I Regulation). (15)

Abolition of exequatur and ordre public

As already mentioned, the most important change in the recast Brussels I Regulation concerns abolition of exequatur. However, the recognition of the judgement shall be refused if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed (Article 45(1a)). It follows that the defendant may contest the execution of a judgment of a court of another Member State not just because of procedural defects having arisen during the proceedings before the court of origin but also on public policy grounds. Ordre public as one of the grounds for refusal of recognition of a foreign judgement therefore remains a topic to be examined.

It is worth noting that in the Slovenian doctrine and case law, public policy (ordre public) is construed in a restrictive manner. Only foremost constitutional provisions (including human rights – substantive and constitutional procedural guarantees)) and certain norms, which are fundamental for the socio-economic order and vital interests of the state are considered to form a public order. Thus the notion of the ordre public is certainly narrower as the notion of ius cogens (sometimes referred as an ordre public interne as opposed to ordre public international). Besides, the notion of ordre public should be construed even in a more restrictive manner when it concerns recognition of a foreign judgement than when it concerns application of foreign substantive law in a domestic court (doctrine of ordre public atténué).

A good example of restrictive interpretation of ordre public international in the Slovenian case law is the decision of the Supreme Court II Ips 462/2009. (16) The Supreme Court held that it was not against public policy to recognise a foreign judgement of an American court, which constituted adoption of a child by same-sex couple.

3. CONCLUDING REMARKS

Despite criticisms the Brussels I Regulation has proved to be a model of success. Such statement is not likely to meet with much opposition. It is widely known by now that the Brussels I Regulation and its predecessor the Brussels Convention are the most successful of the last century in the realm of ECP law. It may safely be asserted that its positive solutions prevail. The greatest contribution of the Brussels I Regulation was that it created its own set of rules regulating European jurisdiction (compétence directe). Accordingly, the re-examination of jurisdiction in recognition and enforcement proceedings in principle is not required.

Enriched with ten years of experience a Slovenian judge is still facing difficulties when applying EU law. In this respect Slovenian judges are particularly prone to positivism and narrow interpretation of the arguments of the parties and national procedural rules. It can be argued that a duty to apply EU law ex officio is not an easy job to do. The entire corps of EU laws including the ECJ judgements becomes an integral part of the national legislation on at least an equal footing with national law. Finding, accessing and properly understanding the ECJ case law by using the existing search engines and databases is a complex task taken into account that not all the ECJ judgements delivered before the accession of Slovenia to the EU are translated to Slovenian language. It should be repeated that a major obstacle in the way of more distinguished presence of EU law in Slovenia is the inadequate implementing legislation.

A national judge in a new Member State applying EU law is like a traveller – he must begin a journey of a thousand miles with a single step. To ensure the effectiveness of EU law and to overcome the gap between the knowledge of national law and EU law continuous, high-level and targeted training on EU law for judges is of utmost importance. A special attention should be paid to a constant dialogue between the Member States, the ministries and the judiciary. In order to suit needs of demanding customers like judges the search engines and databases of the ECJ case law could be improved. Last but not least, the abolition of exequatur underlines the premise of mutual trust. However, without clear EU rules as to what constitutes a fair trial, mutual trust in the recognition and execution of each others judicial decisions may be little more than a hollow phrase.



Mutual Recognition in Criminal Matters

by President Branko Hrvatin (Supreme Court of the Republic of Croatia)

Today's basic guiding principle of free movement of goods, services, money constitutes quite a challenge for modern society. Common market, community without the borders, globalization are the factors which facilitate the fluctuation of people. Those factors provide opportunities for business to develop – the legal ones but unfortunately the illegal and criminal ones as well.

The crimes became more sophisticated, spreading their activities across the borders of one state, griping to the governmental system so that it is sometime difficult to separate legal from illegal segments. Unison answer of the judicial authorities throughout the EU to such situation is an imperative.

EU has already built the efficient and powerful legal framework to fight the crime. This activity is ongoing process. Unlike to the situation in civil and commercial matters which are regulated in great deal by regulations and directive, criminal matters are mainly regulated by framework decisions (with exception of several directives (17)) with no possibility of direct appliance to the specific cases in the Member State. Transposition of the framework decision's provisions into national legal instruments concerning the EU law is a challenging task. The legal tradition, philosophy and existing complementary laws define the integration of such provisions in the national legal system. It cannot be avoid easily. Putting on the hat of the European judge can be more difficult as it may seem.

Legal framework

Although the provisions of the framework decisions must be followed in the implementation procedure some mutation and discrepancies of national legal provisions cannot be avoid, whilst not welcomed. The Pupino case may be the lighthouse in resolving that problem since this ruling established that Member States must interpret domestic law in conformity with the wording and purpose of framework decisions. This principle should apply even more to the national laws when implementing the EU legal instruments.

But passing the law i.e. setting up the legal framework is only first step since the provisions have to be applied to the particular case. Hence is the importance of the national courts, especially of the highest courts in the Member States. Give or take the supreme courts of every country show guidance to the lower courts by interpretation and/or explanation as well as by applying the provisions which origin in EU legal instruments (framework decisions, directives). This is of utmost importance when the human rights are at stake. The highest courts are to be guardians of the legal system but in the same time the protection of human rights has to be in their focus as well.

Role of the courts

Approximation of the legal views and standards of the supreme courts of EU Member States and harmonization of their case law concerning protection of society from the crime and also preserving the human rights of the perpetrators, should be their common goal. The unanimous answer of the judiciary to the crime contributes to the safety and security of the community i.e. EU and its citizens. Judicial cooperation at that level is essential.

The rulings of the courts, including the highest court in the Member States, implicating the cross border elements have effects not only within the concerned Member State but also outside of its borders. The courts in one Member State must be able to recognize and understand the decision of their colleagues from some other state and consequently to enforce such decision. Law level of mutual acquaintance of each other's legal systems additional burdens the process of embracing foreign rulings by the national courts/judges.

Such deemed role of the national courts in no sense undermines the jurisdiction, authority and importance of the European Court of Justice and its rulings. It should only make aware the national courts/judges of the fact that their rulings have effect in wider community and induce their responsibility for those rulings. Baring in mind the role of the European Court of Justice to render preliminary rulings concerning the interpretation and validity of the provisions written in EU legal instruments it still left for national judge to resolve the particular case pending before him/her.

The highest courts in Member States are carrying the great responsibility. In that view their cooperation and collaboration are essential and as important as following the case law of the Court of Justice of the European Union and of the European Court of Human Rights as well. Establishing the firm bonds between supreme courts of Member States linking them in vertical cooperation is a path to mutual understanding and effective network. Consequently this will contribute in setting up the efficient and strong tools to fight the national as well as international crimes, safeguarding in the same time the fundamental human rights.

This is also a way for establishing the solid and firm ground for appliance of the principle of mutual recognition between judicial authorities of different Member States in everyday practice. Namely the mutual recognition was promoted as the cornerstone of judicial cooperation already at the Tampere European Council in 1999 and introduced by the Maastricht Treaty under Title V (provisions on a common foreign and security policy).

Role of the Court of Justice of EU

The rulings of the Court of Justice of EU which is the pre-eminent authority to interpret European law indicate that the Court values the principle of mutual recognition as highest achievement in the judicial cooperation. This principle serves as a guideline to the uniform and autonomous interpretation of provisions of European law.



National courts should strive in searching of the uniform and autonomous meaning of terms in framework decisions to fulfill their obligation to interpret national law in conformity with framework decisions, and to give particular weight to the principle of mutual recognition in doing so. Based on the Treaty of Lisbon all national courts will have the competence – and the highest national courts the obligation – to request preliminary rulings if they are necessary in order to give judgment in national proceedings.

The principle of mutual recognition should extend to all types of court decisions and judgments – civil, criminal or administrative. The Treaty of Lisbon, entails that national courts will have to take increasingly more account of the meaning of that principle in the interpretation of national rules having their origin in European law in the area of cooperation in criminal matters.

Comparing the case law of the Court of Justice of EU and European Court of Human Rights sometime it may seem that the principles of mutual recognition and mutual trust blur the Member State's obligation to respect fundamental rights. But the principles of mutual trust and mutual recognition should not be rivaled to the protection of fundamental rights since the preservation of those rights gives firm fundamentals to the principles of mutual recognition and mutual trust. In that framework i.e. because the EU Member States trust that fundamental rights have been respected throughout the Union they can recognise and execute each other's judicial and extrajudicial decisions as if they were their own. Therefore, mutual trust and mutual recognition are based on the assumption that all EU Member States respect fundamental rights. In principle, recognition and enforcement can only be refused on one of the grounds for non-recognition and/or non-enforceability, expressly inscribed in EU secondary legislation which does not include the violations of fundamental rights as such.

The ambiguity of the legal framework postulate when interpreting those provisions the judge should look not so much into wording of the various legal instruments but rather into the general scheme of the EU legal order. It is therefore obvious that the obligation of national authorities to recognize and enforce quasi automatically a judicial or extrajudicial decision delivered in another Member State, should be reconciled with their obligation to protect fundamental rights when they apply EU law. A balance should therefore be struck between these two obligations. The vertical cooperation of the Court of Justice of EU and European Court of Human Rights but also of the highest national courts is welcomed and it could undoubtedly strengthen the mutual trust and understanding.

Mutual recognition

As it has been said, open borders within the EU Member States gives a European dimension to more and more criminal cases. To fight an organized crime spread across several EU countries, or to bring to justice an offender who tries to hide in a different EU country or to obtain evidence gathered in another country, judicial cooperation is necessary.

A traditional mutual legal assistance as a form of judicial cooperation which is not, by the way, exclusive to EU members may be slow and complex at times. It no longer corresponds to the reality of today's European area where people circulate easily, with little or no control at all. A more advanced form of judicial cooperation is needed and this is mutual recognition of judgments and judicial decisions – a process by which a decision taken by a judicial authority in one EU country is recognized and enforced by other EU country as if it was a decision taken by the judicial authorities of that latter country. This is a key concept in the field of judicial cooperation. It helps to overcome the difficulties stemming from the diversity of judicial systems throughout the EU and sometimes burden of the prejudice caused by lacking of mutual knowing and understanding.

A free circulation of the people throughout Europe should be followed by the free movement of judicial decisions. The key answer is the principle of mutual recognition and its effect in changing the philosophy of judicial cooperation. It means that each national judicial authority should recognize requests made by the judicial authority of another Member State with a minimum of formalities stipulated according the EU legal instruments.

Enhancing of mutual recognition aims to uplift the efficiency of cooperation between authorities. It is based on mutual confidence that Member States have in each other's systems, based on the common respect of human rights and fundamental freedoms as set in the Treaty of the European Union. Seeing from the judge's perspective embracement of this trans-nationality dimension arouses not only technical questions derived from comparative differences but also legal and political ones. Legal problems relate to the (in)compatibility of particular legal systems as well as their interaction capacity, in the other hand political dilemma relates to the role of judges in the jurisdiction of respected Member State.

The developing and strengthening of the area of freedom, security and justice is one of the main aims of the European Union. These endeavors are necessary for providing security to the Member States, but also to build mutual trust and the rule of law within the European Union. This is the way to give judiciary solid and efficient framework so it can fulfill its tasks. While the EU cannot adopt a general EU criminal code, its criminal legislation can add, within the limits of EU competence, important value to the existing national criminal law systems.

But legislation lives only through practice, through rulings of the judiciary in particular cases. Without prejudice to the importance and value legal instruments of European Union it must be stress out that the judiciary, judges in the first place are creators of the justice which is determined by their understanding of some provisions and their appliance in particular case.

So lacking of the common rules between Member States can be successfully and efficiently overlap only by mutual recognition and consequent execution of the judgments or judicial decisions taken in other Member State as if they were its own. Although the execution of a decision may differ from one Member State to another, due to the distinct perception of the principle of mutual recognition in the national law, it should not undermine the mutual trust between the states. In this respect the question of setting minimum standards and harmonization of the case law, as it already has been said, should be the goal in the vertical cooperation of the courts. Strengthening of the legal standards and approximation of the case law will add value to the mutual trust to each other's legal system and would result in enhancing the principle of mutual recognition. There is a common consensus that it should be supported and broadened, in the future maybe even beyond the EU's boundaries.

In order to achieve more effective judicial cooperation in criminal matters between the Member States the assessment of the current legal instruments can open new frontiers and direct the new legislative proposals towards effective development of a common judicial area.

Judiciary should strongly support the specific programs launched by the Council of the EU aimed to promote judicial cooperation by:

- contribution to the creation of a genuine European area of justice in criminal matters based on mutual recognition and mutual confidence;
- promoting the compatibility of rules applicable in EU countries as may be necessary to improve judicial cooperation;
- improving contacts and exchange of information and best practice between legal, judicial and administrative authorities and the legal professions (lawyers and other professionals involved in the work of the judiciary);
- improving the training of the members of the judiciary ; and
- strengthening mutual trust with a view to protecting the rights of victims and the accused.

In ever changing world the new challenges are already on the horizon. Only networking and linking of the judiciary, especially judges in vertical and horizontal cooperation can give an answer to those challenges ahead of us. It should be strongly emphasized that the responsibility of the judges – practitioners who apply the law surmounts the national legal system and borders of the concerned state. Living in the community gives the security and confidence to its members, but it should be protected from endangerment of criminals who ever they are so it could be the safe place to live in.

(1) As already mentioned the Brussels I Regulation has been revised recently. The important changes concern abolition of *exequatur*, choice-of-court clauses, *lis pendens* and weaker party protection (consumer transactions). The purpose of these amendments is to facilitate and expedite the circulation of judgments in civil and commercial matters within the EU, in line with the principle of mutual recognition and the Stockholm programme guidelines.

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter the Brussels I Regulation. The European Commission has issued proposal for the recast of the Brussels I Regulation in December 2010 on the basis of a general study on the practical application of the Brussels I - the "recast" Regulation was promulgated in late 2012 and shall enter into force in January 15, 2015. The full name of the „new born“ regulation is 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 (recast).

(2) Judgement of the Supreme Court, Cp 2/2006, 29 June 2006.

(3) 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.

(4) Point 17 of the preamble and Article 41 of the Brussels I Regulation.

(5) Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

(6) An illustrative example of such approach is lack of implementing legislation regarding international abduction of children which is the subject of the 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 and the Hague Convention on the civil aspects of international child abduction.

(7) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating European Enforcement Order for uncontested claims.

(8) Annex IV of the Brussels I Regulation. Slovenia reported that appeals pursuant to Article 44 may be lodged to the Supreme Court RS: "Slovenia, an appeal to Supreme Court RS".

(9) The Article 66 provides:

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,
 - a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;
 - b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

(10) Case *Rechberger v Austr*, 15 June 1999 (C-140/97).

(11) See e.g. case *CT Control (Rotterdam) BV and JCT Benelux BV v European Commission*, 6 July 1993 (C-121/91 and C-122/91)

(12) See e.g. decision of the Supreme Court Cp 16/2006, 7 February 2007.

(13) Case *Wolf Naturprodukte v SEWAR*, 21 June 2012 (C-514/10).

(14) Par. 24-27. In this case, the defendant had his permanent residence in the Czech Republic, which neither at the time when the proceedings were instituted nor at the time when the judgment was given was an EU member. Therefore, the balance of interests between the parties was not ensured.

(15) Decision of the Supreme Court Cp 8/2003, 2 December 2004.

(16) Decision of the Supreme Court Cp 8/2003, 28 January 2010. Even though the Supreme Court did not apply EU law in this case it is a good example of restrictive interpretation of *ordre public* in the Slovenian case law.

(17) For example:

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings