

INTEGRATION AND COOPERATION OF INTERNATIONAL AND EUROPEAN PRIVATE LAW ACCORDING CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

INTEGRACIÓN Y COOPERACIÓN DEL DERECHO PRIVADO INTERNACIONAL Y EUROPEO SEGÚN LA CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

DIMITRIS LIAKOPOULOS

*Full Professor of European Union Law at the Fletcher School-Tufts University
(MA in international law and MA of Arts in Law and diplomacy)*

*Full Professor of International and European Criminal and Procedural Law
at the De Haagse Hogeschool-The Hague. Attorney at Law a New York and Bruxelles*

ORCID ID: 0000-0002-1048-6468

Recibido: 27.01.2019 / Aceptado: 29.04.2019

DOI: <https://doi.org/10.20318/cdt.2019.4954>

Abstract: The time has come, given the relative maturity of the jurisprudence of the Court of Justice of the European Union, regarding the peculiarities linked to the protection of fundamental rights in EU system of civil judicial cooperation to dedicate a detailed investigation and in the field of incidence of EU Charter of Fundamental Rights on EU's legal system, as well as the specific modalities that affects the elaboration and application of the instruments of civil judicial co-operation.

Keywords: CFREU, European Union integration, private international law, civil judicial cooperation, protection of fundamental rights.

Resumen: Ha llegado el momento, dada la relativa madurez de la jurisprudencia del Tribunal de Justicia de la Unión Europea, en relación con las peculiaridades relacionadas con la protección de los derechos fundamentales en el sistema de cooperación judicial civil de la UE para dedicar una investigación detallada y en el campo de la incidencia. de la Carta de los Derechos Fundamentales de la UE sobre el sistema legal de la UE, así como las modalidades específicas que afectan la elaboración y aplicación de los instrumentos de cooperación judicial civil.

Palabras clave: CFREU, integración de la Unión Europea, derecho internacional privado, cooperación judicial civil, protección de los derechos fundamentales.

Summary: I.Introduction; II.Weightting between conflicting rights; III.CFREU as a parameter of validity in EU law; IV.Civil judicial cooperation and the principle of mutual recognition; V.Civil judicial cooperation and values inherent to protection of fundamental rights; VI.The scope of application of CFREU in the system of civil judicial cooperation; VII.Weightting between rights as a general interpretative criterion in civil judicial cooperation; VIII.Interpretation of EU and national rules in accordance with CFREU on civil judicial cooperation; IX.Use of CFREU rules for the interpretation of general concepts of private international law; X.Impact of CFREU on the identification of jurisdiction titles and connection criteria; XI.Concluding remarks.

I. Introduction

1. EU civil judicial cooperation is declined within a highly fragmented system with frequent adoption of instruments dedicated simultaneously to the recognition of decisions and jurisdiction, but also to the designation of applicable law¹. The development of more and more advanced systems in terms of integration of national legal systems has been encouraged, as demonstrated by the abolition of *exequatur*², which has only recently taken place in some areas³: the creation of a European enforcement order, the trend to remove any space left to titles of jurisdiction of state origin and the institution a certificate of European succession⁴.

2. With the now acquired awareness of expansive effectiveness of above all regional international norms in the field of human rights and to private international law and procedure matters whose objectives and methods have long overcome the traditional connotation of neutrality, may be largely conditioned by the need to build certain material results, which the state, without prejudice to the right to choose the most appropriate means for this purpose, has the international obligation to guarantee individuals.

3. The growing importance of coordination between requirements underlying the protection of human rights and specific aims of various areas of private international law and procedure is also worthy of note. Much less attention has, however, been reserved until now to the systematic impact of the Charter for the Fundamental Rights of the European Union (CFREU) as a primary source within EU on judicial cooperation in civil matters⁵.

4. A survey related to this profile appears particularly necessary. Different are the same instruments adopted by the Union in this area and this before were clearly defined in EU's legal system⁶, as it results from the explicit mention of specific provisions in the preamble or in the text of Union's single acts. The Court of Justice of the European Union (CJEU) again is protagonist to the interpretation of these instruments. References to single CFREU dispositions appear even on direct solicitation of natio-

¹ The present paper is updated until February 2019. D. LIAKOPOULOS, *Recognition and enforcement of foreign sentences in European Union context: The Italian and German private international law cases*, in *International and European Union Legal Matters-working paper series*, 2010.

² R.M. MOURA RAMOS, *Estudos de direito internacional privado da União Europeia*, Coimbra University Press, Coimbra, 2016.

³ D. SCRAMM, *Enforcement and the abolition of exequatur under the 2012 Brussels I Regulation*, in *Yearbook of Private International Law*, 2013/2014, pp. 144ss. R.M. MOURA RAMOS, *Estudos de direito internacional privado da União Europeia*, Coimbra University Press, Coimbra, 2016.

⁴ For further details see: G. PALAO MORENO, G., ALONDO LANDETA, I., BUIGES, (dirs.), *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012*, Marcial Pons, Valencia, 2015, pp. 58ss.

⁵ C. MONEREO ATIENZA, J.L. MONEREO PÉREZ, *La Europa de los derechos. Estudio sistemático de la Carta de los derechos fundamentales de la Unión Europea*, ed. Comares, Granada, 2012.

⁶ According to the recital n. 33 of the Regulation n. 2201/2003. 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. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final. See from the CJEU, C-404/14 *Matoukovà* of 6 November 2015, ECLI:EU:C:2015:653, published in the electronic Reports of the cases. See in argument: M. STORME, *Harmonisation of civil procedure and the interaction with substantive private law*, in X.E. KRAMER, C.H. VAN RHEE, *Civil litigation in a globalizing World*, T.M.C. Asser Press, The Hague, 2012, pp. 142ss. W. VAN BALLEGOOI, *The nature of mutual recognition in European law*, ed. Intersentia, Antwerp & Oxford, 2015. C.M. CAAMIÑA DOMÍNGUEZ, *La "supresión" del exequatur en el R 2201/2003*, in *Cuadernos de Derecho Transnacional*, 3, 2011, pp. 66ss. G. CUNIBERTI, *Abolition de l'exequatur et présomption de protection des droits fondamentaux*, in *Revue Critique de Droit International Privé*, 103 (1), 2014, pp. 304ss. T. PFEIFFER, *The abolition of exequatur and the free circulation of judgments*, in F. FERRARI, F. RAGNO (eds), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, ed. Wolters Kluwer/Cedam, The Hague, 2016, pp. 188ss. M. THÔNE, *Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht*, ed. Mohr Siebeck, Tübingen, 2016. A. HAMED, K. TATSIANA, *A step forward in the harmonization of European jurisdiction: Regulation Brussels I Recast*, in *Baltic Journal of Law & Politics*, 9, 2016, pp. 162ss.

nal judgments in an ever less sporadic way. This phenomenon intersects with the consequences that the application of the same CFREU before the national court is intended to produce and to the presence of different categories of provisions inside to its text.

5. CFREU can determine a particularly significant impact with respect to the implementation of acts pursuant to art. 81 Treaty on Functioning of the European Union (TFEU)⁷, in as much as it takes place, by virtue of the instruments of private and procedural international law, according to peculiar mechanisms therefore different from those found in other Union policies. This follows from the fact that these acts regulate only certain aspects of civil procedure, while most procedural aspects⁸ and the application of laws referred to conflict rules, even in the context of transnational disputes, remain under the responsibility of member states and certain efforts of the Union legislator towards the harmonization of procedural⁹ or material rules. It is difficult to clearly delineate a line of demarcation between the profiles of protection of fundamental rights and those of internal importance before considering CFREU's impact and limits.

II. Weighting between conflicting rights

1. A situation of potential contrast between subjective positions can arise in multiple contexts, whenever the values pursued by the individual provisions cannot be simultaneously realized in their entirety, but constitute reciprocal limits to their respective exercise and therefore to their protection. At the same time, it must be borne in mind that the possible competition between several fundamental rights guaranteed by CJEU is likely to be examined whatever the purpose for which these rights are invoked.

⁷ For further details and analysis see: A. HARTKAMP, C. SIBURG, W. DEVROE, *Cases, materials and text on European Union law and private law*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, Oxford, 2014, pp. 133ss. M. WIEZBOWSKI, A. GUBRYNOWICZ, *International investment law for the 21st century*, Oxford University Press, Oxford, 2015. A.H. TÜRK, *Judicial review in European Union law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 788ss. E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, *Complete European Union law. Texts, cases and materials*, Oxford University Press, Oxford, 2013. G. CONWAY, *European Union law*, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, *European Union law stories*, Cambridge University Press, Cambridge, 2017. J. USHERWOOD, S. PPINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, *European Union law and integration. Twenty years of judicial application of European Union law*, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, *Principles of European Union law, including Brexit*, West Academic, Minnesota, 2017, pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, *EU/AEUV*, C.H. Beck, München, 2016. M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 586ss. N. FOSTER, *European Union law directions*, Oxford University Press, Oxford, 2016. A. THIES, *International trade disputes and European Union liability*, Cambridge University press, Cambridge, 2013.

⁸ D. LIAKOPOULOS, *The influence of EU law on national civil procedural law: Towards the adoption of common minimum standards? - La influencia de la legislación de la UE en el derecho procesal civil nacional: ¿hacia la adopción de normas mínimas comunes?*, in *Revista General de Derecho Europeo*, 46, 2018

⁹ A further element of speciality is constituted by the tendentially "horizontal structure of the process" as we have noted through the case *Povse v. Alpagó* (C-211/10 PPU, *Povse* of 1st July 2010, ECLI:EU:C:2010:400, I-06673) on the execution of a provision ordering the return of a child subject to international subtraction pursuant to art. 11, par. 8 of Regulation n. 2201/2003 was closed with two appeals brought by both parties to the European Court of Human Rights (ECtHR) for antithetical violations of art. 8 of the European Convention of Human Rights (ECHR) da parte dell'Austria (ECtHR, *Povse v. Austria* of 18 June 2013 and *M.A. v. Austria v. Austria* of 15 January 2015). For further details see: V. LAZIĆ, *Family private international law issues before the European Court of Human Rights. Lessons to be learned from Povse v. Austria in revising the Brussels II Regulation*, in C. PAULUSSEN, T. TUKÁCS, B. VAN ROMPUY, *Fundamental rights in international and European law*, T.M.C. Asser Press & Springer, Berlin, 2016, pp. 162ss. M. HAZELHORST, *The ECtHR's decision in Povse: Guidance for the future of the abolition of exequatur from civil judgments in the European Union*, in *Nederlands International Privatrechts-NIPR*, 2014, pp. 28ss. With the aforementioned cases we can understand that a certain "obstacle"/impediment with respect to civil judicial cooperation is presented towards a form of declination of an approach to fundamental rights according to the traditional scheme linked to the state-in-individual relationship. The application of the rules of international private and procedural law of the European Union is likely to deny competition between opposing fundamental rights and therefore to impose the use of an evaluation parameter based on the weighting of the values. In the same spirit see also: T. LIEFAARD, J. SLOTH-NIELSEN, *The United Nations Convention on the rights of the child*, ed. Brill, The Hague, 2016, pp. 228ss. X.E. KRAMER, *Cross border enforcement and the Brussels I-bis Regulation. Towards a new balance between mutual trust and national control over fundamental rights*, in *Netherlands International Law Review*, 60 (3), 2013, pp. 346ss.

2. In the jurisprudence of CJEU, situations have long emerged with respect to which competition between fundamental rights can arise and therefore the joint consideration of the same is required. Such a scenario has been examined several times with reference to the protection of personal data and privacy. Prior to the entry into force of the Treaty of Lisbon, in the *Promusicae* of 29 January 2008¹⁰ CJEU ruling noted that the rights of which the association of producers and publishers solicited respect and precisely copyright (brought back by CJEU to guarantee the right of property) and the right to an effective judicial review, were protected by CFREU. But on the other hand, he underlined the fact that they had to be coordinated with the right to respect private life. Reaffirming a solution already proposed by its previous jurisprudence regarding the circulation of personal data¹¹, CJEU emphasized the need to identify a “right balance”¹² between the opposing rights and specified that it must be based on the interpretation of relevant EU act and national transposing legislation, as well as guaranteed by member state authorities. This approach implies not only timely constraints in relation to the interpretation of European and state discipline that comes from time to time, excluding its compatibility with CFREU when it is not inspired in the abstract, to the criterion of “right balance”; but above all it requires an examination of individual’s concrete case, in order to assess whether the reconciliation between various fundamental rights can be achieved.

3. The same solution was repeated in similar cases¹³ in which it was necessary to reconcile the guarantee of intellectual property rights (and possibly of the right to effective judicial protection) with different categories of rights, which include the right to privacy, freedom of enterprise and the right to communicate and receive information¹⁴. In such cases the criterion of “fair balance” was understood as not being compatible with the necessity of protection of fundamental rights national provisions¹⁵ which establish suitable measures to unconditionally privilege one of the fundamental rights in competition with each other, while acceptable to impose restrictions on a right in order to guarantee the other¹⁶.

4. It is apparent from this case-law that a particularly relevant element for assessing the existence of a fair balance is the fact that EU legislature has taken into account this need to reconcile the various fundamental rights by adopting provisions intended for that purpose.

5. This solution appears to be consistent with the provisions of art. 52, par. 1 CFREU¹⁷ which admits limitations of fundamental rights when “they effectively meet (...) the need to protect the rights and freedoms of others”¹⁸. The criterion of “fair balance” seems to constitute a general model to ensure the co-

¹⁰ CJEU, C-275/06, *Promusicae* of 29 January 2008, ECLI:EU:C:2008:54, I-00271.

¹¹ According the sentence from the CJEU: C-101/01, *Lindqvist* of 6 November 2003, ECLI:EU:C:2003:596, I-12971.

¹² D. SUŠNJAR, *Proportionality, fundamental rights and balance of powers*, ed. Brill, The Hague, 2010

¹³ CJEU, C-484/14, *McFadden* of 15 September 2016, ECLI:EU:C:2016:689; C-160/15, *GS Media* of 8 September 2016, ECLI:EU:C:2016:644, C-580/13, *Coty Germany* of 16 July 2015, ECLI:EU:C:2015:485, C-314/12, *UPC Telekabel Wien* of 27 March 2014, ECLI:EU:C:2014:192; C-461/10, *Bonnier Audio and others* of 19 April 2012, ECLI:EU:C:2012:219; C-360/10, *Belgische Vereniging van Auteurs* of 16 February 2012, ECLI:EU:C:2012:85, all the above cited cases was published in the electronic Reports of the cases. See also: C-70/10, *Scarlet Extended* of 24 November 2011, ECLI:EU:C:2011:771, I-11059. For further details see: O.A. RONGSTAD, *Property aspects of intellectual property*, Cambridge University Press, Cambridge, 2018.

¹⁴ V. KOSTA, *Fundamental rights in EU internal market legislation*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 92ss.

¹⁵ CJEU, C-468/10, *ASNEF and FECEMD* of 24 November 2011, ECLI:EU:C:2011:777, I-12181.

¹⁶ The situation appears different in the judgment of the CJEU, C-362/14, *Schrems* of 6 October 2015, ECLI:EU:C:2015:650, published in the electronic Reports of the cases, in which no conflicting rights were discussed but the right to privacy was compressed to facing public security needs. In the sense that in such a case, the very essence of the right being in any case, there could not be any space for a balance. For further details see: T. OJANEN, *Making the essence of fundamental rights real. The Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter*, in *European Constitutional Law Review*, 12, 2016, pp. 220ss. S. GREER, J. GERARDS, R. SLOWE, *Human rights in the Council of Europe and the European Union. Achievement, trends and challenges*, Cambridge University Press, Cambridge, 2018, pp. 328ss. J. WOUTERS, C. RRYNGAERT, T. RUYSS, *International law. A European perspective*, Hart Publishing, Oxford & Oregon, Portland, 2018.

¹⁷ X. GROUSTOT, G.T. PETURSSON, *The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?*, in S. DE VRIES, U. BERNITS, S. WEATHERILL, *The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing*, Oxford University Press, Oxford, 2015.

¹⁸ S. DE VRIES, U. BERNITS, S. WEATHERILL, *The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing*, Oxford University Press, Oxford, 2015.

existence of conflicting rights¹⁹ even if it was used by CJEU in an inconsistent manner, sometimes ensuring a clear prevalence of one of the competing rights²⁰, especially where this corresponded to one of the imperative requirements to which CJEU had previously referred in its jurisprudence on freedom of movement²¹.

11. A different solution could be prefigured in hypothesis, in which the importance of one of the subjective positions involved is such as not to tolerate exceptions or restrictions as belonging to the category of rights that have been defined as “absolute”. The very nature of the latter could determine the necessity of resorting to a criterion not attributable to the “right balance” even if it seems to be excluded that in the matter of protection of fundamental rights a mechanical criterion of prevalence can take place, on the other not applicable not even when a right of an absolute nature should be weighted with respect to the needs of a public nature²². It is strongly emphasized by CJEU the need to guarantee, obviously through judicial

¹⁹ CJEU, C-547/14, *Philip Morris Brands* of 4 May 2016, ECLI:EU:C:2016:325; C-426/11, *Alemo-Herron and others* of 18 July 2013, ECLI:EU:C:2013:521, par. 30ss, above the cited cases published in the electronic Reports of the cases. See also: C-324/09, *L'Oréal and others* of 12 July 2011, ECLI:EU:C:2011:474, I-06011, par. 143. For further details and analysis see: J. MENDES, I. WENZKE, *Allocating authority: Who should do what in European and international law*, Hart Publishing, Oxford & Oregon, Portland, 2018. C. TWIGG-FLESNER, *Research handbook on EU consumer and contract law*, Edward Elgar Publishers, Cheltenham, 2016, pp. 124ss. M. HOSOVEC, *Injunctions against intermediaries the European Union*, Cambridge University Press, Cambridge, 2017.

²⁰ As we can see in the case CJEU, C-12/11, *McDonagh* of 31 January 2013, ECLI:EU:C:2013:43, published in the electronic Reports of the cases.

²¹ For further details see: P. OLIVER, *Free movement of goods in the European Union*, Hart Publishing, Oxford & Oregon, Portland, 2010, pp. 228ss.

²² CJEU, C-578/16, *C.K. and others v. Republika Slovenija* of 16 February 2017, ECLI:EU:C:2017:127, joined cases C-404/15 and C-659/15, *P. Aranyosi and R. Căldăraru* of 5 April 2016, ECLI:EU:C:2016:198, above the cited cases published in the electronic Reports of the cases. In particular the attitude of the Luxembourg courts in relation to the interpretation of the principle of mutual recognition and mutual trust in civil procedural matters is intended to align with the “warnings” enucleated by the European Court in Avotinš. The reasons behind the less rigorous interpretation of this principle in the aforementioned ruling-based on the derivation of a new mandatory reason for non-execution of a European arrest warrant, where such execution exposes the person concerned to the actual risk of suffering treatment inhuman or degrading-they can not in fact move perfectly within the civil procedural matter, considering the ontological difference of the fundamental rights at stake. The CJEU has gone further on the mutual recognition and has been based on another interpretative way stating that the art. 3 of the ECHR and 4 of the CFREU must be interpreted: “(...) in a convergence between (...)”. In particular the Advocate General Yves Bot has declared that: “(...) In the Advocate General’s search for balance he considers first whether Article 1(3) FDEAW constitutes a ground for non-execution of an arrest warrant. He rejects such a notion for the following three reasons. First off, interpreting Article 1(3) as a non-execution ground would run counter to the phrasing of that Article, which due to its place and wording does not express a non-execution ground, but rather the principle of mutual trust. Secondly, such a notion would not be in agreement with the EU legislator’s intent to create a system of surrender with exhaustively enumerated non-recognition grounds, whereby, in addition to the grounds in Articles 3, 4, and 4a FDEAW, only in the exceptional circumstances described in Recitals (10) and (13) surrender can be suspended or removal, expulsion or extradition can be prohibited. Last, a ground of non-recognition in Article 1(3) would severely damage mutual trust between judicial authorities on which the Framework Decision is based and would, as a result, make the principle of mutual recognition meaningless (...)”. We are also talking about another principle-value of the Union, that of proportionality as a balancing of interests and the widening of the discretionary sphere of the internal judge, and the circumstances in speciem. Criminal cooperation does not seem to be comparable with the similar ground and dates back to the experience of the single market, in terms of decisive jurisprudential protagonism. Let us not forget that criminal cooperation has been based on the definition of common minimum standards for delineating spaces and limits of cooperation between judicial and police authorities in the areas selected by the Member States and by the Union legislator. Of course we can speak of a positive and normative unification for years in the criminal sector and especially after the Treaty of Lisbon the merit belongs to the principle of mutual recognition of judicial decisions which continues to guarantee a median solution to integration that is summarized in the protection of rights fundamental rights, the inalienable rights of individuals and a continuous progress dictated by the Member States towards an increasingly active and proactive contribution, a harbinger of innovations and achievements with the main objective among others the continuous accelerated integration but within a harmonious development and development of all the individual interest and not the state one. S. GÁSPÁR-SZILÁGYI, *Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a European arrest warrant, in European Journal of Crime, Criminal Law and Criminal Justice*, 24 (1), 2016, pp. 198ss. K. BBOVEND’ EERDT, *The joined cases Aranyosi and Căldăraru: A new limit to the mutual trust presumption in the Area of Freedom, Security and Justice?*, in *Utrecht Journal of International and European Law*, 32, 2016, pp. 112ss. M. GUIRESSE, *Confiance mutuelle et mandat d’arrêt européen: Evolution ou inflexion de la Cour de justice?*, in *GDR-ELSJ*, 12 avril 2016. R. NIBLOCK, *Mutual recognition, mutual trust?: Detention conditions and deferring an EAW*, in *New Journal of European Criminal Law*, 24 (2) 2016, pp. 250ss. A.E. VERVAELE, *Mutual legal assistance in criminal matters to control (transnational) criminality*, in N. BOISTER, R.J. CURRIE (a cura di), *Handbook of transnational criminal law*, ed. Routledge, London & New York, 2015, pp. 123ss. N. SYBESMA-KNOL, *The European system for the promotion and protection of human rights*, in *Georgia Journal of International & Comparative*

review, an approach aimed at searching the characteristics of individual concrete case for the balance between the competing prerogatives of the various subjects protected by the different provisions of CFREU.

III. CFREU as a parameter of validity in EU law

1. The use of interpretation of the rules contained in the acts of EU secondary legislation in accordance with CFREU may prove insufficient to guarantee compliance with the same as a text belonging to primary law. CJEU pre Treaty of Lisbon had abstractly affirmed the possibility of verifying the validity of acts of the institutions in relation to their compatibility with the principles relating to the protection of fundamental rights²³, making it clear the consequences that a possible antinomy not resolvable by way of interpretation would have determined the declaration of invalidity of the act.

2. This possibility was permissible for any act of institutions and also included those that approved²⁴ or that would implement international agreements having been clearly stated that “(...) the obligations imposed by an international agreement cannot have the effect of compromising the principles of constitutional provisions of EC Treaty, among which is the principle that all Community acts must respect fundamental rights (...)”²⁵.

3. By the jurisprudence of CJEU it seems to be possible to derive that following the attribution to CFREU of the same legal value of the treaties, this model has found a more solid foundation. Although CJEU continues to recall together with CFREU also the general principles of law as a source on which the need to protect fundamental rights is based, the simultaneous presence of a written source has certainly produced certain repercussions²⁶. They concern both the position of national courts, as it has made it easier to identify possible parameters of legitimacy of Union acts that refer to fundamental

Law, 20, 2014. N. FOSTER, *European Union law directions*, Oxford University Press, Oxford, 2014, pp. 51ss. D. MANSELL, *The European arrest warrant: The role of Judges when human rights are at risk*, in *New Journal of European Criminal Law*, 2 (1), 2011, pp. 133ss. A. TINSLEY, *Protecting criminal defence rights through EU Law: Opportunities and challenges*, in *New Journal of European Criminal Law*, 3 (3), 2013, pp. 461ss. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, op. cit., pp. 37ss. L. ACHMAIER, *Mutual recognition instruments and the role of the CJEU: The grounds for non-execution*, in *New Journal of European Criminal Law*, 5 (4), 2015, pp. 505ss. E. SMITH, *Running before we can walk? Mutual recognition at the expense of fair trials in Europe's Area of Freedom, Justice and Security*, in *New Journal of European Criminal Law*, 3 (1), 2013, pp. 82ss. S. SWOBODA, *The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters: A small note on a fundamental misunderstanding*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2015, pp. 361ss. M.P. BROBERG, N. FENGER, *Preliminary references to the Court of Justice of the European Union and the right to a fair trial under article 6 ECHR*, in *European Law Review*, 23 (4), 2016, pp. 602ss.

²³ CJEU, C-11/70, *Handelsgesellschaft of 17 December 1970*, ECLI:EU:C:1970:114, I-01125. In particular stated that: “the fact that they are impaired or the fundamental rights enshrined in the constitution of a Member State (...) can not diminish the validity of a Community measure or its effectiveness in the territory of the same State (...) it is however appropriate to ascertain whether it has not been violated no similar guarantee, inherent in Community law (...) the protection of these rights, while being informed of the constitutional traditions common to the Member States, must be guaranteed within the framework of the structure and the objectives of the Community (...)”. C-274/99, *Connolly v. Commission of 6 March 2001*, ECLI:EU:C:2001:127, I-01611, In the same spirit see the opinion 2/94 of 28 March 1996, ECLI:EU:C:1996:140. For further details see: D. LIAKOPOULOS, *Interactions between European Court of Human Rights and private international law of European Union*, in *Cuadernos de Derecho Transnacional*, 10 (1), 2018.

²⁴ CJEU, C-122/95, *Germany v. Council of 10 March 1998*, ECLI:EU:C:1998:94, I-00973. For further details see: M. MENDEZ, *The legal effects of EU agreements*, Oxford University Press, Oxford, 2013.

²⁵ CJEU, joined cases: C-415/05 P, *Kadi & Al Barakaat Int'l Foundation v. Council of 8 November 2008*, ECLI:EU:C:2008:461, I-6351. For details see, R. UERPMMANN-WITZACK, *Rechtsfragen und Rechtsfolgendes Beitritts der Europäischen Union zur EMRK*, in *Europarecht*, 2012, pp. 167ss. C. NOWAK, *Europarecht nach Lissabon*, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, *EU law*, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, *Text, cases and materials on EU law*, Gavedish Publishing, New York, 2013. M. HORSPOOL, M. HUMPHREYS, *EU law*, Oxford University Press, Oxford, 2012, pp. 552ss. H. SATZGER, *International and European criminal law*, Hart Publishing, Oxford & Oregon, Portland, 2017. T. OPPERMMANN, C.D. CLASSEN, M. NETTESHEIM, *Europarecht*, C.H. Beck, München, 2016.

²⁶ In argument see: D. SARMIENTO, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, in *Common Market Law Review*, 50, 2013, pp. 1268ss.

rights, shifting their attention to national constitutional framework²⁷; is that of CJEU itself which has shown that it wishes to have more active use of these rules to examine the validity of EU acts.

15. First of all, it is significant that for the first time during the advisory procedure provided for by art. 218, par. 11 TEU²⁸, CJEU considered that a draft agreement concluded by the Union should be considered contrary to primary law for reasons connected to the protection of fundamental rights. In the opinion n. 1/15 on the projected agreement between Canada and EU on the transfer and processing of Passenger Name Record (PNR)²⁹ the compatibility of this text with some provisions of CFREU was examined.

16. CJEU considered de plano falling within the scope of application of the advisory procedure evidently because of the nature of primary right now attributed to CFREU, the latter stated that with respect to the right to personal data protection, CFREU would refer only to art. 8 CFREU not to art. 16 TFEU³⁰ because the first provision established the conditions of data processing in a more specific way. It found that the provisions of the proposed agreement constituted interference with the right to privacy and in the right to protection of personal data, which it felt as a result of a penetrating and complex control partly not supported by sufficient justification and not consistent with the provisions contained on the point in CFREU.

17. This approach is consistent with the one on several occasions followed by CJEU with reference to secondary legislation, the validity of which has been examined in relation to specific provisions of CFREU. Some conclusions can be drawn from this developed practice.

18. Some provisions do not have the necessary characteristics to be used in practice as a parameter of validity of institutions' acts. This applies in particular, according to the orientation expressed in Glatzel judgment of 22 May 2014³¹, where they contain "principles" and are consequently unsuitable to confer rights to individuals, but also when they correspond to provisions of Treaties with respect to which CJEU exercises a non-full control³².

19. Compared to the other provisions of CFREU that can effectively constitute a parameter of validity of Union's acts, CJEU exercises its control on the basis of the paradigm established by art. 52, par. 1 CFREU³³. Following this *modus procedendi* CJEU every time he ascertains that the act of the Union brings a limitation to one of the rights protected by CFREU, he declares him invalid when he ve-

²⁷ D.H. AUGENSTEIN, *Engaging the fundamentals. On the autonomous substance of EU fundamental rights law*, in *German Law Journal*, 14, 2013, pp. 1918ss.

²⁸ CH. HILLION, P. KOUTRAKOS, *Mixed agreements revisited*, Oxford University Press, Oxford, 2010, pp. 342ss. M. GATTI, P. MANZINI, *External representation of the European Union in the conclusion of international agreements*, in *Common Market Law Review*, 49, 2012, pp. 1704ss. A. HARTKAMP, C. SIBURGH, W. DEVROE, *Cases, materials and text on European Union law and private law*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.

²⁹ CJEU, *Opinion n. 1/15* of 26 June 2017, ECLI:EU:C:2017:656, published in the electronic reports of the cases. For further details see: E. CARPNERI, N. LAZZERINI, *PNR: Passenger Name Record, problems not resolved? The EU PNR conundrum after Opinion 1/15 of the CJEU*, in *Air and Space Law*, 42 (4/5), 2017, pp. 379ss.

³⁰ CJEU, C-52/16, *Segro* of 6 March 2018, ECLI:EU:C:2018:157, published in the electronic Reports of the cases. For further details and analysis see: N. VANDELLE, *Le contrôleur européen de la protection des données et la protection des données personnelles dans l'administration européenne*, in *Revue du Marche Commun et de l'Union Européenne*, 2012, n. 555, pp. 44ss. F. NICOLA, B. DAVIES, *European Union law stories*, Cambridge University Press, Cambridge, 2017. J. USHERWOOD, S. PINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018.

³¹ CJEU, C-356/12, *Glatzel* of 22 May 2014, ECLI:EU:C:2014:350, published in the electronic Reports of the cases.

³² As we notice in the case C-444/15, *Associazione Italia Nostra* of 21 December 2016, ECLI:EU:C:2016:978, published in the electronic reports of the cases, that it has been stated that: "(...) that Article 38 of the Charter corresponds to Article 191 of the TFEU, with respect to which, according to an approach developed with reference to the corresponding environmental regulations of the TEC, the trade union The Court must necessarily confine itself to verifying whether the European Parliament and the Council of the European Union (...) have committed a manifest error of assessment (...)" (par. 46). In argument see also: A. SIKORA, *The principle of a high level of environmental protection as a source of enforceable rights*, in *Cahiers de Droit Européenne*, 52 (1), 2016, pp. 400ss. F. PICOD, S. VAN DROGHENBROECK, *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*, ed. Bruylant, Bruxelles, 2017.

³³ A. BIONDI, P. ECKHOUT, S. RIPLEY, *EU law after Lisbon*, Oxford University Press, Oxford, 2012, pp. 156ss.

ifies that this limitation is not respectful of one of the mentioned requisites³⁴. A different approach could naturally be prefigured for rights considered to be of an absolute nature and not susceptible of tolerating limitations of any kind. However, the case law of CJEU has not examined for the time being questions of compatibility of acts of the Union with rights having such characteristics. From the absolute nature of these rights it must be consistently assumed that the relative provisions do not tolerate restrictions, not even in compliance with the requirements of art. 52 CFREU so that the provisions of secondary law that claim to limit these rights should be considered invalid.

IV. Civil judicial cooperation and the principle of mutual recognition

20. EU civil judicial cooperation policy is regulated in terms of primary law by art. 81 TFEU³⁵, although this provision contains mainly rules aimed at attributing and delimiting the competence of Union institutions in this matter and defining legislative procedures, it also has a substantial pruning, where it identifies the principle of mutual recognition of judicial and extrajudicial decisions as foundation of this cooperation.

21. The meaning of this indication contained in art. 81 TFEU deserves a reflection on mutual recognition, which is a very important institution in EU, initially developed with reference to freedoms of movement provided by Treaty of Rome in the logic of allowing the functioning of the single market. In speciem, in the context of the free movement of goods, the principle of mutual recognition emerged as a result of the persistence of a system characterized by a plurality of national regulations, allowing to identify a precise obligation of member states to recognize the regulations of other states as equivalent to their own, subject to certain exceptional hypotheses, to be interpreted restrictively. Such an obligation was derived directly by art. 30 EEC (provision corresponding to the current article 34 TFEU)³⁶ that the CJEU has consistently deemed suitable to produce direct effects.

22. This long-standing principle of other EU policies has long been referred to in relation to civil judicial cooperation in which it has always been anchored in the recognition of judicial and extrajudicial decisions, which is one of the traditional spheres of private and procedural international law.

23. Just remember that already art. 220 of the Treaty of Rome proposed the need for negotiations between member states in order to guarantee, together with other objectives, “the simplification of formalities to which mutual recognition and execution of judicial decisions and arbitration rulings are subjected”³⁷. When the civil judicial cooperation has become a policy of the then European Community, art. 65 of TCE³⁸ introduced by Maastricht Treaty, also provided that this competence included inter alia the adoption of measures to improve and simplify the recognition and enforcement of judgments on civil and commercial matters, including out-of-court decisions. After the “communitarization” of civil judicial cooperation, European institutions have rapidly intended to mark with particular emphasis the element of mutual recognition of decisions that has been identified as a cardinal element of this policy

³⁴ CJEU, joined cases C-92 and 93/09, *Volker and Markus, Schecke and Eifert*, of 9 November 2010, ECLI:EU:C:2010:662, I-11063, par. 65, C-291/12, *Schwarz* of 17 October 2013, ECLI:EU:C:2013:670, par. 31; joined cases C-293 and C-594/12, *Digital Rights Ireland and Seitlinger and others* of 8 April 2014, ECLI:EU:C:2014:238, par. 49. C-157/14, *Neptune Distribution* of 17 December 2015, ECLI:EU:C:2015:823, parr. 68ss. C-134/15, *Lidl GmbH* of 30 June 2016, ECLI:EU:C:2016:498, par. 31, all the above cited cases published in the electronic Reports of the cases. C-190/16, *Fries* of 5 July 2017, ECLI:EU:C:2017:513, not yet published, par. 35ss. For further details and analysis see: A. TAMÓ-LARRIEUX, *Designing for privacy and its legal framework. Data protection by design and default for the internet of things*, ed. Springer, Berlin, 2018.

³⁵ D.A.O. EDWARD, R. LANE, *Edward and Lane on European Union law*, Edward Elgar Publishers, Cheltenham, 2013. C. NNOWAK, *Europarecht nach Lissabon*, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, *European Union law*, Cambridge University Press, Cambridge, 2014.

³⁶ T.H. FOLSOM, *Principles of European Union law, including Brexit*, West Academic, Minnesota, 2017, pp. 278ss.

³⁷ M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018.

³⁸ C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 586ss.

since the conclusions of the Tampere European Council of 15 and 16 October 1999³⁹ and the consequent draft program adopted by the Council and the European Commission (EC)⁴⁰. These guidelines have merged into art. 81 TFEU as reformulated by the Treaty of Lisbon, to indicate the main objective of civil judicial cooperation with respect to which the other competences indicated should have a servant nature⁴¹.

24. Despite this evolution, art. 81 TFEU continues to refer explicitly only to the recognition of judicial and extrajudicial decisions⁴² and does not extend to administrative acts⁴³, nor to subjective situations such as personal and family status, the circulation of which may be imposed on the basis of provisions of primary law relating to the free movement of persons, according to an established system by CJEU⁴⁴. Obviously, this does not exclude that the concrete application of rules on effectiveness of decisions (or of rules on conflict of laws) can run contrary to obligations of recognition of subjective situations constituted abroad connected to the protection of fundamental rights arising by CFREU, as occurred in the sphere of application of the European Convention on Human Rights (ECHR)⁴⁵, but this possibility does not appear directly prefigured by the provision in question.

25. On the other hand, the Treaty provision appears structurally different from the norm enucleated by the CJEU on the basis of the current art. 34 TFEU⁴⁶, since it does not establish a punctual obligation of member states to allow the recognition of decisions, but rather identifies the general objective to be pursued through the exercise of internal and external competence of the union in this field⁴⁷.

26. Although it is unsuitable to be immediately applied as such, the principle is nevertheless understood by Union institutions as having its own at least programmatic content, which is transfused from time to time with the appropriate adaptations within the measures adopted.

27. You can grope to reconstruct the contents of the principle of mutual recognition, which it concretely manifests EU law on the basis of these measures, identifying the general characteristics of

³⁹ In particular, par. 33 of the conclusions reported: “(...) the European Council therefore approves the principle of mutual recognition which, in its opinion, should become the basis of judicial cooperation in the union in both civil and criminal matters (...)”.

⁴⁰ Draft program of measures related to the implementation of the principle of mutual recognition of judgments in civil and commercial matters (2001/C 12/01), in OJ, no. C 12 of 15 January 2001, par. 1.

⁴¹ D. LIAKOPOULOS, *First considerations and discussion of the proposed reform of litigation competences of the Court of Justice of the European Union*, in *International and European Union Legal Matters-working paper series*, 2018.

⁴² J. TILLOTSON, N. FOSTER, *Text, cases and materials on European Union law*, Gavedish Publishing, New York, 2013. M. HORSPOOL, M. HUMPHREYS, *European Union law*, Oxford University Press, Oxford, 2012, pp. 552ss. T. OPPERMANN, C.D. CLASSEN, M. NETTESHEIM, *Europarecht*, C.H. Beck, München, 2016. R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union Law*, Oxford University Press, Oxford, 2018.

⁴³ With respect to this type of acts see the Regulation n. 2016/1191 of the European Parliament and the Council of 6 July 2016 which promotes the free movement of citizens by simplifying the requirements for the re-examination of certain public documents in the European Union and amending Regulation no. 1024/2012 (OJ, L 200 of 26 July 2016) adopted on the different legal basis of art. 21 TFEU, whose art. 2, par. 4 states that “this Regulation does not apply to the recognition in a Member State of the legal effects relating to the content of public documents issued by the authorities of another Member State (...)”. See also from the CJEU, conclusions in the case C-650/13, *Delvigne* of 4 June 2015, ECLI:EU:C:2015:363, published in the electronic Reports of the cases.

⁴⁴ On the right to name see: CJEU: C-148/02, *Garcia Avello* of 2 October 2003, ECLI:EU:C:1003:539, I-11613; C-353/06, *Grunkin and Paul* of 14 October 2008, ECLI:EU:C:2008:559, I-07639; C-208/09, *Sayn Wittgenstein* of 22 December 2010, ECLI:EU:C:2010:806, I-13693; C-391/09, *Runevič-Vardyn and Wardyn* of 12 May 2011, ECLI:EU:C:2011:291, I-03787; C-438/14, *Bogendorf von Wolfersdordd* of 2 June 2016, ECLI:EU:C:2016:401. For further details see: A. HARTKAM, C. SIBURG, W. DEVROE, *Cases, materials and text on European Union law and private law*, Hart Publishing, Oxford & Oregon, Portland, 2017.

⁴⁵ A. VAN HAKEN, I. MOTOC, *The European Convention on Human rights and general international law*, Oxford University Press, Oxford, 2018.

⁴⁶ N. FOSTER, *European Union law directions*, Oxford University Press, Oxford, 2016.

⁴⁷ Opinion 1/13 of 14 October 2014, ECLI:EU:C:2014:2303, published in the electronic Reports of the cases, par. 45, “(...) pursuant to Article 218 (1) and (11) TFEU, a request for an opinion may be submitted to the Court if the Union envisages concluding an agreement, which implies that the latter is to be provided by one or more institutions of the Union which is vested with powers under the procedure provided for in Article 218 TFEU (...)”. M. KLAMERT, *Dark matter: Competence, Jurisdiction and the area largely covered by EU law* □: *Comment on Lesoochranárske*, in *European Law Review*, 19 (3), 2012, pp. 340-350. P. FRANZINA, *The external dimension of EU private international law after Opinion 1/13*, Cambridge University Press, Cambridge, 2017.

the model used by the institutions to implement the objective set out in the Treaty. These characteristics, which are already partly relevant in the case law relating to the Brussels Convention and which have emerged in practice in the period immediately following the entry into force of the Amsterdam Treaty⁴⁸, concern the elimination of procedures aimed at preventing recognition and enforcement of decisions from high member states; to the exceptional nature of causes which prevent the circulation of decisions, from the one hand, and those concerning jurisdiction and the applicable law from the other.

28. Under the first profile, moving from the principle of automatic recognition already introduced by the Brussels Convention and extended by Regulation no. 2201/2003 to the registration of the same in public registers⁴⁹, the measures adopted by EU showed a clear tendency to the abolition of exequatur as a prodromal procedure to the forced execution that currently only remains between the sectors subject to uniform rules in matters of parental responsibility, inheritance, patrimonial relations between spouses and the effects of registered partnerships⁵⁰. In all other matters, the execution of decisions is not subject to the requested state, being able to take place on the basis of a certificate or certificate issued in the member state of origin⁵¹.

⁴⁸ In the sense of continuity of competence established by art. 67, par. 4 TFEU with the acts adopted on the basis of the previous art. 65 TEC, CJEU, C-551/15, *Pula Parking* of 9 March 2017, ECLI:EU:C:2017:193, published in the electronic Report of the cases, par. 53

⁴⁹ This is provided for in the matter of annulment of marriage, divorce and separation, by art. 21, par. 2 of the Regulation n. 2201/2003 for the registration of the decisions in the registers of civil status, when against being no longer allowed to appeal in the State of origin.

⁵⁰ See in particular: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1–29 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016.

⁵¹ 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, entry in force from 10 January 2015. See in argument: P.A. NIELSEN, *The New Brussels I Regulation*, in *Common Market Law Review*, 50 (3), 2013, pp. 503ss. P. HAY, *Notes on the European Union's Brussels-I "Recast" Regulation*, in *The European Legal Forum*, 2013, pp. 2ss. M. POHL, *Die Neufassung der EuGVVO-im Spannungsfeld zwischen Vertrauen und Kontrolle*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 33, 2013, pp. 109ss. A. NUYS, *La refonte du règlement Bruxelles I*, in *Revue Critique de Droit International Privé*, 2013, pp. 3ss. I.P. BERAUDO, *Regards sur le nouveau Règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Journal du Droit International*, 2013, pp. 742ss. A. STAUDINGER, *Schiedsspruch und Urteil mit vereinbarten Wortlaut*, in *Festschrift für Friedrich Graf von Westfalen*, Dr. Otto Schmidt Verlag, Köln, 2010, pp. 662ss. V. RIJAVEC, W. JELINEK, W. BREHM, *Die Erleichterung der Zwangsvollstreckung in Europa*, ed. Nomos, Baden-Baden, 2012, pp. 214ss. V. PULJKO, *Regulation (EU) n. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with special reference to the relationship between the Regulation and arbitration*, in *Interdisciplinary Management Research*, 17, 2015, pp. 4ss. F. GASCÓN-INCHAUSTI, *La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis*, in E. GUINARD (eds), *Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, ed. Larcier, Bruxelles, 2014, pp. 210ss. See in argument the next cases from the CJEU: C-368/16, *Assnes Havn v. Navigatos Management (UK) limited* of 13 July 2017, ECLI:EU:C:2017:546; C-341/16, *Hanssen Beleggingen v. Tanja Prast-Knippin* of 5 October 2017, ECLI:EU:C:2017:738; C-230/15, *Brite Strike Technologies v. Strike Strike Technologies SA* of 13 July 2016, ECLI:EU:C:2016:560; C-350/14, *Lazar v. Allianz SpA* of 10 December 2015, ECLI:EU:C:2015:802; C-536/13, *Gazprom v. Lietuvos Respublika* of 4 December 2014, ECLI:EU:C:2014:316, all the above cited cases published in the electronic reports of the cases. For further analysis see: G. PAYAN, *Droit européen de l'exécution en matière civile et commerciale*, ed. Bruylant, Bruxelles, 2012. B. KÖHLER, *Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation*, in *Praxis des Internationalen Privat- und Verfahrensrecht*, 37, 2017, n. 6 and in particular the next cases from the CJEU: C-70/15, *Emmanuel Lebek v. Janusz Domino* of 7 July 2016, ECLI:EU:C:2016:524; C-12/15, *Universal Music International Holding BV v. Michael Têtreault Shilling* of 16 June 2016, ECLI:EU:C:2016:449; C-605/14, *Virpi Kom v. Pekka Komu and Jelena Komu* of 17 December 2015, ECLI:EU:C:2015:833; C-438/12, *Irmengard Weber v. Mechthilde Weber* of 3 April 2014, ECLI:EU:C:2014:212, the just cited cases published in the electronic Reports of the cases. In particular in this ultimate case the Court has declared that: "(...) Since the "jurisdiction of the Court first seized (could not be) be formally established (...) the Advocate General confirmed (...) that there was no lis pendens in operation in this case and proceedings in the Court second seized need not be stayed. He relied on dicta (...) to justify that it was inappropriate for it to stay proceedings pending before it (...) the justification for the "reliable assessment" this was premised on the fact that the Court first seized did not have jurisdiction and could not therefore either determine the question of lis pendens nor issue a judgment capable of recognition under Articles 35(1) and 45(1) (...)"

29. This choice appears to be consistent with the conception of exequatur procedures as “barriers” to the free circulation of decisions, based on art. 81 TFEU⁵². Once the “sovrainist” logic, *rectius* statist of the resolution has been exceeded, the need to guarantee the right to a fair trial in the execution phase is allowed, permitting the interested party to promptly achieve the result envisaged by the sentence. In this context, the position of the party that has an interest against execution is destined to receive protection no longer through a generalized control of foreign decisions but by means of remedies of a later nature, remitted to its initiative. On the other hand, this development is based on the choice to concentrate as far as possible the remedies available to the debtor in the member state of origin; where, as in the case of a European enforcement order, no assessment is allowed to the judge of the member state of enforcement, the need to guarantee the rights of defense has emerged in the jurisprudence of CJEU, even when the certificate is issued⁵³.

30. EU regulations on civilian judicial cooperation ordered the abolition of the exequatur and also provided for procedures aimed at allowing opposition to the recognition or enforcement of judgments issued in another member state. These procedures are also carried out according to deeply differentiated methods. Under Regulation n. 805/2004 the revocation of the European enforcement order certificate can be requested in the member state of origin⁵⁴. Under Regulation n. 4/2009 the review of the decision on maintenance obligations can be requested in the member state of origin, but a refusal of enforcement in the requested member state can also be opposed for reasons set out in Regulation⁵⁵. Under Regulation n. 1215/2012 the refusal of recognition or enforcement can be arranged in the requested member State⁵⁶. Under Regulation EU n. 655/2014 the debtor may alternatively appeal against

We continue with the next cases: C-218/02, *Lokman Emrek v. Vlado Sabranovic* of 17 October 2013, ECLI:EU:C:2013:62, I-01241; C-190/11, *Daniela Mühlleitner v. Ahmad Yusufi* of 6 September 2012, ECLI:EU:C:2012:542, published in the electronic Reports of the cases. See, J.P. BERAUDO, *Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, op. cit., pp. 742ss. L. GRARD, *La communautarisation de “Bruxelles I”*, in *Revue Générale de Droit International Public*, 117 (4), 2013, pp. 530ss. P. BEAUMONT, M. DANON, K. TRIMMINGS, B. YÜKSEL, *Cross-border litigation in Europe*, Hart Publishing, Oxford & Oregon, Portland, 2017. F. GASCÓN-INCAHUSTI, *La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis*, in E. GUINCHARD (eds), *Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, op. cit., pp. 210ss.

⁵² C. TIETJE, *The status of international in the European legal order: the case of international Treaties and non-binding international instrument*, in J. WOUTERS, A. NOLLKAEMPE, E. DE WET (eds.), *The europeanization of international law: The status of international law in the EU and its Member States*, Cambridge University Press, Cambridge, 2008. A. KACZOROWSKA-IRELAND, *European Union law*, ed. Routledge, London & New York, 2016.

⁵³ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. CJEU: joined cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber* of 18 December 2014, ECLI:EU:C:2014:2361; C-66/17, *Chudač* of 14 December 2017, ECLI:EU:C:2017:972, above published in the electronic Reports of the cases. See in argument also: H. PÉROZ, *Le règlement CE n. 805/2004 del 21 avril 2004 portant création d'un titre exécutoire européen pour les créances incontestées*, in *Clunet*, 2005, pp. 638ss. L. D'AVOUT, *La circulation automatique des titres exécutoires imposée par le règlement 805/2004 du 21 avril 2004*, in *Revue Critique de Droit International Privé*, 95, 2006, pp. 2ss. A. SADLER, *From the Brussels Convention to Regulation 44/2001. Cornerstones of a European law of civil procedure*, in *Common Market Law Review*, 42 2005, pp. 1638ss. CJEU, C-300/14, *Imtech Marine Belgium* of 17 December 2015, ECLI:EU:C:2015:825, par. 38, where the reference to the rights of defense is explicitly justified on the basis of art. 47 CFREU. See also: C-511/14, *Pebros Servizi* of 16 June 2016, ECLI:EU:C:2016:448, par. 25, C-484/15 *Zulfikarpašić* of 9 March 2017, ECLI:EU:C:2017:199, par. 48; C-289/17, *Collect Inkasso* of 28 February 2018, ECLI:EU:C:2018:133, parr. 36ss, all the ultimate cited cases published in the electronic Report of the cases.

⁵⁴ See art. 10 of the Regulation n. 805/2004. The revocation may be requested if it is manifestly granted by mistake, taking into account the established requirements.

⁵⁵ Council Regulation n. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This Regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J. (L 3069) 1, (EC). See from the CJEU: joined cases C-400/13 and C-408/13, *Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber* of 18 December 2014, ECLI:EU:C:2014:2461; C-419/17 P, *Deza/ECHA* of 23 January 2019, ECLI:EU:C:2019:52, the cited cases was published in the electronic Reports of the cases. In argument: N. BAUGUIET, M. DECHAMPS, J. MARY, *Actualités en droit de la famille*, ed. Larcier, *Bruxelles*, 2016. G. CUNIBERTI, *Abolition de l'exequatur et présomption de protection des droits fondamentaux*, in *Revue Critique de Droit International Privé*, 103 (1), 2014, pp. 304ss.

⁵⁶ CJEU, C-306/17, *Northortová* of 31 May 2018, ECLI:EU:C:2018:360; C-64/17, *Saey Home & Garden* of 8 March 2018, ECLI:EU:C:2018:173; C-649/16, *Valach and others* of 20 December 2017, ECLI:EU:C:2017:986; C-433/16, *Bayerische Motoren Werke* of 13 July 2017, ECLI:EU:C:2017:550; C-274/16, *Flightright* of 7 March 2018, ECLI:EU:C:2018:160, the cited cases was published in the electronic Reports of the cases.

European sequestration order in the member state of origin or oppose the execution of the same in the requested member state⁵⁷.

31. This model is an exception to Regulation n. 2201/2003⁵⁸, which for matters in which the exequatur is to be abolished does not admit any means of appeal against the issue of certificate or against the execution of the decision⁵⁹.

32. Secondly, by examining the impediments to recognition and enforcement according to a consistent jurisprudence of CJEU, developed with reference to provisions of the Brussels Convention⁶⁰, the conditions impeding recognition and enforcement are mandatory and must be interpreted restrictively⁶¹. In essence, since the main objective of civil judicial cooperation is the free circulation of decisions, the effectiveness of decisions in a member state other than the one of origin can only represent the rule⁶² and the existence of causes impeding this effectiveness can be invoked only in exceptional cases⁶³. Such an approach finds its explanation in the principle not expressly mentioned in Treaties but derived from CJEU on an inductive basis according to which a high level of mutual trust must exist among member states⁶⁴.

33. These impediments are not uniformly regulated in various regulations, although they are largely attributable to a common conceptual fencing which may be contemplated in order to foreclose the effectiveness of a decision in other member states, related reasons, respectively to the infringement of

⁵⁷ See artt. 33-35 of the Regulation EU n. 655/2014 of European Parliament and of the Council, of 15 May 2014. Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59–92. In speciem, The Regulation refers to the already examined regulations establishing: the European enforcement order, the European order for payment, the procedure for small claims and the European order for attachment. See from the CJEU: C-379/19, *Società Immobiliare Al Bosco* of 4 October 2018, ECLI:EU:C:2018:806, published in the electronic Reports of the cases. For further details see: J.C. FERNÁNDEZ ROZAS, *Un hito más en la comunitarización del Derecho internacional privado: regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas*, in *La Ley Unión Europea*, n° 40, 2016. L.M. MULEIRO PARADA, *La cooperación reforzada en el impuesto sobre transacciones financieras*, in *La Ley Unión Europea*, n° 22, 2015. G. PALAOALAO MORENO, G. ALONSO LANDETA, I. BUIGUES (dirs.), *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012*, Marcial Pons, Valencia, 2015, pp. 58ss.

⁵⁸ CJEU, C-345/18, *ND* of 20 September 2018, ECLI:EU:C:2018:749; C-325/18, *C.E. and N.E.* of 19 September 2018, ECLI:EU:C:2018:739; C-512/17, *HR* of 28 June 2018; ECLI:EU:C:2018:513; C-478/17, *IQ* of 4 October 2018; ECLI:EU:C:2018:812, all the cited sentences was published in the electronic Reports of the cases.

⁵⁹ CJEU, C-491/10 PPU, *A. Zarraga v. Pelz* of 22 December 2010, ECLI:EU:C:2010:828, I-14247, par. 70. For further analysis see: A. WHELAN, *Of courts and constitutions. Liber amicorum in honour of Nial Fennelly*, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 40ss. D. ACOSTA ARCARAZO, C.C. MURPHY, *European Union security and justice law. After Lisbon and Stockholm*, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 25ss. A. BRIGGS, *The conflict of laws*, Oxford University Press, Oxford, 2013, pp. 362ss.

⁶⁰ CJEU, C-414/92, *Solo Kleimotoren v. Boch* of 2 June 1994, ECLI:EU:1994:221, I-02237, par. 20; C-38/98, *Renault* of 11 May 2000, ECLI:EU:C:2000:225, I-02973, par. 26. For further details see: L. HAUBERG WILHELMSSEN, *International commercial arbitration and the Brussels II Regulation*, Edward Elgar Publishers, Cheltenham, 2018. T. KONO, *Intellectual property and private intellectual law: Comparative perspectives*, Hart Publishing, Oxford & Oregon, Portland, 2012.

⁶¹ According to the next jurisprudence: CJEU, C-681/13, *Diageo Brands* of 16 July 2015, ECLI:EU:C:2015:471, par. 41, C-455/15 PPU, *P v. Q* of 19 November 2015, ECLI:EU:C:2015:763, par. 36, C-559/14, *Meroni* of 25 May 2016, ECLI:EU:C:2016:349, par. 38, all the above cited cases published in the electronic Reports of the cases. For further details see: H. SCHERMERS, *Judicial remedies in the European Communities. A case book*, ed. Springer, Berlin, 2013.

⁶² CJEU, C-571/17 PPU, *Ardic* of 22 December 2017, ECLI:EU:C:2017:1026, published in the electronic Reports of the cases.

⁶³ In the sense that control must be particularly rigorous when it takes place only in the member state of origin and no power is attributed to the executing member state in this regard. See also: CJEU, C-289/17, *Collect Incasso*, ECLI:EU:C:2018:133, published in the electronic Reports of the cases.

⁶⁴ See for further details and analysis: M. WELLER, *Mutual trust. In search of the future of European Union private international law*, in *Journal of Private International Law*, 14 (1), 2015, pp. 64ss. D. LIAKOPOULOS, *Procedural harmonization, mutual recognition and multi-level protection of fundamental procedural rights*, in *Revista General de Processo General*, 47, 2019. M. ZILINSKY, *Mutual trust and cross-border enforcement of judgments in civil matters in the European Union: Does the step-by-step approach work?*, in *Netherlands International Law Review*, 64 (1), 2017, pp. 118ss. I. MEVORACH, *The future of cross border insolvency: Overcoming biases and closing gaps*, Oxford University Press, Oxford, 2018. S. HUFNAGEL, C. MCCARTNEY, *Trust in international police and justice cooperation*, Hart Publishing, Oxford & Oregon, Portland, 2017. M. FLETCHER, E. HERLIN-KARNELL, C. MATERA, *The European Union as an area of freedom, security and justice*, ed. Routledge, London & New York, 2016.

public order limit⁶⁵, the failure to notify the judicial request or the application initiating the proceedings and the contrast between decisions.

34. Lastly, it must be borne in mind that the acts adopted to implement the principle of mutual recognition have the common feature of being usually structured according to the model of Brussels Convention, including uniform rules on jurisdiction. In the more recent instruments there are also rules to determine the applicable law. These norms are presented as they are in the conventions of uniform international law, universal in nature and therefore must be classified as true rules of conflict (and not mere inter regional rules). However, it is undisputed that both the rules on jurisdiction and on conflict of laws⁶⁶ do not respond to a unitary model, since the institutions use different approaches in different subjects in relation to values that come from time to time, attributing where appropriate, access to justice or to foreseeability of the forum for the defendant, as well as in specific subjects, to the centrality of child's position, to the favor creditoris concerning food, the need to protect the weaker contractor⁶⁷ and the right of access to divorce and personal separation⁶⁸.

35. It must be added that despite the diversity of approaches followed the presence of a uniform discipline of jurisdiction and of applicable law, as areas of intervention specifically provided for by art. 81 TFEU is also instrumental in preparing a more solid foundation for two further rules that are reaffirmed by various instruments of civil judicial cooperation and which accompany the principle of mutual recognition and precisely the tendential prohibition of review of the jurisdiction of the member state of origin and the substance of foreign decision⁶⁹.

36. By imposing such prohibitions, the regulations adopted by the Union preclude that when a decision of a member state is to be declared effective in another member state, the latter can again control the jurisdiction of the court of member state of origin⁷⁰, you want the accuracy of factual or legal assessments made by the latter or the correct application of legal rules.

37. CJEU has long said that the existence of uniform rules on jurisdiction, imposing itself on national courts and making it presume that in all member states their application would lead to the same result, justifies the absence of any control by the member state requested⁷¹, so that the uniform discipline of jurisdiction plays an ancillary role with respect to the objective of free circulation of decisions. A similar conclusion seems to be reached in relation to the existence of conflict rules, which, determining the need to apply the same law with respect to a given case in all member states, can only encourage mutual trust and ultimately the circulation of decisions.

38. Since the characteristics of the principle of mutual recognition outlined above, which are concretely evident from the measures adopted, are very general in scope and lend themselves to being implemented in very different ways. It does not seem that under art. 81 TFEU can be summarized limits that are particularly relevant to the action of the institutions of the Union⁷². This of course does not mean

⁶⁵ T. CORTHAUT, *EU ordre public*, Kluwer Law International, The Hague, 2012.

⁶⁶ D. LIAKOPOULOS, *Conflicts of law in the European Union Law*, in *International and European Union Legal Matters*, 2010.

⁶⁷ A. SIANY-CYTERMANN, *La protection de la partie faible en droit international privé*, in *Mélanges en l'honneur de Paul Lagarde. Le droit international privé. Esprit et méthodes*, Brill, Hague, 2005, pp. 737ss.

⁶⁸ M. NI SHÜLLEABHÁIN, *Cross border divorce law. Brussels II bis*, Oxford University Press, Oxford, 2010, pp. 149ss. P. BEAUMONT, N. DANOV, K. TRIMMINGS, *Cross-border litigation in Europe*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 804ss.

⁶⁹ CJEU, C-38/98, *Renault* of 11 May 2000, ECLI:EU:C:2000:225, I-02973. C-681/13, *Diageo Brands* of 16 July 2015, ECLI:EU:C:2015:471, published in the electronic Reports of the cases.

⁷⁰ In the sense that such a review of the jurisdiction of the Member State of origin would call into question the very purpose of the regulations on judicial cooperation in civil matters. See also: CJEU, C-455/15, *P v. Q* of 19 November 2015, ECLI:EU:C:2015:763, published in the electronic reports of the cases. C-341/04, *Eurofood* of 2 May 2006, ECLI:EU:C:2006:281, I-03813, par. 42.

⁷¹ CJEU, C-614/10, *Wolf Naturprodukte* of 21 June 2012, ECLI:EU:C:2012:367, par. 25; C-456/11, *Gothaer Allgemeine Versicherung* of 15 November 2012, ECLI:EU:C:2012:719, par. 35, above the cited cases published in the electronic Reports of the cases.

⁷² F. MARTUCCI, *Droit de l'Union européenne*, LGDG, Paris, 2017.

that the objective envisaged for this provision cannot be detected in terms of teleological and systematic interpretation to provide useful elements for the application of individual measures⁷³.

39. A systematic interpretation appears imposed above all by the need to avoid, as far as possible, a conflict between a law belonging to secondary legislation and CFREU. CJEU reiterated that “an act of the Union must be interpreted, as far as possible, so as not to undermine its validity and in accordance with primary law as a whole and with the provisions of CFREU (...)”⁷⁴. From a different point of view, the decision to take into account the requirements connected to the protection of fundamental rights in provisions contained in EU acts appears to be precise recalls contained in the preamble of the same, in order to ensure internal consistency between the act and its motivation⁷⁵. The presence of such recalls seems to allow CJEU to identify a more solid foundation on strictly textual plane, for references to CFREU. The existence of a precise textual link with the rules of CFREU does not constitute a decisive element, since their relevance on primary law imposes the extension of the scope by way of interpretation, within an act of secondary law, also to provisions which do not explicitly refer to CFREU⁷⁶.

40. In some cases CJEU has identified a closer relationship, almost of interpenetration, between individual provisions of CFREU and secondary legislation related to them, concluding that the discipline contained in the latter has the effect of realizing a certain regime of protection of fundamental rights⁷⁷. The consequence is a lower relevance of CFREU provisions for interpretation purposes⁷⁸ and on the other, a particular emphasis on the role of secondary law, even when this takes the form of Directive.

⁷³ CJEU, C-551/15, *Pula Parking* of 9 March 2017, ECLI:EU:C:2017:193, published in the electronic Report of the cases.

⁷⁴ According to the case: C-579/12 RX-II, *Rèexamen Commission v. Strack*, ECLI:EU:C:2013:470, published in the electronic Reports of the cases, par. 40.

⁷⁵ As we can see in the next cases from the CJEU: joined cases: C-175, C-176, C-178 and C-179/08, *Abdulla* of 2 March 2010; ECLI:EU:C:2010:105, I-01493, par. 54; C-486/12, *X* of 12 December 2013, ECLI:EU:C:2013:836, par. 29; joined cases C-148 to C-150/13, *A, B and C*, ECLI:EU:C:2014:2406, par. 46; C-201/16, *Shiri* of 25 October 2017, ECLI:EU:C:2017:805, par. 44, C-360/16, *Hasan* of 25 January 2018, ECLI:EU:C:2018:35, par. 31, the cited cases published in the electronic Reports of the cases.

⁷⁶ CJEU, C-648/11, *MA and others* of 6 June 2013, ECLI:EU:C:2013:367, published in the electronic Reports of the cases.

⁷⁷ An explicit statement to this effect is found in the principle of non-discrimination based on age, whose scope is determined by the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published in OJ L 303, 2.12.2000. See also: CJEU, C-476/11, *HK Danmark* of 26 September 2013, ECLI:EU:C:2013:590, par. 19; C-432/14, *O*, of 1st October 2015, ECLI:EU:C:2015:643, par. 21, the cited cases published in the electronic Reports of the cases. For further analysis and details see: V. HATZOPOULOS, *The collaborative economy and European Union law*, Hart Publishing, Oxford & Oregon, Portland, 2018, pp. 165ss. T. SROREY, A. PIMOR, *Unlocking European Union law*, ed. Routledge, London & New York, 2018, pp. 516ss. The same is also true in large part for the principle of non-discrimination on an ethnic basis concretized by the Directive 2000/43/EC. See the sentence C-83/14, *VHEZ Razpredelenie* of 16 July 2015, ECLI:EU:C:2015:480, published in the electronic Reports of the cases, par. 41ss. In the sense that the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33-35. see also: D. FARGRIVE, F. LICHÈRE, *Public procurement law. Damages as an effective remedy*, Hart Publishing, Oxford & Oregon, Portland, 2011. S. ARROWSMITH, *The purpose of the European Union procurement directives. Ends, means and the implications for national regulatory space for commercial and horizontal procurement policies*, in *Cambridge Yearbook of European Legal Studies*, 4, 2012, pp. 5ss. C. BAUDENBACHER, *The handbook of EEA law*, ed. Springer, Berlin, 2015, pp. 618ss. C. DE KOINICK, P. FLAMEY, *European public procurement law: The European public procurement. Part I-Remedies*, Kluwer Law International, The Hague, 2009, pp. 76ss. J.M. HEBLY, J. BRANTS, *European public procurement: legislative history of the “remedies” of directives 89/665/EEC and 92/13/EEC*, Wolters Kluwer, Aalphen aan den Rijn, 2011. C. BOVIS, *European Union public procurement law*, Edward Elgar Publishers, 2012, pp. 218ss. F. WILMAN, *Private enforcement of European Union law before national Courts. The European Union legislative framework*, Edward Elgar Publishers, 2015, pp. 95ss. H. SCHEBESTA, *Damages in European Union public procurement law*, ed. Springer, Berlin, 2015, pp. 25ss. S. ARROWSMITH, S. TREUMER, *Competitive dialogue on European Union procurement*, Cambridge University Press, Cambridge, 2012, pp. 334ss. A. SÁNCHEZ GRAELLS, *Public procurement and the European union competition rules*, Hart Publishing, Oxford & Oregon, Portland, 2015. The last cited Directive find a concrete expression in the field of public procurement, the principle of effective judicial review. See in this spirit the case: C-35/15 P(R), *Commission v. Vanbreda Risk & Benefits* of 23 April 2015, ECLI:EU:C:2015:275, published in the electronic Reports of the cases, par. 28.

⁷⁸ See for example: C-416/13, *Vital Pérez* of 13 November 2014, ECLI:EU:C:2014:2371, published in the electronic Reports of the cases, par. 25, according to which “(...) when a preliminary question concerning the interpretation of the general principle of non-discrimination based on age, as set out in Article 21 Charter, as well as the provisions of Directive 2000/78 in the context of a dispute between an individual and a public administration, the Court examines the question solely in the

41. It follows that the lack of a detailed content in the norm of primary rank and the wide discretionary space consequently reserved to secondary law cannot but affect the relevance of CFREU with respect to civil judicial cooperation and its ability to influence rules concerning civil judicial cooperation. This conclusion is justified not only for reasons connected to the hierarchy of sources, since it is permissible for CFREU to model the derivative law in a more incisive way, as it is not conditioned by the precise provisions of the Treaties. But it also finds anchor in the content of art. 67 TFEU⁷⁹ which expressly links the realization of the entire area of freedom, security and justice to respect fundamental rights to the need to ensure access to civil justice.

42. According to our opinion, the *modus interpretandi* used up here has two types of risks. On the one hand, CJEU's practice of not always taking sufficient account of the scope and significance of the rights guaranteed by ECHR, as outlined by European Court of Human Rights (ECtHR) jurisprudence, could cause member states to become more and more constrained in two systems, from non-coincidental obligations, making the hypothesis of the existence of an infringement of ECHR possible by the states themselves. On the other hand, and consequently the inconsistency of the approach followed could induce national judgments to perceive a lower capacity of CJEU, precisely in the matter of fundamental rights to provide a guide suitable to ensure compliance with the parallel obligations of member states with respect to CFREU and ECHR⁸⁰. Thus the position of ECtHR assumes symmetric relevance, where for years it has elaborated with reference to relations with EU law the well-known doctrine of "equivalent protection"⁸¹ under which the actions of a contracting state of ECHR are presumed compatible with the latter whenever it has acted to fulfill the obligations arising from participation in an international organization, which guarantees protection of fundamental rights that qualifies as "equivalent" to that afforded by ECHR itself.

V. Civil judicial cooperation and values inherent to protection of fundamental rights

43. Moving from general premises found in the recalls of art. 67 TFEU to the protection of fundamental rights and to the principle of mutual recognition, one can question the existence of specific values relating to the protection of fundamental rights that correspond to the objectives of civil judicial cooperation.

44. It can be obtained from art. 67, par. 4 TFEU the centrality of the principle of effective judicial protection, as protected by art. 47 CFREU⁸² which finds one of its areas of election in civil judicial cooperation. The structure of this provision as it appears from the explanations is based on articles 6 and 13 of ECHR⁸³ since it states in par. 1 the right to an effective remedy (*wirksame Rechtsbehelf*) and identifies in par. 2 guarantees of the fair trial by adding in par. 3⁸⁴ a specific reference to the right to defense at the expense of the state. The residual spaces within which the effective recourse guarantee is destined to be

light of the aforementioned Directive (...) ". See also the case: C-306/16, *Mario Marques da Rosa* of 9 November 2017, ECLI:EU:C:2017:844, not yet published, where it is stated that the art. 31, par. 2 of the Charter which establishes the right to a limitation of the maximum duration of work and daily and weekly rest periods as well as paid annual leave, refers in practice to the contents of Directives 83/104 and 2003/88 so that it could not provide new elements (par. 50).

⁷⁹ R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union Law*, Oxford University Press, Oxford, 2018.

⁸⁰ See in particular: F. EMMERT, C. PICHÉ CARNEY, *The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on human rights and fundamental freedoms. A comparison*, in *Fordham International Law Journal*, 40, 2017, pp. 1052ss.

⁸¹ P. KOUTRAKOS, M. EVANS, *The international responsibility of the European Union*, Oxford University Press, Oxford, 2013, pp. 297ss.

⁸² M. SAFFIAN, D. DÜSTERHAU, *A Union of effective judicial protection: Addressing a multi-level challenge through the lens of article 47 CFREU*, in *Yearbook of European Law*, 33 (1), 2014, pp. 3ss. C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, in *Amsterdam Law School Research Paper No. 2012-88. Centre for the Study of European Contract Law Working Paper Series No. 2012-11*. G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, in *Revue Trimestrielle des Droits de l'Homme*, 106, 2016, pp. 433ss.

⁸³ L.R. Kiestra, *The impact of the European Convention on Human Rights on private international law*, ed. Springer, Berlin, 2014.

⁸⁴ CJEU, C-224/01, *Köbler* of 30 September 2003, ECLI:EU:C:2003:513, I-10239.

applied in civil-procedural context may firstly be identified where elements of attribution to the individual of legal positions of advantage derive from effective law provisions of the union, ie directly applicable in inter-private relationships and current or potential harm to such advantageous situations. The emphasis on the effectiveness of remedy is sufficient in the general theory of process, apart from the classical statement that the duration of the process cannot be to the detriment of the party who is right⁸⁵.

45. CJEU jurisprudence had already elaborated in the past general principles of law largely corresponding in content to the current provision of CFREU. CJEU recalled that art. 47 CFREU leads to a reaffirmation of the principle of effective judicial protection⁸⁶, that had developed from the well-known Johnston of 15 May 1986⁸⁷, similarly with regard to the rights of defense⁸⁸, CJEU believes that art. 47 CFREU reiterates⁸⁹ a pre-existing general principle of Union law⁹⁰, including the right to be heard⁹¹, to be assisted by a lawyer⁹², to access to evidence⁹³ and to equality of arms⁹⁴.

⁸⁵ The principle of effectiveness has paved the way for the extension of substantial safeguards under national private law as we can in the case C-295/04, *Manfredi* of 13 July 2006, ECLI:EU:C:2006:461, I-06619: “(...) the useful effect of the prohibition enshrined (from Article 81 of the EC Treaty) would be called into question if anyone could not claim compensation for the damage caused by a contract or behavior that was liable to restrict or distort competition (...)”. In the same spirit the case C-432/05, *Unibet* of 13 March 2007, ECLI:EU:C:2007:163, I-02271. For further details and analysis see: L. GRUSZCZYNSKI, W. WERNER, *Deferral in international courts and tribunals. Standard of review and margin of appreciation*, Oxford University Press, Oxford, 2014. Always in the antitrust field the art. 47 is the compass that guides the interpretation of the uniform rules on jurisdiction in civil and commercial matters set out in Regulation no. 44/2001 in the case of the Advocate General Jääskinen in case C-342/14, *Cartel Damage Claim* of 11 December 2014, ECLI:EU:C:2014:2443: “(...) the procedural rules the right of the Union must be placed in some way at the service of the substantial norm of the right of the Union, in the sense that the former constitute an instrument that makes tangible the rights and obligations of private and public persons, particularly under the profile of the right to an effective remedy and fair trial enshrined in Article 47 CFREU (C-342/14, *Cartel Damage Claim* of 11 December 2014, ECLI:EU:C:2014:2443). In the same spirit see also: C-249/16, *Kareda* of 15 June 2017, ECLI:EU:C:2017:472; C-196/15, *Granoletto* of 23 December 2015, ECLI:EU:C:2015:559; C-185/15, *Kostanjevec* of 12 October 2016, ECLI:EU:C:2016:763; C-605/14, *Komu and others* of 17 December 2015, ECLI:EU:C:2015:833; C-521/14 *Sovag* of 21 January 2016, ECLI:EU:C:2016:41, all cited cases was published in the electronic Reports of the cases.

⁸⁶ CJEU, C-562/13, *Abdida* of 18 December 2013, ECLI:EU:C:2014:2453, par. 45; C-239/14, *Tall* of 17 December 2015, ECLI:EU:C:2015:824, par. 51, the cited cases published in the electronic Reports of the cases.

⁸⁷ CJEU, C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* of 15 May 1986, ECLI:EU:C:1986:206, I-01651, par. 18. In the same spirit see: joined cases: C-143/88 and C-92/89, *Zuckerfabrik* of 21 February 1991, ECLI:EU:C:1991:65 I-00415; C-465/93, *Atlanta* of 9 November 1995, ECLI:EU:C:1995:369, I-02761; C-78/98, *Preston* of 16 May 2000, ECLI:EU:C:2000:247, I-01501; C-327/00, *Santex* of 27 February 2003, ECLI:EU:C:2003:109, I-01877. For further analysis see: A. BARAV, *Judicial enforcement and implementation of European Union law*, ed. Bruylant, Bruxelles, 2017. P. CRAIG, *European Union administrative law*, Oxford University Press, Oxford, 2018.

⁸⁸ In the same spirit see from the High Court (1996), *Iberian K Ltd v. BPB Industries Plc*: “(...) it should be an abuse of process to allow the defendants to mount a collateral attack on the Commission decision in proceeding against any part before any national court (...)”.

⁸⁹ CJEU, C-277/11, *M.M.* of 22 November 2012, ECLI:EU:C:2012:744, par. 81; C-560/14, *M.* of 9 February 2017, ECLI:EU:C:2017:101, above published in electronic Report of the cases.

⁹⁰ CJEU, C-234/84, *Belgium v. Commission, (Meura)* of 10 July 1986, ECLI:EU:C:1986:302, I-02263, par. 27; C-301/87, *France v. Commission, Boussac Saint Frères* of 14 February 1990, ECLI:EU:C:1990:67, I-00307, par. 29; C-142/87, *Belgium v. Commission* of 21 March 1990, ECLI:EU:C:1990:125, I-00959, par. 46; C-135/92, *Fiskano v. Commission* of 29 June 1994, ECLI:EU:C:1994:267, I-02885, par. 39. For further analysis see: K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, Oxford, 2014, pp. 133ss. J.J. PIERNAS LOPEZ, *The concept of State aid under European Union law: from internal market to competition and beyond*, Oxford University Press, Oxford, 2015.

⁹¹ CJEU, C-349/07, *Sopropè* of 18 December 2008, ECLI:EU:C:2008:746, I-10369, par. 36ss.

⁹² CJEU, C-7/98, *Krombach v. France* of 28 March 2000, ECLI:EU:C:2000:164, I-0193 I the CJEU noticed the right of the German Court to refuse recognition of a judgment rendered in France was based on a procedural rule which penalized the defendant, preventing him from pursuing his defense if he had not submitted himself in the process. The judgment of the CJEU did not bind the Court to a particular solution to the case (in reality, not to recognize the foreign judgment) but to rule out the non recognition of a breach of the Brussels if, in the Court’s view there was a manifest incompatibility of the proceedings before the foreign Court with the fundamental safeguards of the defense. In the same case, the ECtHR, by judgment of 13 February 2001, sentenced France for failing to allow the accused to appear in Court under the French Code of Criminal Procedure, which deprived the defendant of the defense in judgment when an alleged crime was being challenged. The CJEU referred to the case law of the ECtHR in defining the refusal to hear the defense of an accused absent from the hearing as a “manifest violation of a fundamental right” par. 40. See also: J.P. COSTA, *La Cour européenne des droits de l’homme. Des juges par la liberté*, ed. Dalloz, Paris, 2017.

⁹³ CJEU, C-399/99 P, *Carus UK v. Commission* of 2 October 2003, ECLI:EU:C:2003:531, I-02553, par. 19ss.

⁹⁴ CJEU, joined cases C-514, C-528 to C-532/07 P, *Sweden and others v. API and Commission* of 21 September 2010,

46. The importance of the principles expressed by art. 47 CFREU in the matter of civil judicial cooperation derives *ratione materiae* from their transversal character and being able to come into relief with respect to all the sectors of intervention indicated in art. 81 TFEU⁹⁵. The areas included *stricto sensu* in the procedural jurisdiction, such as effectiveness of decisions, judicial assistance, access to justice and uniform rules of civil procedure are subject to compliance with the guarantees of effective judicial protection. But access to justice and exercise of rights of defense⁹⁶ can be conditioned by rules on conflicts of law, at least where these are aimed at achieving certain material objectives⁹⁷.

47. The relevance of art. 47 CFREU in the system of civil judicial cooperation⁹⁸ is also confirmed in the choice of institutions to recall this provision, with great frequency especially after the entry into force of the Treaty of Lisbon, to the preamble of the adopted regulations⁹⁹, mainly when they

ECLI:EU:C:2010:541, I-08533, par. 85. For further details see: M. COSTA, *The accountability gap in European Union law: mind the gap*, ed. Routledge, London & New York, 2016.

⁹⁵ F. MARTUCCI, *Droit de l'Union européenne*, op. cit.,

⁹⁶ CJEU, C-279/09, *DEB GmbH v. Germany* of 22 December 2010, ECLI:EU:C:2010:811, I-13849; C-156/12, *GREP CmbH* of 13 June 2012, ECLI:EU:C:2012:342; C-499/12, *Gentile* of 7 February 2013, ECLI:EU:C:2013:77, not yet published; C-498/12, *Pedone* of 7 February 2013, ECLI:U:C:2013:76, not yet published. For further analysis see: T. KERIKMÄE, *Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights*, ed. Springer, Berlin/Heidelberg, 2014, pp. 80ss. S. DOUGLAS-SCOTT, N. HATZIS, *Research handbook on European Union law and human rights*, Edward Elgar Publishers, Cheltenham, 2017, p. 511ss. S. MORANO FOADI, L. VICKERS, *Fundamental rights in the European union: A matter for two courts*, Hart Publishing, Oxford & Oregon, Portland, 2015. P. CRAIG, *European Union administrative law*, op. cit.,

⁹⁷ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10-16. See also in the same spirit: art. 4 of the 2007 Hague Protocol on the law applicable to maintenance obligations (subject of the 2009/941/EC decision of the Council of 30 November 2009, concerning the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the applicable law to maintenance obligations, in OJ No. L 331 of 16 December 2009, page 17ss), which provides for certain food creditors to derogate from the designation of the applicable law where the *lex causae* does not allow them to obtain the food. See also: P. JURYS, P.F. KJAER, R. YATSUNAMI, *Regulatory hybridization in the transnational sphere*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 268ss. U. MAGNUS, P. MANKOWSKI, *Brussels IIbis Regulation*, ed. De Gruyter, Berlin, 2012, pp. 88ss.

⁹⁸ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'Union européenne*, op. cit.,

⁹⁹ See the formula contained in the 11th recital of Regulation n. 805/2004 (Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15–39) where reference was made in general to the right to a fair trial. Subsequently the 39 recital of the Regulation n. 1214/2012 (Commission Implementing Regulation (EU) No 1214/2012 of 17 December 2012 establishing the standard import values for determining the entry price of certain fruit and vegetables OJ L 348, 18.12.2012, p. 14–15), the 44th recital of Regulation n. 655/2014. The 83 recital of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19-72. See also: C. LISANTI, L. SAUTONIE-LAGUIONIE, *Règlement UE n. 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité*, in *Société de législation comparée, Trans Europe experts*, 2016. The 73 recital of Regulation 2016/1103, the 71th recital of Regulation 2016/1104 in which the formula refers less happily to the right to an effective appeal and to an impartial judgment (but the English version mentions: “the right to an effective remedy and to a fair trial “and the German one:” das Recht auf einen wirksamen Rechtsbehelf und ein faires Verfahren”). The 5th recital of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes OJ L 26, 31.1.2003, p. 41–47. For a reference to the right to a right adversarial principle without mention of art. 47 see recital 9 of Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24 December 2015, p. 1-13. P. CORTÈS, *Does the proposed European procedure enhance the resolution of small claims?*, in *Civil Justice Quarterly*, 27 (1), 2008, pp. 94ss. F. WILMAN, *Private enforcement of European Union law before national courts. The European Union legislative framework*, Edward Elgar Publishers, Cheltenham, 2015. E. MŠČENIĆ, A. RACCAH, *Legal risks in European Union law: Interdisciplinary studies on legal risk management and better Regulation in Europe*, ed. Springer, Berlin, 2016, pp. 80ss. P. COPPEL, *Information rights: law and practice*, Hart Publishing, Oxford & Oregon, Portland, 2014. K. KERAMEUS, *L'harmonisation procédurale dans le monde contemporain*, in L. VOGEL, *La procédure entre tradition et modernité*, éd. Panthéon-Assas, Paris, 2010, pp. 10ss. D. MILMAN, *Personal insolvency law. Regulation and policy*, ed. Routledge, London & New York, 2017, pp. 2048ss. F. TOLMIE, *Corporate and personal insolvency law*, ed. Wolters, Kluwer, The Hague, 2013. G. MCCORMACK, *Something old, something new: Recasting the European insolvency Regulation*, in *The Modern Law Review*, 79, 2016, pp. 122ss. M. RREQUEJO ISIDRO, *La cooperación judicial en materia de insolvencia transfronteriza en la propuesta de Regulation del Parlamento europeo y del consejo por el que se modifica el Regulation (CE) n. 1346/2000 sobre procedimientos de insolvencia*, in *Anuario Español de Derecho Internacional Privado*, 13, 2013, pp. 218ss. V. FINCH, D. MILMAN, *Corporate insolvency law. Perspectives and principles*, Cambridge University Press, Cambridge, 2017, pp. 486ss. S. GOPALAN, M. GUIHOT, *Cross-border insolvency law and multinational enterprise groups. Judicial inno-*

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contain a discipline of jurisdiction and effectiveness of decisions. This choice is not without practical consequences because the presence of a timely reminder in the preamble makes it more likely that CJEU will refer you in its rulings.

48. This choice is not without practical consequences because the presence of a timely reminder in the preamble makes possible CJEU refer to in its rulings.

49. Although the right to effective judicial protection is the only one that can be considered expressly referred to by the rules of treaty in subjecta matter. Institutions clearly shows to recognize also in art. 21 of CFREU¹⁰⁰ a provision destined to have wide repercussions on civil judicial cooperation. In some regulations concerning family matter and in Regulation n. 650/2012 in the matter of succession be considered to insert explicit references to the principle of non-discrimination, evidently on the assumption of particular importance of the same in EU¹⁰¹. The mention of art. 21 TFEU in the preamble of regulations is sometimes of a general nature¹⁰² and indeed the provision is listed together with others¹⁰³, acting only as a reference to interpret and apply the Regulation in accordance with the principle of non-discrimination. In other cases the reference to the principle contained in the preamble¹⁰⁴ or in the text itself of Regulation¹⁰⁵, is more precise, since it aims at guiding the application of well-defined provisions such as public order clause¹⁰⁶ or the conditions impeding recognition and execution of decisions. On this point CJEU's jurisprudence has not yet been expressed and the scope of these claims appears for the moment not wholly clear or ambivalent¹⁰⁷.

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¹⁰⁰ S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, Oxford & Oregon, Portland, 2014

¹⁰¹ CJEU, C-20/17, *Oberle* of 21 June 2018, ECLI:EU:C:2018:485; C-218/16, *Kubicka* of 12 October 2017, ECLI:EU:C:2017:755, above cited cases published in the electronic Reports of the cases.

¹⁰² See also recital 49 of Regulation n. 1259/2010. For further analysis see: U. MAGNUS, P. MANKOWSKI, *Brussels IIbis Regulation*, op. cit.,

¹⁰³ See recital n. 73 of Regulation 2016/1103 and recital n. 71 of Regulation 2016/1104.

¹⁰⁴ According to recital n. 25 of Regulation n. 1259/2010: "(...) the courts should not be able to apply the public policy exception in order not to take into account a provision of the law of another State if this is contrary to CFREU, in particular to the art 21 prohibiting any form of discrimination See also recital No. 58 of Regulation No. 650/2012 which pays more broadly, that "(...) the courts or other competent authorities should not be allowed to make use of of the public objection to waive the law of another Member State or to refuse to recognize-or if appropriate, to accept-or to execute a decision, a public instrument or a court settlement issued in another Member State, if that occurred in violation of the CFREU, in particular of his art. 21 which prohibits any form of discrimination (...)" "The same clause recurred in recital No. 54 of Regulation 2016/1103 and in recital No. 53 of Regulation 2016/1104.

¹⁰⁵ Pursuant to art. 58 of Regulation 2016/1103 and of Regulation 2016/1104: "(...) the courts and other competent authorities of the Member States shall apply Article 37 of this Regulation in compliance with the fundamental rights and recognized principles of the Charter, in particular Article 21 on the principle of non-discrimination (...)"

¹⁰⁶ E. LOUIN, *El orden público y el arbitraje*, Editorial Universidad del Rosario, Bogotá, 2017.

¹⁰⁷ In this spirit see from the CJEU, conclusions of the Advocate General Saugmandsgaard Øe in case C-372/16, *Sahyouni*, ECLI:EU:C:2017:686, published in the electronic Reports of the cases, par. 84. The principle of non-discrimination referred to

50. Especially in the field of application of civil cooperation measures in family matters, the protection of fundamental rights of child, as provided for by art. 24 of CFREU and explicitly mentioned only in the preamble of Regulation no. 2201/2003¹⁰⁸. As is clear from the explanations, the provision intends to refer to the provisions of New York Convention of 1989 on the rights of child, notwithstanding that only some of them are referred to as the source of inspiration for the text of art. 24 TFEU¹⁰⁹, the entire text of Convention, ratified by all member states of the union and already referred to in the past by CJEU as a basis for the general principles of law, inevitably assumes a broader significance. The jurisprudence has already amply highlighted the centrality of the principle of the best interests of the child as a criterion that must guide all choices concerning him¹¹⁰ and stressed the importance of latter's right to be heard before the national court¹¹¹.

51. The preambles to regulations adopted so far refer to further fundamental rights protected by CFREU (such as the right to privacy and family life, the right to marry and establish a family, the right to protection of personal data, the right to property), whose relevance is linked to the specific object of individual acts. Naturally, these references cannot exhaust the list of fundamental rights that can be detected in matters of civil judicial cooperation, not only because CJERU can not be bound, where it has to assess needs linked to the guarantee of an instrument belonging to primary law, from the contents of an act of secondary law but also because already with respect to the measures adopted so far it appears possible to identify, within CFREU, additional parameters that could be relevant in the interpretation and application of the same¹¹². On the other hand, the general scope of protection of fundamental rights and the need to respect them in all areas falling within the scope of civil judicial cooperation of union leads to the exclusion of any attempt to delineate ex ante a predefined group of relevant rights in the system of civil judicial cooperation.

VI. The scope of application of CFREU in the system of civil judicial cooperation

52. It should be borne in mind that, by their very nature, the rules on civilian judicial cooperation are intended to be applied essentially by member states, since it is not in principle possible to establish an executive activity on the part of European Institutions.

53. With reference to the acts of member states, in the general principle of art. 51, par. 1 the scope of application of CFREU coincides with the scope of EU law¹¹³.

herein to exclude the applicability of the law of a third State which provides for divorce by a unilateral will of the husband (also in a situation in which Regulation No. 1259/2010 was applicable, for the purpose of recognition a divorce decision issued in Syria, by express reference to the German law and not in force). The issue has not been addressed in the judgment Sahyouni of 20 December 2017, ECLI:EU:C:2017:988, having been deemed that Regulation no. 1259/2010 is not applicable to divorces of a private nature.

¹⁰⁸ CJEU, C-111/17 PPU, *OL* of 8 June 2017, ECLI:EU:C:2017:436; C-565/17, *Saponaro and Xylina* of 19 April 2018, ECLI:EU:C:2018:265, published in the electronic Reports of the cases.

¹⁰⁹ For further details see: J.P. DOEK, T. LIEFAARD (eds.), *Litigating the rights of the child. The UN Convention on the rights of the child in domestic and international jurisprudence*, Oxford University Press, Oxford, 2015. T. LIEFAARD, J. SLOTH-NIELSEN, *The United Nations Convention on the rights of the child*, ed. Brill, The Hague, 2016, pp. 228ss. W. VANDENHOLE, E. DESMET, D. REYNAERT, *Routledge international handbook of children's rights studies*, ed. Routledge, London & New York, 2015. I. IUSMEN, H. STALFORD, *The European Union as a children's rights. Actor, law policy and structural*, Barbara Budrich Publishers, Opladen, Berlin, Toronto, 2016. R. LAMONT, *Family law*, Oxford university Press, Oxford, 2018.

¹¹⁰ On the inextricable link between consideration of the child's best interests and respect for his fundamental rights see from the CJEU C-428/15, *D. (Child and Family Agency)* of 27 October 2016, ECLI:EU:C:2016:819, par. 44.

¹¹¹ CJEU, C-491/10 PPU, *Aguirre Zarraga* of 22 December 2010, ECLI:EU:C:2010:828, I-14247 par. 61 on the basis of this ruling, the proposal for the revision of Regulation no. 2201/2003, COM (2016) 411 final of 30 June 2016 contemplates the art. 20, concerning "the right to express the common opinion" that would establish a more precise obligation also with respect to art. 12 of the 1989 New York Convention, for the judges of the member states to proceed to the listening of the child if "capable of discernment".

¹¹² By way of example, articles 15 and 16 concerning professional freedom and the freedom to conduct a business with regard to contractual and non-contractual obligations can be cited. Articles 23 relating to equality between men and women and 30-33 relating to guarantees of workers' rights, in the matter of employment contracts. Article 38 concerning consumer protection still in the matter of contractual obligations.

¹¹³ CJEU, conclusions in the case: C-524/15, *Menci* of 12 September 2017, ECLI:EU:C:2017:667, published in the electronic Reports of the cases.

54. In *Åkerberg Fransson* case¹¹⁴, CJEU was partially identified the scope, delimitating as a parameter to be used for this purpose the existence of a relevant link between domestic and EU law. In particular, this implies that, with respect to the specific case examined by the judge, the relevant national legislation is used to guarantee the implementation of Union law or produces such an effect¹¹⁵.

55. This broad criterion apparently has general scope and is intended to apply also with respect to the field of civil judicial cooperation, which also presents some peculiarities from this point of view, since the rules that are considered therein pertaining to the determination and the coordination of jurisdiction, judicial assistance in the conduct of civil proceedings of a uniform nature, the identification of the applicable law or finally the effectiveness of foreign decisions presented as instrumental to the conduct of civil proceedings. It may happen that the object of the latter is wholly unrelated to the scope of EU law, when the need to apply any EU law does not arise from a material law perspective. Similarly, it may happen that the conduct of the process is entirely governed by the internal law of a member state and that only a well-defined basis of it (for example, the assumption of a foreign approval) is subject to uniform rules on civil judicial cooperation. In such situations it is questionable whether the mere fact that the civil trial before the national court is subject to uniform rules of EU law is sufficient to place the whole case under the orbit of the provisions of CFREU.

56. According to our opinion the answer cannot be unitary, but requires taking into consideration the nature of various instruments that may be considered for this purpose and the forecasts contained in them with reference to relations with national law. It can move from a general consideration, concerning the need to consider subject to EU law only those cases that have transnational implications, meaning for them, according to a generally broad conception, those presenting elements of contact with several member states or with a member state and a third state.

57. With regard to the rules on jurisdiction, it is a general principle affirmed by CJEU already with reference to Brussels Convention, that according to which the conditions provided for by the Union are present because the case falls within its material and personal scope. Determination of jurisdiction is regulated by uniform rules towards third states¹¹⁶. On the other hand, with the exception of Regulation n. 1215/2012 (which uses the criterion of domicile of the defendant on the basis of the archetype of the Brussels Convention), the determination of jurisdiction is exhaustively *ratione personae*, whether the rules of national jurisdiction come to certain conditions referred to and therefore attracted to the scope of the Union Regulation¹¹⁷, whether the uniform rules completely replace national jurisdiction rules¹¹⁸. It

¹¹⁴ CJEU, C-617/10, *Åkerberg Fransson* of 26 February 2013, ECLI:EU:C:2013:10, published in electronic reports of the cases, par. 19ss. It is no coincidence that references to the most prominent court rulings are aimed solely at enhancing the binding nature of the general EU principles (CJEU, C-4/73, *Nold* of 14 May 1974, ECLI:EU:C:1974:51, I.00491, par. 13; case C-44/79, *Hauer* of 13 December 1979, ECLI:EU:C:1979:290, I-03727, par. 15-16; case C-5/88, *Wachauf* of 13 July 1989, ECLI:EU:C:1989:321, I-02669, par. 17) although, constant references to the content of the Convention as a parameter to determine the content of these principles are not lacking (see also the case: C-260/89, *ERT* of 18 June 1991, ECLI:EU:C:1991:254, I-02925, par. 41). For further details and analysis see: M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, Oxford University Press, Oxford, 2014, pp. 402ss. L.J. CONANT, *Justice contained. Law and politics of the European Union*, Cornell University Press, Ithaca, 2018. G. BECK, *The legal reasoning of the Court of Justice of the European Union*, Hart Publishing, Oxford & Oregon, Portland, 2013. M. DERLÈN, J. LINDHOLM, *The Court of Justice of the European Union. Multidisciplinary perspectives*, Hart Publishing, Oxford & Oregon, Portland, 2018.

¹¹⁵ The same spirit of orientation also in the next cases: CJEU, C-206/13, *Siragusa* of 6 March 2014, ECLI:EU:C:2014:126, published in the electronic reports of the cases. C-482/10, *Cicala* of 21 December 2011, ECLI:EU:C:2011:868, I-14139. For further details see: P. CRAIG, *European Union administrative law*, op. cit., M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, Oxford University Press, Oxford, 2014.

¹¹⁶ CJEU, C-281/02, *Owusu* of 1st March 2005, ECLI:EU:C:2005:120, I-01383, relating to a situation in which the defendant was domiciled in the territory of a Contracting State but most of the other items were in a third State. For further details see: J. HILL, A. CHONG, *International commercial disputes: commercial conflict of laws in English Courts*, Hart Publishing, Oxford & Oregon, Portland, 2018.

¹¹⁷ According to the artt. 7 and 14 Regulation n. 2201/2003. On the methods for applying the first provision, see from the CJEU: C-68/07, *Sundelind Lopez* of 29 November 2007, ECLI:EU:C:2007:740.

¹¹⁸ As happens starting from Regulation n. 4/2009. See also from the CJEU the next cases: C-214/17, *Mölk* of 20 September

should also be added that national rules can be considered integrated into EU rules also whenever they are explicitly or implicitly referred to some of the elements that underlie the title of jurisdiction¹¹⁹ or to allow the functioning of rules related to determination¹²⁰ or coordination of jurisdiction¹²¹.

58. To the extent that the assessment of jurisdiction takes place on the basis of Union or national rules referred to therein, there is no doubt that it falls within the scope of CFREU, which also extends to all those other aspects of the process that find their discipline in union instruments in connection with the determination of jurisdiction. This includes verifying the admissibility of the action, including in relation to the notification of application, the determination and effects of liaison and connection¹²²; as well as the profiles relating to the precautionary jurisdiction and the conditions for the exercise of the same, sometimes governed directly by the uniform rules¹²³.

59. Member states are certainly called upon to take into account the provisions of CFREU when they give concrete application to the rules of EU, but this does not exhaust the scope of relevance of CFREU. Although it certainly does not pose the ultimate conclusion that the determination of jurisdiction on the basis of uniform rules implies that the internal conduct of the procedure is only for this reason to be considered subject to EU law, all national provisions must be included in this which are also used to implement uniform rules on jurisdiction or which have effects on their application. It seems that those rules that regulate procedures or mechanisms functional to the establishment of jurisdiction in transnational situations when they are used within the scope of regulations pursuant to art. 81 TFEU¹²⁴, and those rules that may have the effect of limiting or preventing the exercise of jurisdiction established on the basis of these regulations¹²⁵. On the contrary, it is doubtful whether the rooting of jurisdiction on

2018, ECLI:EU:C:2018:744; C-558/16, *Mahnkopf* of 1st March 2018, ECLI:EU:C:2018:138; C-467/16, *Schlömp* of 20 December 2017, ECLI:EU:C:2017:993 all the cited cases was published in the electronic Reports of the cases.

¹¹⁹ See in particular the art. 62 of Regulation n. 1215/2012 relative to the determination of the domicile of the parties according to the national law of the court seised or of the place of domicile. An implicit reference is also made when the title of jurisdiction is based on the citizenship of one of the parties, which remains governed, in principle, by the domestic law of the Member States. The relevance of state citizenship as a prerequisite for European citizenship can moreover, some aspects of the first under the law of the European Union, as held by CJEU C-135/08, *Rottmann* of 2 March 2010, ECLI:EU:C:2010:104 I-01449. On the question of the multiple citizenships in the presence of a title of jurisdiction founded on the citizenship, see from the CJEU the case C-168/08, *Hadadi* of 16 July 2009, ECLI:EU:C:2009:474, I-06871.

¹²⁰ For example regarding the tacit extension of jurisdiction pursuant to art. 24 of the Regulation n. 1215/2012. See also from the CJEU the case: C-327/10, *Hypote ni banka* of 17 November 2011, ECLI:EU:C:2011:745 I-0000, par. 37; C-350/14, *Lazar* of 12 December 2015, ECLI:EU:C:2015:802; C-297/14, *Hobobm* of 8 September 2015, ECLI:EU:C:2015:556, the above cases was published in the electronic Reports of the cases. For further details see: P. BEUAMONT, M. DANON, K. TRIMMINGS, B. YÜKSEL, *Cross-border litigation in Europe*, Hart Publishing, Oxford & Oregon, Portland, 2017.

¹²¹ This applies, for example, to the profiles relating to the application of the uniform criterion of provenance laid down by the regulations for the purposes of lis pendens and connection, such as that outlined in art. 32 of Regulation n. 1215/2012.

¹²² On the innovative character of the articles 33 and 34 of Regulation n. 1215/2012 which also regulate lis pendens and the connection with cases pending in third States see: F. MARONGIU BUONAUTI, *Lis alibi pendens and related actions in the relationships with the courts of third countries in the recast of the Brussels I Regulation*, in *Yearbook of Private International Law*, 2014, pp. 88ss.

¹²³ See the art. 20 of the Regulation n. 2201/2003 regarding provisional and precautionary measures in matrimonial matters of parental responsibility, and above all Regulation n. 655/2014 regarding the attachment of bank accounts. D. LIAKOPOULOS, *European integration and its relation with the jurisprudence of European Court of Human Rights and private international law of European Union*, in *Homa Publica.Revista Internacional de Direitos Humanos e Impresa*, 2 (2), 2018.

¹²⁴ For this solution with reference to the national procedures applicable to the return of the child see from the CJEU the case: C-498/14 PPU, *Bradbrooke* of 9 January 2015, ECLI:EU:C:2015:3, published in the electronic Reports of the cases, par. 52. D. LIAKOPOULOS, *Protection of human rights between European Court of Human Rights and Court of European Union*, in *International and European Union Legal Matters*, 2015.

¹²⁵ On the use of anti-suit injunction in the field of application of Regulation no. 44/2001 see from the CJEU the case: C-185/07, *Allianz* of 11 February 2009, ECLI:EU:C:2009:69, I-00663. With respect to the scope of the Brussels Convention, see the case C-159/02, *Turner* of 27 April 2004, ECLI:EU:C:2004:228, I-03565. See also: T. KRUGER, *Civil jurisdiction rules of the EU and their impact on third State*, Oxford University Press, Oxford, 2008, pp. 262ss. A. SADLER, *From the Brussels Convention to Regulation 44/2001. Cornerstones of a European law of civil procedure*, in *Common Market Law Review*, 42 2005, pp. 1638ss. See also the next cases from the CJEU: C-325/18 PPU, *C.E. and N.E.* of 19 September 2018, ECLI:EU:C:2018:739; C-595/17, *Apple Sales International and others* of 24 October 2018, ECLI:EU:C:2018:854; C-337/17, *Fenikes* of 4 October 2018, ECLI:EU:C:2018:805, all of them published in the electronic Reports of the cases.

the basis of a title envisaged or referred to by EU law can make the provision of CFREU relevant to the reasonable duration of the process relevant to the relevant judgment, in consideration of the negative sign in the past by CJEU on this specific point.

60. With regard to mutual legal assistance, the principle expressed in *Åkerberg Fransson* sentence seems to operate in a substantially similar manner, since EU instruments regulate a specific phase or procedural activity with uniform rules (the notification of an act), which only falls within the scope of EU law.

61. They need to be integrated by rules of the member state in which the activities must be carried out as punctually provided for by art. 10 of Regulation n. 1206/2001 on the execution of requests for recruitment of evidence coming from the judicial authority of another member state or from art. 7 of Regulation no. 1393/2007 for the execution of requests for notification following transmission to the receiving agency¹²⁶. It is evident that when the national procedural rules are applied to the execution of a request for judicial assistance based on acts and regulations, they are still absorbed in the field of application of EU law with the consequent need to take account of the related needs of CFREU.

62. A specific problem may arise with regard to the consequences that the judicial assistance activities carried out in the requested member state can produce in the trial before the judicial authority of the home member state. One might ask whether the national rules governing the effects that the judge is called upon to draw from the notification of a judicial act pursuant to Regulation n. 1393/2007 or the evaluation of tests undertaken pursuant to Regulation n. 1206/2001 can present a connection with the scope of EU law and therefore be correlated with the protection of fundamental rights provided by CFREU. In consideration of the criterion used by CJEU to apply art. 51, par. 1 CFREU¹²⁷ and the strictly procedural nature of the instruments in question, it seems to us that in these cases the application of national law can be considered connected with EU law when the judge is called to draw consequences on the procedural level from the notification of a judicial act (for example, for the purposes of defending a term) or evidence taken abroad (for example, in relation to its admissibility or the manner in which it is recruited)¹²⁸, but not when these consequences are reflected in the application of material law, which can remain totally unrelated to the scope of EU law.

63. Where regulations in accordance with art. 81 TFEU providing for uniform civil proceedings, it is necessary to take into account, first of all, the optional nature of these proceedings. Therefore, only in the presence of a choice of the plaintiff to substantiate the same, the case may fall within the scope of EU law¹²⁹.

¹²⁶ D. LIAKOPOULOS, *Protection of human rights between European Court of Human Rights and Court of European Union, in International and European Union Legal Matters*, 2015.

¹²⁷ J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

¹²⁸ In the sense that even in a case where the court of the Member State of origin chooses not to resort to the rules of Regulation n. 1206/2001 and apply the national law to sue before a witness living abroad, the consequences of the failure to appear a witness must be appreciated according to the law of the member state of origin “provided they are applied in compliance with the law ‘Union (...)’”. See also from the CJEU C-170/11, *Lippens* of 6 September 2012, ECLI:EU:C:2012:540, published in the electronic Reports of the cases, par. 38ss. The application of national procedural law to the consequences of the unjustified refusal to receive the notification see the case C-384/14, *Alta Realitat* of 28 April 2016, ECLI:EU:C:2016:316, published in the electronic Reports of the cases, par. 81ss.

¹²⁹ CJEU, C-618/10, *Banco Español de crédito* of 14 June 2012, ECLI:EU:C:2012:349, par. 79; C-488/13, *Parva Investition Banka* of 9 September 2014, ECLI:EU:C:2014:2191, above published in the electronic Reports of the cases. The different conclusion reached in the cited obiter dicta of the *Lippens* of 6 September 2012 seems justified by the fact that Regulation n. 1206/2001 (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1-24) not expressly qualified as an instrument of an optional nature, even if the CJEU considered that the judge can choose to cite a witness before him/herself, without applying the Regulation. For further analysis see: M. CREMONA, H.W. MICKLITZ, *Private law in the external relations of the European Union*, Oxford University Press, Oxford, 2016. D. LIAKOPOULOS, *Conflicts of law in the European Union Law*, in *International and European Union Legal Matters*, 2010. L. IDOT, S. FRANQ, J. BASEDOW, *International antitrust litigation: Conflict of laws and coordination*, Hart Publishing, Oxford & Oregon, Portland, 2012.

64. In this case too, the recourse to the regulations provided for by the regulations cannot fall within the scope of EU law even if those national provisions are to be used as a result of explicit or implicit recall of the regulations themselves¹³⁰, when they refer to any aspect not provided for in the national law of the forum addressed¹³¹.

65. These instruments also contain rules that will be used to coordinate the procedures they have regulated with other procedures intended to be carried out according to national law. Thus according to Regulation n. 1896/2006 the opposition to European order for payment determines the start of an ordinary civil proceeding. According to Regulation n. 861/2007 the sentence issued in a small-scale dispute is subject to an appeal based on the *lex fori*¹³², according to Regulation n. 655/2014 the order of attachment must be followed by the introduction of merit procedure¹³³. In this case, too, it is necessary to ask whether these further proceedings governed by domestic law of member states and the national rules applicable to them fall due to the link with the respective uniform procedure within the scope of EU law and are therefore subject to CFREU standards.

66. Despite the fact that in all cases there is an undoubted connection between the proceedings governed by uniform legislation and those governed by national law, a differentiated response is preferable. Whilst the appeal of the sentence pronounced in the procedure provided for by Regulation no. 861/2007 is nothing more than the natural continuation of the degree of judgment that has taken place according to the uniform rules, both the opposition to the European order for payment and the judgment of merit with respect to the European sequestration order open a completely new procedural phase distinct from the antecedent¹³⁴. It seems logical to consider that, by limiting the right of EU to regulate the

¹³⁰ Referral to national law on the consequences of non-notification of a European order for payment in accordance with the minimum standards laid down in the Regulation n. 1896/2006 see from the CJEU joined cases joined cases joined cases C-119/13 and C-120/13, *Eco Cosmetics GmbH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchuk* of 4 September 2014, ECLI:EU:C:2014:2144, par. 45ss. Regulation (EC) No 1896/2006-creating a European order for payment procedure. See from the ECJ the next cases: C-508/12, *Walter Vapenik v. Josef Thurner* of 5 December 2013, ECLI:EU:C:2013:790, published in the electronic Reports of the cases; C-300/13, *Imtech Marine Belgium NV v. Hellenic Radio SA* of 17 December 2015, ECLI:EU:C:2015:188, published in the electronic Reports of the cases, which the CJEU has declared that: “(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the European enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)”. C-511/14, *Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd* of 16 June 2016, ECLI:EU:C:2016:448, published in the electronic Reports of the cases, which the CJEU has stated that: “(...) the default judgment was to be counted among the executive title that were to be certified as a European enforcement order, even if it could not, in fact, to be certified as a European enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)”. And in case of monitor process see: C-144/12, *Goldbet Sportwetten v. Massimo Sperindeo* of 13 June 2013, ECLI:EU:C:2013:383; C-215/11, *Iwona Szyrocka v. SiGer Technologie GmbH* of 13 December 2012, ECLI:EU:C:2012:794; joined cases C-119/13 and C-120/13, *Eco Cosmetics GmbH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchuk* of 4 September 2014, ECLI:EU:C:2014:2144; C-245/14, *Thomas Cook Belgium NV v. Thurner Hotel GmbH* of 22 October 2015, ECLI:EU:C:2015:715; C-94/14, *Flight Refund Ltd vs. Deutsche Lufthansa AG* of 10 March 2016, ECLI:EU:C:2016:148, the above cited cases published in the electronic Reports of the cases. For further analysis of the above cases see: M. DUROVIC, *European law on unfair commercial practices and contract law*, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 106ss. M. HAZELHORST, *Free movement of civil judgments in the European Union and the right of fair trial*, ed. Springer, The Hague, 2017, pp. 438ss. T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, München, 2017, pp. 686ss. F. EICHEL, *Keine rügelose Einlassung in Europäischen Mahnverfahren*, in *Revue de Droit Privé de L'Union Européenne*, 24, 2014. M. BOBEK, *Central European judges under the European influence. The transformative power of the EU revisited*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 234ss. P. GRUBER, *Die Nichtgerklärung eines europäischen Zahlungsbefehls*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 13 (1), 2016, pp. 153ss. W. JELINEK, S. ZANGL, *Insolvenzordnung*, Manz Verlag, Wien, 2017.

¹³¹ In this sense from the CJEU, C-215/11, *Szyrocka* of 13 December 2012, ECLI:EU:C:2012:794, par. 34 with reference to court fees in the European order for payment procedure. See also: C-300/14, *Imtech Marine Belgium* of 17 December 2015, ECLI:EU:C:2015:825, above published in the electronic Reports of the cases. According to which Regulation n. 805/2004 does not require the Member State to establish a review procedure for uncontested claims, but where the Member State establishes the procedure it must comply with the requirements of Union law.

¹³² CJEU, C-627/17, *ZSE Energia* of 22 November 2018; ECLI:EU:C:2018:941, published in the electronic Reports of the cases.

¹³³ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, München, 2017.

¹³⁴ Thus the expression envisaged by art. 16 of the Regulation n. 1896/2006 on a mere complaint of credit, initiates an ordinary civil procedure and the injunction remains devoid of any effect.

effects of the or non-opening of the new procedural step¹³⁵, the performance of the latter must be considered extraneous to the scope of EU law and therefore of CFREU (unless you are attracted by reason of the link with the subject of the proceeding).

67. The identification of national rules that can be used for the implementation of these conflict rules using the parameter outlined in the *Åkerberg Fransson* judgment can be quite varied. In the first place, the national rules that are the subject of express reference in the regulations can certainly be qualified in this sense. Among these may be reminded by way of example, the national rules that allow the choice of the law regulating divorce and personal separation during the course of the case, which may be detected pursuant to art. 5, par. 3 of Regulation no. 1259/2010¹³⁶.

68. In this context, they can mainly detect national rules relating to general questions of private international law insofar as they remain applicable in the absence of a uniform solution provided for by the regulations pursuant to art. 81 TFEU¹³⁷. Among these we can mention national rules on issues concerning positive and negative conflicts of citizenship for which a uniform solution does not seem to arise, as well as those relating to the verification of foreign law.

69. It is necessary to question the possibility that laws referred to in conflict rules should also be considered as relevant national rules for the implementation of EU law. A similar question is due to the particular formulation of the 16th recital of Regulation no. 1259/2010, in the matter of divorce and personal separation “the law chosen by the spouses must comply with the fundamental rights recognized by treaties and CFREU¹³⁸. From this formulation it seems to be necessary to find that, in the opinion of the Board, the applicable material law may also be subjected to a check for compatibility with the requirements of protection of fundamental rights. This would imply a much wider control than that allowed by the limit of public order since it could not only concern the law of the forum but would not be subordinated to the confirmation of a manifest incompatibility as required by the provisions on public policy.

70. A similar conclusion based on a weak textual clue, which does not appear in other regulations, appears to be excessively extensive. In this regard, it does not seem that the link between the conflict rules and the *lex causae* is the same as that described in the *Åkerberg Fransson* judgment, since it cannot be said that the applicable material law which may also belong to third-country laws is actually used to implement the rules of conflict of EU¹³⁹. One followed the reasoning that seems to underlie the passage mentioned above in the preamble of Regulation no. 1259/2010 derives from the application of the conflict rules contained in the regulations pursuant to art. 81 TFEU an indiscriminate extension of the field of application of EU law (and of CFREU) to the solution, on the plane and material right, of all civil disputes that present an element of extraneousness. But this indication does not seem to be really compatible with the approach taken by the Court of Justice in delimiting that scope of application¹⁴⁰.

71. It remains the possibility to examine the contrast of material right referred to by the conflict rules with the public order of the requested member state, whose content is inevitably also influenced

¹³⁵ As we can see in the case from the CJEU: C-144/12, *Golbet Sportwetten* of 13 June 2013, ECLI:EU:C:2013:393, published in the electronic Reports of the cases, par. 31ss. For further details and analysis see: D. ACOSTA ARCARAZO, C.C. MURPHY, *European Union security and justice law after Lisbon and Stockholm*, Hart Publishing, Oxford & Oregon, Portland, 2014.

¹³⁶ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, München, 2017.

¹³⁷ F. MARTUCCI, *Droit de l'Union européenne*, op. cit.,

¹³⁸ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, München, 2017. S. DE VRIES, U. BERNITS, S. WEATHERILL, *The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing*, Oxford University Press, Oxford, 2015.

¹³⁹ On the other hand, the aforementioned recital refers exclusively to the law chosen by the parties and has no general scope. Also in light of the circumstance that no mechanism is foreseen in the provisions of the Regulation to supervise the compatibility check with CFREU, it should be considered that the mention is intended rather to draw attention to the possible risks of choosing law in a subject so sensitive.

¹⁴⁰ CJEU, C-400/10 PPU, *McB*, of 5 October 2010, ECLI:EU:C:2010:582, I-08965.

by CFREU norms or to apply specific provisions that require the judge to discard foreign laws that are contrary to the protection of certain fundamental rights¹⁴¹.

72. It is necessary to examine how the scope of EU law is articulated in the area of effectiveness of decisions, first of all taking into account the fact that the measures adopted so far only apply to the circulation of decisions between member states. For the moment, the recognition and enforcement of decisions by third states remain extraneous to the scope of Union law, with the sole exception of matters governed by international conventions concluded by the union itself or by member states in its interest¹⁴².

73. Also in this case, despite the fact that the regulations define in detail the procedures from time to time envisaged for the declaration of enforceability, for the main ascertainment of the absence of grounds impeding recognition for the refusal of recognition or enforcement and the rules of national procedures can be highlighted in relation to unregulated profiles¹⁴³.

74. On the other hand, the regulation of enforcement procedures remains tended to be in the sphere of national law¹⁴⁴ because following the declaration of enforceability or accompanied by the certificate in matters in which the exequatur was abolished, the sentence of another member state is entirely equivalent to a national judgment¹⁴⁵. Since the regulations of EU provide a punctual guarantee for the effective enforcement of decisions coming from other member states, possibly after declaration of enforceability if national rules hinder its implementation and consequently the free circulation of decisions, the case could be included within the scope of EU law to the extent that the effectiveness of the latter is affected.

VII. Weighting between rights as a general interpretative criterion in civil judicial cooperation

75. If CFREU is applicable to the case under consideration in so far as it falls within the scope of application of EU law, the latter will be able to deploy the various functions described above from time to time. In the field of civil judicial cooperation, the impact of CFREU must be commensurate with the need to take into account the type of relationship affected by this competence of the EU, which correspond to horizontal relations, inevitably subject to private law.

76. This is derived from the same definition of civil and commercial matters that are not found in art. 81 TFEU¹⁴⁶ but CJEU jurisprudence has dealt with the interpretation of individual acts adopted by the union. In particular, this definition excludes the fiscal, customs and administrative matters and the

¹⁴¹ See for example the art. 10 of Regulation n. 1259/2010 pursuant to which "(...) if the applicable law pursuant to Article 5 or Article 8 does not provide for divorce or does not grant one of the spouses, because belonging to one or the other sex, equal access conditions to the divorce or the personal separation, the law of the forum applies (...)". In the sense that the art. 10 applies automatically whenever the law referred to does not provide for divorce or does not allow equal access to separation or divorce.

¹⁴² In the sense that CJEU is not competent to interpolate international conventions concluded by the Member States as not belonging to EU law, except in the case where the latter was subsequently replaced by the Member States in the competence relating to the matter in which it was stipulated the Convention. See from the CJEU, C-533/08, *TNT, Express Nederland* of 4 May 2010, ECLI:EU:C:2010:243, I-04107, par. 59ss.

¹⁴³ In the sense that the appeal aimed at challenging the declaration of enforceability pursuant to Regulation n. 44/2001 although governed by national law constitutes implementation of Union law. CJEU, C-156/12, *GREP* of 13 June 2012, ECLI:EU:C:2012:342; C-322/14, *El Majdoub* of 3 July 2015, ECLI:EU:C:2015:334; C-297/14, *Hobobm* of 23 December 2015, ECLI:EU:C:2015:844; C-375/13, *Kolassa* of 28 January 2015, ECLI:EU:C:2015:37; C-548/12, *Brogssitter* of 13 March 2014, ECLI:EU:C:2014:148, all cited cases was published in the electronic Reports of the cases.

¹⁴⁴ CJEU, C-4/14, *Bohez* of 9 September 2015, ECLI:EU:2015:563, published in the electronic Reports of the cases, par. 51

¹⁴⁵ CJEU, C-139/10, *Prism Investments* of 13 October 2011, ECLI:EU:C:2011:653, I-09511, par. 40; C-148/84, *Deutsche Genossenschaftsbank* of 2 July 1985, ECLI:EU:C:1985:280, I-01981, par. 18. For further details and analysis see: A. BRIGGS, *Civil jurisdiction and judgments*, CRC Press, New York, 2015.

¹⁴⁶ M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, Cambridge University Press, Cambridge, 2017, pp. 321ss.

matter of the responsibility of States for actions or omissions in the exercise of public powers. According to this logic, a case may be considered extraneous to civil matters when public authority is involved and this acts in the exercise of its power of authority¹⁴⁷.

77. Now this does not result in significant consequences with respect to CFREU's ability to produce direct effects. In fact, the provisions from which "norms capable of conferring rights to individuals" can be evinced are capable of producing direct effects both vertically and horizontally¹⁴⁸; while those that do not have this feature will be unfit tout court to be included in the scheme of direct effectiveness and can only be detected on the interpretative level within the limits established by art. 52, par. 5 CFREU¹⁴⁹.

78. But the very fact that the legal relations involved in civil judicial cooperation have a horizontal nature makes it clear that in the disputes submitted to the courts of member states there is an extraordinary phenomenon of competition between fundamental rights of the two opposing parties with the consequence that the criterion of fair balance is a recurring interpretative tool in this matter.

79. A similar approach is confirmed by the fact that in this ambit, the reference to art. 47 CFREU¹⁵⁰, which requires to take into account the overall scope of the principles expressed therein in relation to the structure of civil trial¹⁵¹, insofar as they guarantee, at the same time, plaintiff's right to an effective remedy and defendant's right to guarantee his defense.

80. Although this dual dimension of the principle does not seem to emerge from the indications expressed in articles 67 and 81 TFEU¹⁵², which emphasize on one side access to justice and on the other, the importance of circulation of decisions. CJEU has repeatedly acknowledged the importance of rights of defense and the need to take account of their equal importance.

81. In the jurisprudence there has been constant emergence since the rulings concerning Brussels Convention, to the reference of the necessary reconciliation between the opposing needs to guarantee a simplification of formalities connected to the exercise of the right of action and the circulation of decisions and to ensure the observance of rights of defense. This reconciliation does not necessarily follow pre-established formulas but must be carried out keeping in mind, on the one hand, the different structure of the individual acts and on the other the needs inherent to the specific case.

82. From the first point of view, the weighting between the right of the plaintiff for access to justice and of the defendant to effectively exercise his rights of defense is affected primarily by the aim pursued by individual measures.

83. With regard to service of judicial documents pursuant to Regulation n. 1393/2007 and the previous Regulation n. 1348/2000, CJEU has considered from its first decisions that the rights of defense of the recipient must be ensured¹⁵³ without going so far as to effectively prevent the simplification of

¹⁴⁷ CJEU, C-645/11, *Sapir and others* of 11 April 2013, ECLI:EU:C:2013:228, par. 33; C-302/13, *FlyLAL-Lithuanian Airlines* of 23 October 2014, ECLI:EU:C:2014:2319, par. 30, above the cited cases published in the electronic Reports of the cases.

¹⁴⁸ Expressly in the sense that the art. 47 CFREU is able to produce direct horizontal effects, in this case it was considered irrelevant that one of the parties was a third State, since it related to the subordinate employment relationship like an individual. A. SANGER, *State immunity and the right of access to a court under the EU Charter of Fundamental rights*, in *International and Comparative Law Quarterly*, 65 (1), 2016, pp. 214ss.

¹⁴⁹ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, München, 2017.

¹⁵⁰ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, op. cit.,

¹⁵¹ On the other hand, it is to this structure that the values referring to their own needs and international judicial cooperation must be considered, on the basis of which the need to guarantee a flexibility of the right to a fair trial is prefigured, since in fact those needs do not constitute other than an emphasis on protecting the right to action in cross-border disputes.

¹⁵² A. MANGAS MARTÍN, *Tratado de la Unión Europea, Tratado de Funcionamiento*, ed. Marcial Pons, Madrid, 2018.

¹⁵³ CJEU, C-223/14, *Tecom Mican SL and Arias Dominguez* of 11 November 2015, ECLI:EU:C:2015:744, published in the electronic Reports of the cases.

formalities envisaged by the instrument or to place excessive burdens on the sender¹⁵⁴. After the entry into force of the Treaty of Lisbon, this reconstruction was consistently re-proposed, corroborating it with express references to CFREU.

84. Firstly, it has been established that the means of notification which provide only a legal presumption of knowledge without guaranteeing in any way the delivery of the deed to the addressee habitually resident in a different member state, are incompatible with the rights of defense¹⁵⁵. Starting with the defense of *Leffler* of 8 November 2005¹⁵⁶ CJEU has stated that if the respect of rights of defense and the right to the due process impose to allow the addressee to refuse an act not accompanied by its translation, would be incompatible with the objectives pursued by the Regulation to believe that such a lack cannot be remedied¹⁵⁷. For the same reason CJEU comes to affirm that the effects of the amnesty are produced at different times for the sender and for the recipient¹⁵⁸. After the entry into force of the Treaty of Lisbon CJEU has repeatedly stated that the use of the standard form provided for by the Regulation constitutes an essential formality to ensure respect for the rights of defense, as it allows the recipient to be aware of his right to refuse the act. But at the same time its omission does not imply the nullity of notification but the obligation to regularize it¹⁵⁹.

85. A similar reasoning is carried out by CJEU with respect to the instruments designed to favor the free circulation of decisions, especially when it must assess, pursuant to art. 45 of Regulation n. 1215/2012, the existence of grounds for refusal of recognition or enforcement based on failure to notify or notify the application. This impeding condition in the sense that the “regular” communication or notification of the introductory act was necessary in time for the defendant to prepare his defense¹⁶⁰. With art. 34 of Regulation no. 44/2001 this condition of regularity of notification was suppressed with the consequence that the decision may not be recognized or performed in another member state only if it has not been communicated or notified to the defendant¹⁶¹ in time to present his defenses, except that even though he had the possibility, he did not challenge the decision¹⁶².

86. With the *ASML* judgment of 14 December 2006¹⁶³ CJEU has clearly indicated the need to interpret this provision taking into account, at the same time, legislator’s decision to further expand the spaces for the circulation of decisions and the need not to excessively compress defendant’s right of defense. Therefore, in that judgment CJEU found that the defendant can rely on the ground for non-disclosure or notification of the application, whenever he, although aware of the existence of the decision, did not receive the communication or the notification and therefore could not challenge it.

¹⁵⁴ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, op. cit.

¹⁵⁵ CJEU, C-325/11, *Alder* of 19 December 2012, ECLI:EU:C:2012:824, published in the electronic Reports of the cases, par. 35.

¹⁵⁶ CJEU, C-443/03, *Leffler* of 8 November 2005, ECLI:EU:C:2005:665, I-09611.

¹⁵⁷ CJEU, C-443/03, *Leffler* of 8 November 2005, ECLI:EU:C:2005:665, I-09611, par. 42.

¹⁵⁸ On the need for an interpretation inspired by a fair balance of the norms that allow the recipient to reject the act from the CJEU the case C-14/07, *Weiss and Partner* of 8 May 2008, ECLI:EU:C:2008:264 I-03367, according to which it is sufficient that the document introducing the judgment (and not also the supporting documents) are drafted in a language understandable to the addressee.

¹⁵⁹ CJEU, C-519/13, *Alpha Bank Cyprus* of 16 September 2015, ECLI:EU:C:2015:603; C-354/15, *Henderson* of 2 March 2017, ECLI:EU:C:2017:157, par. 58, above published in the electronic Reports of the cases.

¹⁶⁰ According to art. 27, n. 2 of the Convention see from the CJEU, C-49/84, *Debaecker and Plouvier* of 11 June 1985, ECLI:EU:C:1985:252, I-01779; C-522/03, *Scania Finance France* of 13 October 2005 of 13 October 2005, ECLI:EU:C:2005:606 I-08639; C-3/05, *Verdoliva* of 16 February 2006, ECLI:EU:C:2006:113 I-01579.

¹⁶¹ See in argument from the CJEU: C-386/17, *Liberato* of 16 January 2019, ECLI:EU:C:2019:24; C-308/17, *Kuhn* of 15 November 2018, ECLI:EU:C:2018:911; C-296/17, *Wiener & Trachte* of 14 November 2018, ECLI:EU:C:2018:902; C-560/16, *E.On Zurich Holding* of 7 March 2018, ECLI:EU:C:2018:167; C-368/16, *Assens Havn* of 13 July 2017, ECLI:EU:C:2017:546; C-341/16, *Hassen Beleggingen* of 5 October 2017, ECLI:EU:C:2017:738, the cited cases was published in the electronic Reports of the cases.

¹⁶² In the sense that the fact that the decision has been appealed precludes ex se, if it is possible to assert this impeding cause, CJEU, C-420/07, *Apostolides* of 28 April 2009, ECLI:EU:C:2009:271, I-03571, par. 72.

¹⁶³ CJEU, C-283/05, *ASML* of 14 December 2006, ECLI:EU:C:2006:787, I-12041.

87. Based on the principles expressed in this ruling, in the subsequent rulings relative to this provision CJEU explicitly referred to the need to ensure a “fair balance” between the need for effectiveness linked to the principle of mutual recognition and the guarantee of mutual trust between states members and respect for the rights of the defense as protected by art. 47 CFREU¹⁶⁴. This argumentative procedure was followed, to conclude that the requested member state judge is required to verify the notification of the document initiating proceedings in the member state of origin¹⁶⁵ and that the defendant cannot be required to have challenged the decision if it becomes aware of it only after the time limit for proposing an expired appeal¹⁶⁶.

88. Moreover, this reading focused on the rights of defense was explicitly re-proposed at times with express reference to the need to respect art. 47 CFREU also with regard to instruments that provided for the abolition of exequatur, an even more radical simplification of the formalities required to guarantee circulation between member states¹⁶⁷. Lack of control of the decision by the judge of the member state of enforcement imposes an even stricter guarantee of the rights of defense in the member state of origin¹⁶⁸.

89. Precisely with reference to art. 34, n. 2 of Regulation n. 44/2001, this approach was essentially considered also compatible with art. 6 of ECHR by ECtHR homologation in the aforementioned

¹⁶⁴ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, op. cit.,

¹⁶⁵ CJEU, C-619/10, *Trade Agency* of 6 September 2012, ECLI:EU:C:2012:531, published in the electronic Reports of the cases.

¹⁶⁶ CJEU, C-70/15, *Lebek* of 7 July 2016, ECLI:EU:C:2016:524, published in the electronic Reports of the cases. In this case it was discussed the possibility of submitting a request to remove a foreclosure on the appeal pursuant to art. 19, par. 4 of Regulation no. 1393/2007 (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79-120), when the defendant had made aware of the decision only after the expiry of the deadline established under the Regulation to request the removal of the foreclosure.

¹⁶⁷ See from the Regulation n. 805/2004, CJEU, C-300/14, *Imtech Marine Belgium* of 17 December 2015, ECLI:EU:C:2015:825; C-511/14, *Pebros Servizi* of 16 June 2016, ECLI:EU:C:2016:448. According to the Regulation n. 1896/2006 (Regulation (EC) No 1896/2006-creating a European order for payment procedure) see the next cases from the CJEU: joined cases C-119 and C-120/13, *Eco Cosmetics* of 4 September 2014, ECLI:EU:C:2014:2144, par. 45ss; C-245/14, *Thomas Cook Belgium* of 22 October 2015, ECLI:EU:C:2015:715, par. 41; C-94/14, *Flight refund* of 10 March 2014, ECLI:EU:C:2016:148, par. 59; C-508/12, *Walter Vapenik v. Josef Thurner* of 5 December 2013, ECLI:EU:C:2013:790, published in the electronic Reports of the cases; C-300/13, *Imtech Marine Belgium NV v. Hellenic Radio SA* of 17 December 2015, ECLI:EU:C:2015:188, published in the electronic Reports of the cases, which the CJEU has declared that: “(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the European enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)”. See also the case: C-511/14, *Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd* of 16 June 2016, ECLI:EU:C:2016:448, published in the electronic Reports of the cases, which the CJEU has stated that: “(...) the default judgment was to be counted among the executive title that were to be certified as a European enforcement order, even if it could not, in fact, to be certified as a European enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)”. And in case of monitor process see: C-133/12, *Goldbet Sportwetten v. Massimo Sperindeo* of 13 June 2013, ECLI:EU:C:2013:105; C-215/11, *Iwona Szyrocka v. SiGer Technologie GmbH* of 13 December 2012, ECLI:EU:C:2012:794; joined cases C-119/13 and C-120/13, *Eco Cosmetics GmbH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchuk* of 4 September 2014, ECLI:EU:C:2014:2144; C-245/14, *Thomas Cook Belgium NV v. Thurner Hotel GmbH* of 22 October 2015, ECLI:EU:C:2015:715; C-94/14, *Flight Refund Ltd vs. Deutsche Lufthansa AG* of 10 March 2016, ECLI:EU:C:2016:148, the above cited cases published in the electronic Reports of the cases. For the analysis of the above cases see: M. DUROVIC, *European law on unfair commercial practices and contract law*, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 106ss. M. HAZELHORST, *Free movement of civil judgments in the European Union and the right of fair trial*, ed. Springer, The Hague, 2017, pp. 438ss. T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, op. cit., pp. 686ss. F. EICHEL, *Keine rügelose Einlassung in Europäischen Mahverfahren*, in *Revue de Droit Privé de L'Union Européenne*, 24, 2014. M. BOBEK, *Central European judges under the European influence. The transformative power of the EU revisited*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 234ss. P. GRUBER, *Die Nichtgerklärung eines europäischen Zahlungsbefehls*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 13 (1), 2016, pp. 153ss. W. JELINEK, S. ZANGL, *Insolvenzordnung*, Manz Verlag, Wien, 2017.

¹⁶⁸ CJEU, C-289/17, *Collect Inkasso* of 28 February 2018, ECLI:EU:C:2018:133, published in the electronic Reports of the cases.

Avotins v. Latvia case¹⁶⁹. In that judgment, while drawing attention to the fact that a purely mechanical application of the rules on circulation of judgments could lead to violations of fundamental rights and the need to provide mechanisms to ensure that the judge of the requested state has the power to verify whether or not there is such violations¹⁷⁰. ECtHR has finally recognized the need to ensure a balance between the safeguards provided for the defendant and the need for the circulation of decisions, which require the defendant to avail himself of the remedies provided in the member state of origin.

90. Precisely because there are no preconceived formulas to ensure a proper balance between the different components of the right to effective judicial protection it is possible that both in jurisprudence and legislative acts, different ways of reconciling the right of the plaintiff to access justice and to agreed to a fair trial.

91. CJEU's rulings have revealed the need to ensure a certain prevalence of the right to action where the notification of the document introducing the trial is made impossible by the latter's unrepeatability. CJEU found itself examining a case of this kind in the *Hypot ni Banka* sentence of 17 November 2011¹⁷¹ in which it also held that in relation to contracts concluded with consumers and in spite of the protection conferred on them by Regulation no. 44/2001 an action can be promoted against a consumer whose current address is unknown to the judge of the place of the last known domicile provided that all the necessary research to identify the new domicile has been carried out. To reach this conclusion, CJEU referring to art. 47 CFREU referred to the purpose of "reinforcing the legal protection of persons established in the Union" and the need to respect the right of the plaintiff to appeal to a judge to determine the validity of his claims "and acknowledged that in such circumstances it is possible impose a limitation on the defendant's rights of defense to avoid a clear denial of justice against the plaintiff"¹⁷².

92. This principle was reiterated in the subsequent *G v. Cornelius de Visser* sentence of 15 March 2012¹⁷³, in which CJEU acknowledged that the notification of an application can also be made by means of a bill posting notification expressly referring to a ruling by ECtHR which considered this notification method compatible with art. 6 of ECHR¹⁷⁴ and reiterating that the defendant is in any case open to the possibility of subsequently opposing the recognition and enforcement of the decision if the application was not notified to him.

93. In a logic of evaluation of the concrete case in the subsequent sentence *A v. B* of 11 September 2014 CJEU has examined a case in which the defendant was found a curator in absentia and the plaintiff invoked the non-contestation of jurisdiction by the latter and therefore the tacit extension of jurisdiction in favor of the court seised. In these circumstances it was expressly stated that such a possibility was wholly unsuitable to establish the right balance between the right to an effective remedy

¹⁶⁹ D. LIAKOPOULOS, *Protection of human rights between European Court of Human Rights and Court of European Union*, in *International and European Union Legal Matters*, 2015.

¹⁷⁰ See for further details see: F. AIT-OUYAHIA, *Les mécanismes de reconnaissance mutuelle dans l'Union européenne à l'épreuve du droit à un procès équitable à propos de l'arrêt Avotins v. Lettonie*, in *Cahiers de Droit Européenne*, 52 (3), 2016, pp. 978ss.

¹⁷¹ CJEU, C-327/10, *Hypote ni Banka* of 17 November 2011, ECLI:EU:C:2011:745, I-0000.

¹⁷² The CJEU also states that in the absence of notification of the application initiating the proceedings, the defendant is without prejudice to the right to object to the recognition of the decision on the basis of Article 34, n. 2 of the Regulation n. 44/2001 while the plaintiff would remain without any means of appeal (paragraph 54).

¹⁷³ CJEU, C-292/10, *G v. Cornelius de Visser* of 15 March 2012, ECLI:EU:C:2012:142, published in the electronic Reports of the cases. In this case it was considered possible to establish jurisdiction based on the forum of non-contractual liability provided for at the time under art. 5, n. 3 of Regulation n. 44/2001.

¹⁷⁴ ECtHR, *Nunes Dias v. Portugal* of 10 April 2003. For further details and analysis see: B. RAINEY, W. WICKS, C. OVEY, *Jacos, White and Ovey: The European Convention on Human Rights*, Oxford University Press, Oxford, 2017. J.P. COSTA, *La Cour européenne des droits de l'homme. Des juges pour la liberté*, ed. Dalloz, Paris, 2017. F. TIMMERMANS, *Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights*, in *Liber amicorum Pieter Van Dijk, M. Van Roosmalen and others* (eds.), Intersentia, Antwerp, Oxford, 2013, pp. 225ss. D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human rights*, Oxford University Press, Oxford, 2014, pp. 372ss.

and the rights of the defense”, since the defendant could not be considered validly represented by the appointed curator, whom he had not conferred a mandate and could not be considered a summation of the relevant defendant for the purposes of the formation of the tacit extension¹⁷⁵.

94. A clear prevalence of the right to an effective appeal is found in those provisions of regulations of ex art. 81 TFEU¹⁷⁶ which allow recourse to the necessity court. According to the formulation of the provision used for the first time in art. 7 of Regulation no. 4/2009 and repeated later in art. 11 of Regulation n. 650/2012 and also in art. 11 of the “twin” regulations 2016/1103 and 2016/1104 “(...) in exceptional cases the courts of a member state may be aware of the dispute if the proceeding cannot reasonably be brought or carried out or it proves impossible in a third state with which the dispute has a close connection. The dispute must present a sufficient connection with the member state of the court seised (...)”¹⁷⁷.

95. This institute outlined by the internal law or the jurisprudential practice of some member states appears once again inspired by concerns related to the right to effective judicial protection, since it prefigures a situation in which despite the dispute being closely connected with a third state, the judgment it may take place in a member state with which there is a “sufficient connection”¹⁷⁸. From the impossibility of introducing the judgment in the third state, and therefore as a guarantee of the right of the plaintiff to an effective appeal, the rule to derive an autonomous title of jurisdiction, certainly derogating from the principle of predictability of the defendant’s court and therefore abstractly susceptible to compress the rights of defense of the latter, insofar as the action is proposed in a member state with which he does not present significant connections. But once again on the rights of defense is the need to avoid a denial of justice against the actor that the institutions show they want to derive from article. 47 CFREU¹⁷⁹ as well as the precise indications of art. 67, par. 4 TFEU¹⁸⁰, although without being considered clearly obliged, was to introduce the necessity forum in all the instruments related to civil judicial cooperation¹⁸¹ as shown by the approach followed in the approval of Regulation no. 1215/2012.

96. In a broader context, the regulations offer variable balancing formulas between the opposing needs of the plaintiff and the defendant, even though they are connected to the right to effective judicial protection, where they modulate the rules of jurisdiction according to different parameters. In this sense the general approach seems to be that established on the basis of Regulation architecture n. 1215/2012, according to which, in determining jurisdiction, defendant’s defensive needs must first be taken into account by ensuring that he is sued before a foreseeable forum¹⁸².

¹⁷⁵ It is not clear from the aforementioned ruling whether the CJEU intended to raise doubts as to whether the defendant, when considered non-contumacious for the purposes of the tacit extension, could object to the recognition and enforcement of the sentence issued at the end of the proceedings. However, this risk had to be considered excluded in the light of the previous jurisprudence of the CJEU, as we can see from the case C-78/95, *Hendrikman and Feyen v. Magenta Druck & Verlag* of 20 October 1996, ECLI:EU:C:1996:380, I-04943, moreover expressly mentioned in the case: A v. B. for a case similar to Regulation n. 2201/2003 see from the CJEU the case: C-215/15, *Gogova* of 21 October 2015, ECLI:EU:C:2015:710, published in the electronic Reports of the cases.

¹⁷⁶ M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, op. cit.,

¹⁷⁷ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, op. cit.

¹⁷⁸ On the compatibility of the analogous criterion foreseen by the art. 3 of the Swiss law of private international law with the art. 6 of the Convention see from the ECtHR the sentence of *Naït Liman v. Switzerland* of 15 March 2018, par. 208ss, where it is also highlighted the similarity of the norm to the Swiss law with that contained in the regulations of the Union. For the improper nature of the actual link between the dispute and the court seised pursuant to art. 5 of the ECHR see also the case from the ECtHR *Arlewein v. Sweden* of 1st March 2016, par. 63ss. D. LIAKOPOULOS, *Protection of human rights between European Court of Human Rights and Court of European Union*, in *International and European Union Legal Matters*, 2015

¹⁷⁹ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, op. cit.,

¹⁸⁰ T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, op. cit.

¹⁸¹ In the sense that an obligation in this sense does not derive neither from customary law nor from contractual norms according the case of the ECtHR in sentence of *Naït Liman v. Switzerland* of 15 March 2018.

¹⁸² T. RAUSCHER, *Internationales Privatrecht mit internationalem Verfahrensrecht*, op. cit.

97. The balancing of the guarantee of the rights of defense with the right of the plaintiff to an effective appeal can lead to different outcomes whenever the latter right is combined with other relevant values that are abstractly traceable to the protection of other fundamental rights provided by CFREU. A clear example is found first of all in Regulation n. 1215/2012, where it admits that this general architecture should be set aside in the presence of requirements related to the protection of the weak contractor and identifies insurance contracts¹⁸³, concluded with consumers and individual contracts for subordinate employment, a discipline exhaustive, based on these requirements, which are undoubtedly their foundation, as well as in Treaties and in article 38 of CFREU on consumer protection and in articles 30 and 31 of the same on the subject of working conditions¹⁸⁴.

98. On the other hand, similar requirements of the weak party emerge in the determination of jurisdiction in matters of maintenance obligations in family¹⁸⁵ on the basis of Regulation no. 4/2009, as stated in the 15th recital of the Regulation, the jurisdiction rules laid down therein are inspired by the principle of favor creditor¹⁸⁶, whose implementation is moreover linked to the protection of the right to private and family life guaranteed by art. 7 of CFREU¹⁸⁷ and therefore oriented to ensure a broad access to justice by the creditor of food. In the same vein, the rules on jurisdiction of Regulation no. 2201/2003, which are designed in broad terms to realize the interests of the spouses in relation to the needs related to the mobility of persons¹⁸⁸ and consequently provide a plurality of alternative forums, are intended to favor the plaintiff's right to an effective appeal as it with the need to protect the right to private and family life according to ECtHR *Babiarz v. Poland* case of 10 January 2017¹⁸⁹.

99. The need for weighting between different rights of jurisdiction rules contained in the same Regulation no. 2201/2003 and relating to parental responsibility, which appear clearly oriented to pursue an objective of protection of fundamental rights of the child that can be derived from art. 24 CFREU which requires the primary interest of child to be considered pre-eminent¹⁹⁰.

100. Not only this last principle is expressly referred to as a necessary evaluation parameter in the provisions of Regulation¹⁹¹ but above all CJEU jurisprudence has clarified that it is responsible for the centrality of the jurisdiction based on the habitual residence of the minor, as the nearest judge is also what is in the most favorable position to evaluate the measures to be taken¹⁹². From this CJEU has also obtained the consequence that it must be interpreted restrictively any other rule on the jurisdiction contained in Regulation¹⁹³, precisely because the subjective positions of the high parties involved even if

¹⁸³ CJEU, C-249/16, *Kareda* of 15 June 2017, ECLI:EU:C:2017:472; C-29/16, *Hanse Yachts* of 4 May 2017, ECLI:EU:C:2017:343; C-24/16, *Nintendo* of 27 September 2017, ECLI:EU:C:2017:724; C-230/15, *Brite Strike Technologies* of 14 July 2016, ECLI:EU:C:2016:560, the above cases was published in the electronic Reports of the cases.

¹⁸⁴ K. STERN, M. SACHS, *Europäische Grundrecht Charta*, ed. C.H. Beck, München, 2016.

¹⁸⁵ CJEU, C-295/95, *Farrell v. Long* of 20 March 1997, ECLI:EU:C:1997:168, I-01683.

¹⁸⁶ CJEU, C-499/15, *Wand V.* of 15 February 2017, ECLI:EU:C:2017:118, published in the electronic Reports of the cases.

¹⁸⁷ In this regard, the orientation of the ECtHR according to which the successors rights are so intimately connected to the family bonds that fall within the sphere of application of art. 8 of the ECHR according to the sentence *Marckx v. Belgium* of 13 June 1979, par. 51-52; *Pla and Puncernau v. Andorra* of 13 July 2004, par. 26. D. LIAKOPOULOS, *La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux*, in *International and European Union Legal Matters-working paper series*, 2012.

¹⁸⁸ CJEU, C-294/15, *Mikolajczyk* of 13 October 2016, ECLI:EU:C:2016:772, not yet published, par. 50.

¹⁸⁹ D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014.

¹⁹⁰ CJEU, C-372/16, *Sahyouni* of 20 December 2017, ECLI:EU:C:2017:988, published in the electronic Reports of the cases

¹⁹¹ See in particular the articles 12, paragraphs 1 and 3, regarding the extension of competence and the art. 15, paragraphs 1 and 5, on the transfer of jurisdiction to a court which is more suitable for dealing with the case.

¹⁹² CJEU, C-256/09, *Purrucker* of 15 July 2010, ECLI:EU:C:2015:437, I-07353, par. 91; C-499/15, *W. and V.* of 15 February 2012, ECLI:EU:C:2012:118, par. 51; C-111/17 PPU, *OL* of 8 June 2017, ECLI:EU:C:2017:436, par. 63, the above cited cases published in the electronic Reports of the cases.

¹⁹³ With respect to the extension of jurisdiction pursuant to art. 12 of the Regulation see from the CJEU the case: C-215/15, *Gogova* of 21 October 2015, ECLI:EU:C:2015:710, published in the electronic Reports of the cases. par. 41; with respect to the transfer to a judge more suited to dealing with the case pursuant to art. 15 of Regulation according to the sentence of the

attributable to the protection of other fundamental rights such as the right of parents to family life, they can never determine any weakening of the rights of the child.

VIII. Interpretation of EU and national rules in accordance with CFREU on civil judicial cooperation

101. The examination of CJEU jurisprudence clearly shows that the technique of logical-systematic interpretation of secondary law in accordance with CFREU is also widely used in the field of civil judicial cooperation, as JEU has repeatedly referred to the provisions of CFREU for identify the meaning to be attributed to concepts used in the regulations pursuant to art. 81 TFEU¹⁹⁴.

102. In *McB* case of 5 October 2010 it was considered that pursuant to art. 2, n. 11 of Regulation n. 2201/2003 the transfer of a minor can be considered illegal only if it takes place in violation of a right of custody conferred by the applicable national law which in the present case attributed it in the couples not to officially associate to the mother and only following a possible judicial decision also to the father. CJEU, after declaring its intention to limit its analysis to the Regulation standard without evaluating the applicable national law (which was outside the scope of Union law), examined the compatibility of the notion of “illegal transfer” identified on the basis of the rules applicable internal (and therefore at least indirectly also the latter) with reference to articles 7 and 24 CFREU. Based on this analysis, also conducted on the basis of the jurisprudence of ECtHR in relation to the right to private and family life protected by art. 8 of ECHR concluded that the above interpretation did not conflict with art. 7 CFREU¹⁹⁵, since it was in any case allowed to the father even without the consent of the mother, to obtain a right of custody on the basis of a judicial decision; nor with art. 24, because the attribution of the right of custody by the judge makes it possible to ascertain whether it is in the best interests of the minor.

103. This ruling is of particular interest as it provides confirmation of the use of various mechanisms relating to the implementation of CFREU discussed above on the general plan. On the one hand, the ruling is concerned with ascertaining the compatibility of the interpretation of the act of secondary legislation with the rules of CFREU¹⁹⁶. On the other hand, it identifies which parameters relevant to this purpose are not only a provision of CFREU expressly mentioned in the preamble to the Regulation (article 24) but also as logical due to the hierarchical prevalence of CFREU, a different provision¹⁹⁷, evoked by the referring court. For a further verse makes use of the equivalence clause contained in art. 52, par. 3 CFREU, making explicit recourse to the jurisprudence of ECtHR.

104. In some cases the logical-systematic interpretation has led CJEU to prescribe an interpretation of regulations not immediately evident from the textual content of their provisions.

105. Of this possibility CJEU has repeatedly made use with reference to art. 24 CFREU and the consequent need to guarantee the best interests of the minor, since these are parameters expressly referred to in the preamble of Regulation no. 2201/2003. It affirmed that a provisional or precautionary

CJEU C-428/15, *D. (Child and Family Agency)* of 27 October 2016, ECLI:EU:C:2016:819, published in the electronic Reports of the cases, par. 48.

¹⁹⁴ M. POLARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, op. cit.,

¹⁹⁵ D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human rights*, Oxford University Press, Oxford, 2014. C. GRABENWARTER, *European Convention on human rights: ECHR*, C.H. Beck, München, 2014. J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

¹⁹⁶ In the same spirit from the CJEU, C-491/10 PPU, *Aguirre Zarraga* of 22 December 2010, ECLI:EU:C:2010:828, I-14247, par. 60ss.

¹⁹⁷ For a reference to the art. 6 ECHR on the right to freedom in the case of cross-border placement of the minor in an institution see the sentence of the CJEU, C-92/12 PPU, *Health Service Executive* of 26 April 2012, ECLI:EU:C:2012:255, published in the electronic Reports of the cases, par. 11. D. LIAKOPOULOS, *The best interests of the child between European and international private law rules: Unification and evolution of child protection*, in *Juris Gradibus-working paper series*, 2014.

measure adopted by a judge not responsible for the merit cannot affect the custody of the minor¹⁹⁸. It has established that the appeal against the declaration of enforceability of a decision regarding parental responsibility has no suspensive effect¹⁹⁹; he considered that he could not speak of “illicit failure to return” when a child was born by express will of the parents, in a particular member state in which he has the habitual residence of parents, even if the common residence of parents was before birth in a different member state in which the child was not transferred as initially agreed, and excluded that this could find an obstacle in child’s right to entertain personal relationships with both parents²⁰⁰.

106. On the other hand, the use of art. 24 CFREU also occurred with reference to regulations that did not mention it explicitly. CJEU has ruled that an application for food in favor of a minor can be submitted pursuant to art. 3, lett. c) of Regulation no. 4/2009 to the jurisdiction of the member state in which a divorce or separation between the parents is taking place²⁰¹.

107. The right to effective judicial protection has also frequently been used by CJEU to interpret regulations on civil judicial cooperation. In doing so CJEU has especially favored the perspective of weighting between conflicting rights, implicit in the structure of art. 47 CFREU and the consequent search for the right balance. On this basis CJEU has repeatedly interpreted the concepts used in the regulations pursuant to art. 81 TFEU in line with the requirements of effective judicial protection. Thus the notion of “review procedure” used in Regulation no. 805/2005²⁰² or the methods for informing the recipient of a notification on the right to refuse the document²⁰³ have been reconstructed based on the parameter of art. 47 CFREU²⁰⁴.

108. Furthermore, it may be added that even on a more limited group of cases CJEU has deemed possible to recall the norms of CFREU also with reference to the national rules used for the implementation of EU law by proposing a specific interpretation²⁰⁵ or imposing its application²⁰⁶.

IX. Use of CFREU rules for the interpretation of general concepts of private international law

109. The emergence of the theme of protection of fundamental rights in the system of Brussels Convention of 1968 took place with the Krombach sentence with reference to the interpretation of the

¹⁹⁸ CJEU, C-403/09, *Detiček* of 23 December 2009, ECLI:EU:C:2009:810, I-12193, par. 53ss. For further details and analysis see: V. TRSTENJAK, P. WEINGERL, *The influence of human rights and basic rights in private law*, ed. Springer, Berlin, 2015.

¹⁹⁹ CJEU, C-92/12 PPU, *Health Service Executive* of 26 April 2012, ECLI:EU:C:2012:255, published in the electronic Reports of the cases, par. 124.

²⁰⁰ CJEU, C-111/17 PPU, *OL* of 8 June 2017, ECLI:EU:C:2017:436, published in the electronic Reports of the cases, par. 36ss.

²⁰¹ CJEU, C-184/14, *A.* of 16 July 2015, ECLI:EU:C:2015:479, published in the electronic Reports of the cases, par. 46.

²⁰² CJEU, C-300/14, *Imtech Marine Belgium* of 17 December 2015, ECLI:EU:C:2015:825, published in the electronic Reports of the cases, par. 38.

²⁰³ CJEU, C-519/13, *Alpha Bank Cyprus* of 16 September 2015, ECLI:EU:C:2015:603, par. 35; C-384/14, *Alta Realitat* of 28 April 2016, ECLI:EU:C:2016:316, the above cited cases was published in the electronic Reports of the cases par. 48ss.

²⁰⁴ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l'utilité de l'article 47 de la Charte des droits fondamentaux de l'union européenne*, op. cit.,

²⁰⁵ In particular from the CJEU in case C-519/13, *Alpha Bank Cyprus* of 16 September 2015, ECLI:EU:C:2015:603, the powers of the national judge in relation to the refusal were reconstructed according to parameters related to effective judicial protection to receive the notification of an act. See also in the same spirit the case C-498/14 PPU, *Bradbrooke* of 9 January 2015, ECLI:EU:C:2015:3, published in the electronic Reports of the cases, in which the national legislation which attributed the jurisdiction to a specialized legal authority on the direct projections to judge on the return or on the custody of a minor has been deemed compliant with the art. 24 CFREU, as it is considered to be respectful of the speed of the procedure requirement. See also the case: C-184/14, *A.* of 16 July 2015, ECLI:EU:C:2015:479, published in the electronic Reports of the cases, in which the national legislation concerning the appointment of a trustee in absentia has been interpreted as meaning that the latter can not express the will of the person represented in particular for of the tacit extension of justification.

²⁰⁶ CJEU, C-354/15, *Henderson* of 2 March 2017, ECLI:EU:C:2017:157; C-21/17, *Catlin Europe* of 6 September 2018, ECLI:EU:C:2018:675, above the cases was published in the electronic Reports of the cases, in which a national Regulation that considered nothing to be a notification for non-delivery of the standard form required by Regulation no. 1393/2007 was considered incompatible with the Regulation itself in relation to the principles derived from art. 47 CFREU.

notion of public order as a cause impeding the recognition of decisions. Now the interpretation of the notion of public order in the light of the protection of fundamental rights has been urged to CJEU already on two occasions after the entry into force of the Treaty of Lisbon.

110. In *Trade Agency* case²⁰⁷ the preliminary ruling was considered contrary to public order, ie it does not specify the subject of the request or the reasons to be founded by the judge. In particular, the national court assumed that a decision with such characteristics was contrary to the right to a fair trial.

111. In examining these arguments, CJUE stated that it would not be the case to identify the content of the concept of public order of the requested member state, but only to define the limits of the use of this concept. It has thus held that only the manifest and immense violation of a fundamental right²⁰⁸, such as the right to a fair trial guaranteed by art. 47 CFREU²⁰⁹, could justify the non-recognition of a decision by contrast with the public order and then examined whether in the present case, a manifest and disproportionate violation could be referred to the examination of certain profiles to the referring court.

²⁰⁷ CJEU, C-619/10, *Trade Agency* of 6 September 2012, ECLI:EU:C:2012:531, published in the electronic Reports of the cases.

²⁰⁸ Already with reference to the 1968 Brussels Convention, the CJEU had lastly referred to the citation note of a manifest and immense “violation” of a fundamental right, based on the exceptional nature of the limit of public order. See in the same spirit the case. CJEU, C-394/07, *Gambazzi* of 2 April 2009, ECLI:EU:C:2009:219, I-02563, par. 33. The English procedural law opens up, to be true, a rather unhelpful remedy for the unsuccessful party sentenced to be default and which does not appear in line with art. 47 CFREU. This is the application to set aside, provided for by Rule 13 CPR, whose acceptance requires the demonstration of a realistic prospect of resisting the demand (*Godwin v. Swindon BC* 82001) 4 ER 641, for May Lj; *Akram v. Adam* 820049 EWCA Civ. 1601; *ED & F may products ltd v. Patel & Anr*, 82003), EWCA Civ. 472, Potter LJ; *Bond v. Dunster Properties Ltd* (2011) EWCA Civ 455, par. 4; *English Reimbold & Strick Ltd* (200) EWCA Civ 605; (2002) 1 WLR 2409, CA, par. 12; *Privy Council decisions Attorney-General v. Universal Projects Limited* (2011) UKPC 37 and *Attorney v. Matthews* (2011) UKPC 38; *International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz* (2012) EWCA Civ 196, par. 78 (with the relevant comment: M. AHMED, *Setting aside judgment in default, article 6 of the ECHR and the principle of res judicata*, in *Civil Justice Quarterly*, 30, 2012, pp. 418ss) *Standard bank Plc v. Sgrivest International inc.*, 82010, EWCA Civ. 1400, moore-bick LK; *Wightman v. Wiffrington (succession de)*, 2007, QCCA 1687 (CanLII) (2008) of 5 December 2008, parr. 5-8; *Castor Holding Ltd. (Sundic de)*, 2008 QCCS 3437 (CanLII), (2008), R.J.Q. 2207 of 30 July 2008; *Queen’s Bench Division, Commercial Court*, in case of 20 December 2007 (2007) EWHC 23010 (Comm), *Masri v. Consolidated Contractors International Co Sal. And for practical applications see also: Babanaft International v. Bassatne* (1989) 2 WLR 232); *Republic of Haiti v. Duvalier* (1989) 2 WLR 261; *Derby & Co v. Weldon (n.1)* (1989) 2 (WLR 276). In case *Summers v. Fairclough Homes Ltd* 2012 UKSC 26, ar. 377 was noted that: “(...) court has a wide discretion as to how to exercise its case management powers. These include the power to strike out the whole or any part of a statement of case at whatever stage it is made, even if it is made at the end of the trial. However the cases stress the flexibility of the CPR (...)”. The imposition of unnatural and higher charges and probative standards for the default, than would be for the defendant constituted. The limitation of the right to the trial of the default; the absence of judgment, if not indirectly, as a reflection of the validity of the impedimental, amending, extinctive facts deduced from the dispute, on the constituting facts of the right asserted by the plaintiff and the discretionality of the return in the defensive powers of the involuntary default make this remedy a blunt weapon. For further details see: A. ZUCKERMAN, *Rule making and precedent under the civil procedure rules 1998-still an unsettled field*, in *Civil Justice Quarterly*, 28, 2010, pp. 14ss. J. HARRIS, L. COLLINS, *Dicey, Morris & Collins, The conflict of laws*, Sweet & Maxwell, London, 2017, pp. 13ss: “(...) the general principle (is) that in England service of process is the foundation of the court’s jurisdiction to entertain a claim in personam (...) when process cannot legally be served upon a defendant, the court can exercise no jurisdiction over him[. T]he converse of this statement holds good, and whenever a defendant can be legally served with process, then the court, on service being effected, has jurisdiction to entertain a claim against him. Hence in proceedings in personam (...) the rules as to service define the limits of the court’s jurisdiction (...) in continental countries (...) service of process is often required to give the defendant notice of proceedings, but it does not create jurisdiction; jurisdiction must exist already before a writ can be served (the most common basis of jurisdiction being the habitual residence of the defendant) (...)”. N. ANDREWS, *Civil procedure*, in A. BURROWS (ed.), *English private law*, Oxford University Press, Oxford, 2013, chapter 22: “(...) the order without notifying the respondent without notice or ex parte its essence is a surprise procedural strike (...)”. S. SIME, *A practical approach to civil procedure*, Oxford University Press, Oxford, 2018, pp. 474ss. A. ZUCKERMAN, *Zuckerman on civil procedure*, Sweet & Maxwell, London, 2013, pp. 502ss. S. SHETREET, *The cultural of judicial independence: rule of law and world peace*, Martinus Nijhoff Publishers, The Hague, 2014. G. GUNIBERTI, *Debarment from defending, default judgments and public policy*, in *Praxis des internationalen Privat-und Verfahrensrechts*, 30 (9), 2010, pp. 148ss.

²⁰⁹ C. MAK, *Rights and remedies: Article 47 EUCFR and effective judicial protection in European private law matters*, op. cit., G. LEBRUN, *De l’utilité de l’article 47 de la Charte des droits fondamentaux de l’union européenne*, op. cit.,

112. In the *Meroni* sentence of 25 May 2016²¹⁰ the question referred for a preliminary ruling concerned the possible incompatibility of a decision capable of infringing the rights of persons who did not intervene in the proceedings with the public order, once again subject to the right to a fair trial. CJEU after having recalled the premises already carried out in the *Trade Agency* case and having clarified that CFREU rules in the light of the principle elaborated in *Åkerberg Fransson* ruling could be relevant to the reconstruction of the concept of public policy, concluded that in the present case there was a manifest and disproportionate violation of the right to a fair trial because third parties affected by the decision could appeal for its modification or its annulment.

113. These decisions provide a useful framework for understanding the functioning of CFREU rules for the reconstruction of general concepts of private international law. It should first be noted that CJEU has, despite its initial premise, reconstructed in detail if the notion of public order could be invoked in the two cases, examining the relevant circumstances in a precise and detailed manner. But this reconstruction seems understandable in the light of the ways in which the very notion of public order has been interpreted by CJEU, which has expressly considered that CFREU rules can contribute to delineate this notion, this conclusion is consistent with the premise that CFREU is now part of the primary law of EU and identifies rules of fundamental importance within the latter system. Since, as the norms of EU law²¹¹ can constitute a component of public order of the individual member states, obviously the norms of CFREU must be considered suitable to influence the content of public order. To the extent that the interpretation of the notion of public order presupposes in turn the interpretation of art. 47 CFREU²¹² (but possibly also of such provisions of the same) this operation undoubtedly falls within the competence of CJEU for preliminary rulings.

114. The two judgments just mentioned acknowledge that the principles expressed by CFREU, in consideration of their position in EU also in relation to their purpose, can detect in order to reconstruct the concept of public order as a cause impeding the recognition of decisions, but because of the structural equivalence between the two concepts, even as a limit to the application of foreign law.

115. In these cases CJEU has come to the conclusion that the violation of the fundamental right to the fair trial does not have the necessary characteristics to transmit in an incompatibility with public order, evidently starting from the premise of the exceptional nature of this limit²¹³. It could doubt such a reconstruction, as it determines a “weakened” application of CFREU, which is emphasized not in the presence of any violation, but only when it is classified as “manifest and immense”.

116. It does not seem to be in actual fact contrary to the principles relating to the application of CFREU when it is considered that, in the hypothesis considered, this application is essentially *par ricochet*, according to a scheme already outlined with respect to ECHR. The principles relating to the protection of fundamental rights, as recognized in EU law, are relevant to what is relevant here, only at the stage of recognition and enforcement of decisions, in which it is clearly acceptable under the principle of mutual trust, which underlies the system of civil judicial cooperation that control over respect for fundamental rights is limited²¹⁴.

117. Two distinct hypotheses can occur. In a first hypothesis, if the relevant rules for the dispute in the member state of origin are extraneous to the scope of EU law, CFREU cannot be applied in the

²¹⁰ C-559/14, *Meroni* of 25 May 2016, ECLI:EU:C:2016:349, published in the electronic Reports of the cases, par. 38.

²¹¹ I. BASEDOW, *Recherches sur la fonction de l'ordre public européen dans la jurisprudence*, in *Mélanges en l'honneur de Paul Lagarde*, Dalloz, Paris, 2005, pp. 37ss. S. PFEIFF, *La portabilité de statuts personnels dans l'espace européen*, ed. Bruylant, Bruxelles, 2017.

²¹² J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

²¹³ In this spirit see from the CJEU the case C-145/86, *Hoffman* of 4 February 1988, ECLI:EU:C:1988:61, I-00645, par. 21. C-420/07, *Apostolides* of 28 April 2009, ECLI:EU:C:2009:271, I-03571.

²¹⁴ For a statement to this effect in the scope of the Regulation n. 2201/2003 see the case from the CJEU: C-455/15 PPU, *P v. Q* of 19 November 2015, ECLI:EU:C:2015:763, published in the electronic Reports of the cases.

member state of origin. On the other hand, the requested member state is not directly imposing the infringement of CFREU but only by implementing the decision based on incorrect application of CFREU and therefore is reasonable that its power of control is limited to exceptional circumstances.

118. On the other hand, even if the norms relevant to the dispute in the member state of origin fell within the scope of EU law, it was for that state to ensure that the protection of fundamental rights was guaranteed in the proceedings before its courts. CJEU has already stated in the past that in the recognition of a declaration of enforceability of a foreign decision by the requested member state, even if the judge of the latter considers that a rule of EU law has been infringed, he can take into account for the purpose of the ground for public order, only the manifest violation of a rule of law considered essential²¹⁵. This principle should apply where the exequatur procedure has been abolished and only a procedure for monitoring the foreign decision of a potential nature is envisaged.

119. It remains to be added that this mechanism appears in reality also consistent with the principles indicated by ECtHR in the aforementioned *Avotīnš v. Latvia* case²¹⁶ in which it was established that EU member states must also retain the power to exercise control over foreign decisions “(...) if a serious and substantiated complaint is raised before (domestic courts) to the effect that the protection of a convention right has been deficient (...)”²¹⁷. With respect to this international obligation, the limits of admissibility to the public order clause as outlined by the jurisprudence described above appear substantially consistent, while difficulties could arise in the application of those instruments of the Union in the field of civil judicial cooperation which, like the regulations no. 2201/2003, 805/2004 and 4/2009 no longer provide for control of foreign decisions in terms of compatibility with public order²¹⁸.

120. A different conclusion could arise only in the presence of the violation of a right of an absolute nature, such as those related to the protection of human dignity and therefore such as not to tolerate any kind of derogation from member states. In such an hypothesis, which appears to be improbable at least in the relations between member states of the union, it might be imposed to the required state to exercise more precise control, since the circulation of a decision capable of infringing a fundamental right having an imperative nature cannot be admitted.

121. The impact of CFREU on the general categories of private and procedural international law does not seem to be limited to public order clause, since other concepts of indeterminate content can be influenced, in their concrete reconstruction, by the need to take into account the requirements related to the protection of fundamental rights.

²¹⁵ CJEU, C-38/98, *Renault* of 11 May 2000, ECLI:EU:C:2000:225, I-02973; C-302/13, *FlyLAL-Lithuanian Airlines* of 23 October 2014, ECLI:EU:C:2014:2319; C-681/13, *Diageo Brands* of 16 July 2015, ECLI:EU:C:2015:471, par. 48, the above cited cases published in the electronic Reports of the cases.

²¹⁶ The reasoning of the ECtHR is not, at this point, completely clear. Referring in particular to the possibility of overcoming (instead of not applying) the presumption of equivalence, it seems that the examination of the judges of Strasbourg continues to have as object the compatibility of the system of circulation of judgments referred to in Regulation 44/2001, instead that the behavior of the Latvian authorities. Such a formulation could hide, as already highlighted in the text, the intention of the European judges to keep the attention on the problem of compatibility with the Convention of mechanisms for recognition and automatic execution.

²¹⁷ J. FAWCETT, *The impact of article 6 (1) of the ECHR on private international law*, in *International and Comparative Law Quarterly*, 46, 2007, pp. 4ss. A. MAYSS, A. REED, *European business litigation*, ed. Routledge, London & New York, 2018.

²¹⁸ P. BEAUMONT, *Abolition of exequatur in Brussels I: Is a public policy defence necessary for the protection of human rights*, in *Praxis des Internationalen privat und Verfahrensrecht-IRPax*, 30 (2), 2010, pp. 105ss. X.E. KRAMER, *Abolition of exequatur under the Brussels I Regulation: Effecting and protecting rights in the European judicial area*, in *Netherlands International Law Review*, 4, 2011, pp. 972ss. F. MARCHADIER, *La suppression de l'exequatur affaiblit-elle la protection des droits fondamentaux dans l'espace judiciaire européen?*, in *Journal Européenne des Droit de l'Homme*, 26 (2), 2014, pp. 348ss. P. SCHLOSSER, *The abolition of exequatur proceedings. Including public policy review*, in *Praxis des Internationalen privat und Verfahrensrecht-IRPax*, 30 (2), 2010, 2010, pp. 102ss. L.J. TIMMER, *Abolition of exequatur under the Brussels I Regulation: Conceived and premature?*, in *Journal of Private International Law*, 9 (1), 2013, pp. 129ss.

122. It seems that these needs can play a role in the identification of the necessary application rules, defined by Regulation n. 593/2008 with a formula that is otherwise applicable to the field of application of other regulations, such as “provisions which considered crucial by a country to safeguard its public interests, such as its political, social or economic organization, to all situations falling within their scope, whatever the law applicable to the contract should be (...)”²¹⁹. In setting out in detail which provisions may fall within this framework, the assessment of the aspects relating to the protection of fundamental rights may be significant. In the category of necessary application rules, the protective rules of the subjective positions of single individuals must be considered whenever the interests attached to them also have a significant public relevance²²⁰.

123. Likewise in CJEU jurisprudence, the need arose to recall the rules on the protection of fundamental rights to interpret the extremely broad concept of “superior interest of the minor”, relevant for the functioning of multiple names contained in Regulation n. 2201/2003²²¹; on this point, even though it is necessary to assess the concrete scope of this concept on a case-by-case basis, it has been clearly stated that the consideration of child’s best interests is aimed at ensuring respect for the fundamental rights of the child of this requirement²²².

X. Impact of CFREU on the identification of jurisdiction titles and connection criteria

124. A further profile of potential impact of CFREU rules on the functioning of civil judicial cooperation system concerns the jurisdictional rights and linking criteria, which, as is the case, can come to collide on the basis of their formulation with the rules laid down the protection of fundamental rights. It is clear that in the context of civilian judicial cooperation in the EU such a conflict arises between the rules of secondary law which establish jurisdiction titles or linking criteria and rules of CFREU, the former should be considered invalid. A similar risk must be avoided, as far as possible, by means of a logical-systematic interpretation, which therefore necessarily also involves the jurisdiction titles or the connection criteria. Moreover, the same requirement also arises for the national rules that must be used in relation to the implementation of the rules on jurisdiction or the rules of conflict of the union.

125. Compared to this problem, CFREU rules relating to the principle of non-discrimination seem to be particularly relevant, since the choice of a given jurisdiction or of a connecting factor could be discriminatory, if based on an element that is directly or indirectly linked one of the prohibitions set out in articles 21 and 23 of CFREU itself²²³.

126. In this perspective, it is first of all considered the possible impact of the criterion of citizenship that traditionally (although less frequently) constitutes a factor used, even in combination with

²¹⁹ From the CJEU see: C-54/16, *Vinyls Italia* of 2 march 2017, ECLI:EU:C:2017:164; C-557/13, Lutz of 16 April 2015, ECLI:EU:C:2015:227, above cited cases was published in the electronic Reports of the cases. For further details and analysis see: J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

²²⁰ Think about the rules for consumer protection or for the protection of personal data. On these last ones in particular the recital n. 2 of the preamble of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88, as well as the free circulation of such data and repealing Directive 95/46/EC according to which the Regulation itself “(...) is intended to contribute to the creation of an area of freedom, security and justice and economic union, to economic and social progress, to the strengthening and convergence of economies in the internal market and to the well-being of natural persons (...)”. see also from the CJEU the case: C-496/17, *Deutsche Post* of 16 January 2019, ECLI:EU:C:2019:26, published in the electronic Reports of the cases.

²²¹ See the aforementioned articles 12 and 25 regarding jurisdiction also the art. 23, par. 1, lett. a) according to which in relation to decisions on parental responsibility, compatibility with public policy must be assessed “taking into account the best interests of the child”.

²²² CJEU C-428/15, *D. (Child and Family Agency)* of 27 October 2016, ECLI:EU:C:2016:819, published in the electronic Reports of the cases, par. 44.

²²³ J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

others, for the determination of jurisdiction or for the designation of the applicable law. Article 21, par. CFREU has incorporated the prohibition of discrimination on the basis of nationality, already provided by the treaty as a rule, with provisions to be considered corresponding to art. 18 CFREU as also shown in explanations. On the basis of these provisions the use of the criterion of citizenship in the field of private international and of procedural law must be carefully assessed.

127. It may also be noted that where the purposes of determining jurisdiction or designation of the applicable law, the common citizenship of the parties, as is normally the case in Union's regulations²²⁴, cannot be invoked as in the case of citizenship also of only one of the parties. The latter it constitutes one of several elements on whose combination the judge must base his jurisdiction²²⁵ or the identification of the applicable law. This applies in particular where the parties have chosen as competent forum that of the state of which one is a citizen²²⁶ or the national law of one of them²²⁷, since the negotiating element underlying the *electio fori* or the *electio iuris* excludes the possibility of discrimination. For the same reason, and in view of the particular position of the deceased, it does not seem that difficulties may arise with respect to the *professio iuris* of the person whose inheritance is ruled, although it may also concern the law of a state, of which that person possesses the citizenship without preserving significant links with it.

128. On the contrary, where the citizenship of a buttonhole of the parties constitutes the only element taken into consideration, the rule could be incompatible with the aforementioned prohibition of discrimination. Although the union's regulations show a clear reluctance for such a solution²²⁸, this solution could still occur on the basis of the national jurisdiction rules referred to in the residual title by art. 7 and 14 of Regulation n. 2201/2003.

129. The principle of non-discrimination on the basis of nationality may impose specific constraints in the event of zero citizenship of the parties or one of them. This can be excluded when the question of multiple citizenship is resolved directly by Union act. In particular with regard to jurisdiction over matrimonial matters, but with a solution likely to have general scope, CJEU considered without referring to the principle of non-discrimination, that the presence of more common citizenship allows the parties to use each of them for found the jurisdiction of one of the member states of which they are citizens²²⁹.

130. In the event of a choice of law, there is no reason to limit this faculty of the parties to only one of the multiple nationalities of which they or one of them are provided²³⁰, since the circumstance that in such a case a national law is recalled by the will of the elide parties. Where, on the contrary, a single

²²⁴ See for example on the subject of jurisdiction the art. 3, lett. b) of Regulation n. 2201/2003, the art. 6 of Regulation n. 4/2009, articles 5, lett. b) and 6, lett. d) of the 2016/1103 and 2016/1104 regulations. In terms of applicable law, the art. 4, par. 4 of the Hague 2007 protocol. 8, lett. c) of Regulation n. 1259/2010. Article. 26, par. 1 lett. b) of the 2016/1103 and 2016/1104 regulations. See also: P. STONE, *Stone on private international law in the European Union*, Edward Elgar Publishers, Cheltenham, 2018.

²²⁵ For the purposes of jurisdiction concerning matrimonial matters, art. 3, lett. a) last indent of Regulation no. 2201/2003, however, can not be invoked by persons other than spouses from the CJEU the case C-294/15, *Mikolajczyk* of 13 October 2016, ECLI:EU:C:2016:772, not published, for the purposes of the extension of competence in matters of parental responsibility, the art. 12, par. 3, lett. a) of the same Regulation for the purpose of transferring to a judge more suited to dealing with the case, the art. 15, par. 3, lett. c) of the same Regulation. In the sense that the citizenship of a party can be compared to the forum necessitatis see the 16th recital of Regulation n. 4/2009.

²²⁶ The *electio fori* in favor of the national state of one of the parties is admitted by the art. 4, lett. b) of Regulation n. 4/2009 and from the art. 6 of the regulations n. 2016/1103 and 2016/1104. G. CUNIBERTI, S. MIGLIORINI, *The European account preservation order Regulation. A commentary*, Cambridge University Press, Cambridge, 2018, pp. 265ss.

²²⁷ This is for example allowed by art. 5, lett. c) of Regulation no. 1259/2010 and art. 22, lett. b) of the 2016/1103 and 2016/1104 regulations.

²²⁸ See the art. 3, letters c) and d) of Regulation no. 4/2009 which exclude the concentration of the action in the matter of maintenance obligations with that in the matter of the status of the persons or of the responsibility of the authorities if the jurisdiction on the second is based only on the citizenship of one of the parties.

²²⁹ CJEU, C-168/08, *Hadadi* of 16 July 2009, ECLI:EU:C:2009:474, I-06871.

²³⁰ P. HAMMJE, *Le nouveau règlement (UE) n. 1259/2010 du Conseil du 20 December 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*, in *Revue Critique de Droit International Privé*, 100 (2), 2011, pp. 318ss.

national law must be identified on the basis of objective criteria, in the absence of a uniform solution (such as the one now prefigured by article 26, par. 2 of Regulation no. 2016/1103 and 2016/1104 which excludes the resorting to the criterion of connecting common citizenship if spouses or partners have more than one), it will resort to the internal law of individual member states²³¹, with respect to which the prohibition of discrimination will therefore be emphasized.

131. Nationality is not the only parameter against which discrimination can be considered prohibited. It must first of all take into account the need to exclude any discrimination based on sex prohibited by articles 21 and 23 CFREU²³². A title of jurisdiction or a liaison criterion which privileges one of the parties by reason of the genre cannot be regarded as admissible in any way, as in the past for reference to the national law of the husband or father in the legal systems of member states. Although no forecasts of such a break are found, in the state, in the Union law, the principle nevertheless requires particular caution in the interpretation of jurisdictional rights or connection criteria based on the habitual residence of the minor, when it is derived from that of the mother²³³ excluding any automatism on the point.

132. The relevance of this principle and more generally of that of equal treatment envisaged by art. 20 CFREU of which it is an expression, may also emerge with reference to the jurisdiction and the connection criteria based on the will of the parties, since for the purposes of the validity of the *electio fori* or the *electio iuris*, it is necessary to ascertain that there is an agreement that is not based on a significant disparity between the parties.

133. This need reveals many indications in the regulations pursuant to art. 81 TFEU²³⁴. In some cases the choice of competent court (or of the applicable law) is completely and expressly excluded, as happens with regard to maintenance obligations in favor of a minor pursuant to art. 4, par. 3, of Regulation n. 4/2009 and of art. 8, par. 3 of the Hague Protocol of 2007²³⁵. Limitations affecting the freedom of choice of the parties must also be ascribed to the same need, since they are aimed at guaranteeing the protection of a weaker party. Despite the lack of precise limitations to the freedom of choice from the point of view, the need to guarantee the equality of the parties in relation to the choice of law also emerges in Regulation no. 1259/2010 because its preamble clearly emphasizes, precisely in view of the risks inherent in a potential disparity between spouses, on the so-called “informed choice” principle²³⁶, without however indicating in detail the practical ways of implementing this principle, with the invalidity of a choice of law also made by a spouse with detailed information on its consequences is expressly stated.

134. A last possible tension profile with the principle of non-discrimination concerns the rules on conflict of laws concerning the recall of multiple legislations, in particular where these are structured on a personal basis and use potentially discriminatory criteria to determine the application of a distinct material right on a religious or ethnic basis. In this regard, EU regulations while recalling the need to take into account the prohibitions of discrimination pursuant to art. 21 CFREU limit themselves to referring to rules in force in the legal system of the third State in question²³⁷, thus permitting the application

²³¹ In this sense, the 22 recital of Regulation n. 1259/2010 which makes clear “the full respect of the general principles of European Union law”, including, obviously, those obtainable from CFREU.

²³² J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union*, ed. Nomos, Baden-Baden, 2014.

²³³ CJEU, C-497/10 PPU, *Mercredi* of 22 December 2010, ECLI:EU:C:2010:829, I-14309, par. 55.

²³⁴ M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, op. cit.,

²³⁵ This last provision is also applicable to “an adult who, due to an alteration or insufficiency of personal faculties, is not able to take care of his interests (...)”.

²³⁶ See recital n. 18 of the Regulation: “the informed choice of both spouses is an essential principle of this Regulation. Each spouse should know exactly what the legal and social consequences of the choice of applicable law are: the possibility to choose by mutual agreement the applicable law should without prejudice to the rights and equal opportunities of the two spouses, to this end the judges in the participating Member States should be aware of the importance of an informed choice for both spouses regarding the legal consequences of the agreement reached (...)”.

²³⁷ In this sense see in particular: art. 15 of the Regulation n. 1259/2010, art. 37 of Regulation n. 650/2012, the art. 34 of Regulation n. 2016/1103 and 2016/1104, art. 17 of Protocol of Hague of 2007. See also from the CJEU, C-404/14, *Matoušková* of 6 October 2015, ECLI:EU:C:2015:653, published in the electronic Reports of the cases.

of potentially discriminatory criteria. Such a choice does not appear in itself contrary to the principles expressed by CFREU, whose art. 22 moreover guarantees respect for cultural, religious and linguistic diversity²³⁸, it being understood that in the presence of a sufficiently qualified violation of the prohibition of discrimination, public order clause may be invoked as a limit to the application of foreign law or as a cause impeding the recognition of the decision issued on the basis of a law referred to by applying criteria contrary to the aforesaid prohibition.

XI. Concluding remarks

135. While the conventional system can only offer protection for equivalent-together with any enforcement, judicial or legislative enforcement effects, which the individual Member States deem to attribute to the ECtHR ruling-the exercise of the Union's powers in point protection of fundamental rights-with the consequent provision of minimum standards of guarantee-is able to offer, by means of those mechanisms such as the direct effect and the non-application of the incompatible national rule, a specific form of protection. Protection, the latter, which implies a higher standard of protection, even only for the mere application of the principle of primacy.

136. In my opinion, therefore, given that the two different guarantee schemes have contained-and offer protection- which is not perfectly comparable, the proper fulfillment of the obligations set out in articles 2 and 6 TEU could not be disregarded, where the Union enjoys its own competence, from the adoption of common minimum standards to safeguard fundamental rights on the sole basis that the same rights are also protected by the ECHR. This is because, by exercising the Union's regulatory competence, better and more effective protection could be guaranteed to them. This is especially true in connection with the construction of a system of free circulation of foreign judgments based on the principle of trust and mutual recognition, respect for fundamental rights can not be presumed by the fact that all Member States are also part of the ECHR. Indeed, in this case the question assumes the same tautological character as a presumption of respect for fundamental rights based solely on participation in the Union, in accordance with article 2 TEU²³⁹.

137. In particular, the balancing act between the right to effective judicial protection and other opposing interests-which, as we have seen, presupposes a rich series of political evaluations-should be placed primarily on a legislative level. Only later, if the assessment of the European legislator is flawed by unreasonableness, or is disproportionate, the question could pass to the examination of the judicial power. However, legislation which is "systematic" and not strictly sectoral in the matter of fundamental procedural rights would constitute a useful benchmark for the CJEU in those cases in which it must balance their protection in the specific case-that is to assess the compatibility of a legislative act with the same-attenuating the "political" character of these decisions and calming any criticism in relation to the excessive "activism" of the courts of Luxembourg.

138. The legislative action on harmonization and procedural approximation did not follow that transition between economic Europe and the Europe of rights that the Treaty of Lisbon wanted to give to every aspect of the Union, but rather remained firmly anchored to that functional link between the procedural impact and the functioning of the internal market which has characterized the early stages. And indeed, there is a marked gap between the declarations of intent of the European institutions on the

²³⁸ L. GANNAGÉ, *Les méthodes du droit international privé à l'épreuve du conflit de cultures*, ed. Brill, The Hague, 2013, pp. 22ss.

²³⁹ M. WIERZBOWSKI, A. GUBRYNOWICZ, *International investment law for the 21st century*, Oxford University Press, Oxford, 2015. A.H. TÜRK, *Judicial review in European Union law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss. C. BARNARD, S. PEERS, *European Union law*, op. cit., pp. 788ss.

protection of fundamental rights in the EU Justice Agenda for 2020²⁴⁰-and the effective action of the Union in this area.

139. If one were to identify one of the most needy aspects of development and evolution within the harmonization work, this is certainly relative to the protection of fundamental rights in civil proceedings. Action in this sense appears to be extremely urgent, as also highlighted by the recent resolution of the European Parliament of 25 October 2016 concerning the establishment of a safeguard mechanism at the level of the Union of fundamental rights²⁴¹. And this not only to guarantee individuals a better level of protection for their rights, especially in connection with the free circulation of foreign measures-does not detract from the latter.

140. Furthermore, it would be necessary to reconcile the pursuit of the “justice” component of the Freedom and Security Security Area-intended as a better realization of the right to effective judicial protection, with a consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market-with a concrete and not presumed realization of the “freedom” component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed.

141. Unfortunately, in the field of civil matters the legislator does not seem to have made use of the possibilities offered by the new approach of the Lisbon Treaty²⁴², especially as regards the cross-border judicial cooperation sector, where the immanent requirement for the functioning of the market the interior has been dequalified from a necessary to merely preferential element. Once this requirement had been removed, it would have been relatively simple to justify a cross-cutting procedural harmonization action, aimed at defining a series of common rules to protect fundamental procedural rights, albeit limited to cross-border disputes.

142. The possibility of interpreting article 114 TFEU, individually or jointly with article 81 TFEU²⁴³, should not be excluded a priori, as the legitimacy of the adoption of a directive aimed at defining a set of minimum standards or common principles in civil procedural in order to facilitate the free circulation of judgments through the strengthening of mutual trust between the judicial systems of the Member States-and thereby facilitate the functioning and complete establishment of the common market. Furthermore, a possible recourse to the instrument of enhanced cooperation should not be excluded.

²⁴⁰ COM(2014)-144, The EU Justice Agenda for 2020: strengthening trust, mobility and growth in the Union, Brussels 11 March 2014.

²⁴¹ Only the harmonization and approximation of national laws by means of common provisions which, inter alia, ensure respect for fundamental procedural and non-procedural rights could allow the concrete removal of the necessary scrutiny by the national court of the execution, and consequently the reasons for refusal, without necessarily sacrificing the prerogatives of individuals. It is true that, at a precise and timely reading of the Povse and Bosphorus rulings, a presumption of absolute equivalent protection, and consequently the realization of a full European full faith and credit clause, would always be incompatible with compliance with the Convention. However, it is also clear from the rulings of the European Court that the element of primary importance is that of guaranteeing concrete protection of the fundamental rights guaranteed by the Convention. The presence of a normative corpus of EU law capable of infusing and realizing within the legal systems of the Member States a minimum, common and uniform standard for the protection of fundamental procedural rights-also modeled taking due account of the decisions of the Courts of Strasbourg and Luxembourg-would greatly reduce both the possibility of a conflict between the legal systems of the Union and the individual Member States with the provisions of the Convention, and possible conflicts between the jurisprudence of the two Courts. Furthermore, one would thus reconcile the pursuit of the “justice” component of the SLSG.-understood as a better realization of the right to effective judicial protection, with consequent greater effectiveness of EU law and completion, correct or better functioning of the internal market-with a concrete realization, and not presumed, of the “freedom” component, to be understood as the right of individuals to act and live in an area of legality, within which fundamental rights are fully and concretely guaranteed. Such a course of action was undertaken, for example, in relation to criminal law, starting with the Council resolution of 30 November 2009, which established a roadmap for strengthening.

²⁴² The reason for such a difference in treatment could be raised. Even in this case, the most likely appears the ontological difference between the “very personal” values at stake in the criminal sphere-among which, of course, personal freedom stands out-and those that can be traced back to civil matters. Nevertheless, such a reasoning does not fully satisfy. Indeed, within civil matters are not only rights from exclusively economic but also social nature, such as that of family life.

²⁴³ L. WOODS, P. WATSON, *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss.

143. Likewise, a more structured approximation action could, in part, already be done by means of the optional instruments, in the area of cross-border disputes. This also by setting up genuine special courts²⁴⁴ of the Union competent to resolve-following their procedural rules-disputes in cross-border civil and commercial matters, or in areas where the Union's harmonization action is already substantial, such as consumer protection, copyright, industrial patents²⁴⁵, public procurement, competition²⁴⁶. That is, in the event that the necessary political agreement could not be reached, defining special procedures applicable to such disputes, while maintaining them in the executive State of the individual national judicial authorities. In this case, the competence could easily be inferred both directly pursuant to art. 81 TFEU (for cross-border disputes) that indirectly pursuant to art. 114 and 115 TFEU (for further subjects)²⁴⁷. The proposal made by the European Parliament in the aforementioned declaration of 25 October 2016 to make article 2 TEU and CFREU itself a valid legal for the adoption of legislative measures to protect fundamental rights²⁴⁸.

144. Of such problems, especially at the point of possible inequality of treatment between internal and cross-border actions, it seems to take note to widen the notion of "transnational controversy" as far as possible, including cases where-although the parties are domiciled in the same Member State of the court seised-the place of performance of the contract, in which the harmful event occurs or the enforcement of the judicial decision is situated in a different Member State, or the matter at issue falls within the scope of Union law.

145. However, this solution, although appreciable, does not convince in terms of practical feasibility. Indeed, it has already been pointed out that the Member States are inclined towards a strict interpretation of the requirement of cross-border implications referred to in article 81 TFEU, the latter recently reconfirmed with the approval of Regulation 2015/2421²⁴⁹-of modification of the European procedure for small claims and the order for payment procedure-in which the Commission's proposal to widen the scope of the aforementioned proceedings was rejected through an almost similar extensive interpretation of the concept of a dispute border. Excluding exceptional revisions of the positions of the Council-possibly also following the exit of the United Kingdom from the Union-the scope of application of the draft of Directive therefore runs the risk of being brought back into the narrowest riverbed as per regulations 1896/2006²⁵⁰ and 861/2007²⁵¹ and 861/20072. Moreover, particular perplexity arises from the extensive clause aimed at considering cross-border any dispute that falls within the scope of Union law, if only because of the considerable difficulties in application and interpretation that it entails, which are configured as neither more nor less difficult with respect to those relating to the scope of the restrictive clause in article 51 CFREU²⁵².

²⁴⁴ It must not be forgotten, in fact, that the dispute before the Court of Justice and the Court of First Instance is governed by its own procedural regulations. However, the recent decline, by Regulation (EU) no. 2015/2422 of 16 December 2015, of the only specialized court pursuant to art. 257 T.F.U.E. seems to exclude the will to proceed towards the creation of a series of ad hoc European judges.

²⁴⁵ On the model, for example, the Unified Patent Court, which owns a very detailed procedural regulation, which regulates in detail every aspect of the process before it, including any extremely important accessory aspects for effective access to justice, such as legal aid and exemption from court fees.

²⁴⁶ B. HESS, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure*, P.E. 556.971, (Study of European Parliament, 2016), pp. 13ss.

²⁴⁷ A. KACZOROWSKA-IRELAND, *European Union Law*, Routledge, London & New York, 2016. F. MARTUCCI, *Droit de l'Union européenne*, op. cit.,

²⁴⁸ A. KACZOROWSKA-IRELAND, *European Union Law*, op. cit.

²⁴⁹ CJEU, C-627/11, *ZSE Energia* of 22 November 2018; ECLI:EU:C:2018:941, published in the electronic Reports of the cases.

²⁵⁰ As we can see from the next cases from the CJEU: C-21/17, *Catlin Europe SE* of 6 September 2018, ECLI:EU:C:2018:675; C-245/14, *Thomas Cook Belgium* of 22 October 2015, ECLI:EU:C:2015:715, all of them published in the electronic Reports of the cases. See also for the last case: S. PEERS, *European Union justice and home affairs law*, Oxford University Press, Oxford, 2016, pp. 380ss.

²⁵¹ See from the CJEU: C-516/18, *Sun Express Deutschland* of 22 August 2018, ECLI:EU:C:2018:730, published in the electronic Reports of the cases.; C-422/18 PPU, *FR* of 27 September 2018, ECLI:EU:C:2018:784, not yet published.

²⁵² C. PICHERAL, *Le droit à un procès équitable au sens du droit de l'Union européenne*, ed. Anthemis/Nemesis/Limal, Bruxelles, 2012. M. SILVEIRA, A. CANOTILHO, *Carta dos direitos fundamentais da União Europeia*, ed. Almedina, Coimbra, 2013, pp. 537ss.

146. It would have been perhaps politically simpler-in order to guarantee a generalized scope of application to the provision-to try to promote an extensive interpretation of article 114 TFEU capable of legitimizing a minimum harmonization intervention in terms of protection of rights fundamental procedural law in the whole civil and commercial matter, rather than a notion of a dispute with cross-border implications so broad that it essentially clears article 81 TFEU²⁵³-which already provides for the possibility to intervene directly on the procedural arrangements of the Member States, albeit limitedly, in fact, to the transnational dispute-from every one of its borders. The latter option, which will hardly be accepted by the Member States willingly, if not for the implications present, but to avoid the creation of a precedent that could be inconvenient in the future²⁵⁴.

147. In conclusion, the slowness of the Institutions in profiting the openings of the Lisbon Treaty, also with the aim of guaranteeing better protection of fundamental procedural rights, is partly disheartening, but probably also a child of the delicate moment of turbulence-or open crisis-that Union has lived in these last years. The harmonization of national procedural systems-now becoming a necessary element for a further development of the free circulation of foreign judgments and provisions (and therefore for the completion of the common market)-could ultimately benefit from the strong political will that is usually formed in relation to issues related to the functioning of the internal market, to reinforce the protection of fundamental procedural rights and reduce differences in judicial treatment in the different Member States. In this way, that balancing operation would take place between the different components that for too long has been postponed in favor of “security”, or “justice”²⁵⁵, to the partial detriment of strengthening the protection of the fundamental rights of European citizens.

²⁵³ A. HARTKAMP, C. SIBURGH, W. DEVROE, *Cases, materials and text on European Union law and private law*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.

²⁵⁴ Therefore, it is not mere coordination arrangements between the different courts, or obligations of mutual recognition in relation to notifications made in a different Member State with respect to that of the course seised.

²⁵⁵ A. HARTKAMP, C. SIBURGH, W. DEVROE, *Cases, materials and text on European Union law and private law*, op. cit.