ABOLITION OF EXEQUATUR: PROBLEMS AND SOLUTIONS. MUTUAL RECOGNITION, MUTUAL TRUST AND RECOGNITION OF FOREIGN JUDGMENTS: TOO MANY WORDS IN THE SEA[*] [**]

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I. Introduction

A. First steps

The abolition of exequatur is one of the objectives laid down by the European Union (EU) in order to strengthen the European Area of Justice. The Stockholm Programme establishes that "the process of abolishing all intermediate measures (the exequatur), should be continued"[1]. This represents the last formulation of an idea that had already been introduced in the European Policy by the Tampere Programme. Point 34 of the latter urges the Commission to make proposals for further reducing the intermediate measures required to enable the recognition and enforcement of decisions or judgments in the requested State[2]. As a consequence of this mandate, the Commission drew up some Proposals that later became Regulations. Regulation 2201/2003 concerning

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[1] See point 3.1.2; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XG0504(01):EN:NOT

[2] "In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State. As a first step these intermediate procedure should be abolished for the tittles in respect of small consumer or commercial claims and for certain judgments in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decision would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law."; http://www.europarl.europa.eu/summits/tam_en.htm.

jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000[3], establishes that certain judgments concerning rights of access and certain judgments which require the return of a child are enforceable in a Member State, other than the Member State were the judgment was given, without the need for a declaration of enforceability and without any possibility of opposing its recognition. The condition for this "automatic" enforceability is that the judgment be certified in the Member State of origin in accordance with the provisions of the Regulation[4]. The road to an unconditional recognition and enforcement of judgments given in other Member States had been opened, and Regulation 805/2004 creating a European Enforcement Order for uncontested claims became the next step forward.

Regulation 805/2004 determined that judgments given or public documents drawn up in a Member State and certified as a European Enforcement Order would be enforceable in another Member State without any possibility of opposing its recognition. This means that a European Enforcement Order certified in a Member State should be enforced under the same conditions as a judgment handed down in the Member State of enforcement[5].

Quite understandably, the direct enforcement of a foreign judgment, without the possibility of opposing its recognition, was new and, to a certain extent, shocking. The European Enforcement Order was conceived as a kind of experiment aimed at testing the possibilities of further reductions of the exequatur[6]. As we have seen, Point 34 of the Tampere Programme urges the Commission to adopt initiatives in order to reduce intermediate measures required for the recognition in a Member State of decisions adopted in another Member State. Thus, in only five years the Commission managed to draw up two Proposals that became Regulations by means of which the exequatur was eliminated for certain types of judgments.

In November 2004 the European Council adopted a multiannual plan for the area of freedom, security and justice (the Hague Programme), which was aimed at building on the achievements already reached, as well as meeting new challenges. The Programme

[3] *OJ* L 338, 23.12.2003.
[4] See Art. 41(1) and 42(1) of Regulation 2201/2003.
[5] See Art. 20(1) of Regulation 805/2004.
[6] *Cf.* GARCIMARTÍN ALFÉREZ F.J., *El título ejecutivo europeo*, Cizur Menor (Navarra) 2006, p. 35. See also MIGUEL ASENSIO P.A. DE, 'Espacio Europeo de Justicia: evolución y perspectivas en el sector del reconocimiento y ejecución de resoluciones', *Anuario Español de Derecho internacional privado* 2006, pp. 441-466, p. 450.

of the Council did not include a specific call for the abolition of intermediate measures[7], but the Commission assumed that the suppression of exequatur had to be evaluated. Point 4.3 of the Annex to the Communication from the Commission to the Council and the European Parliament on the Hague Programme[8] considers "the evaluation of the possibility of the suppression of exequatur" as one of the tasks that should be done in order to strengthen the efficiency of justice and improve mutual recognition and effective access to justice in civil matters. The timetable scheduled by the Commission establishes that this evaluation should be done in the period 2008-2010. Similarly, the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union[9] includes the "evaluation of the possibility of completing the abolition of exequatur (2006 to 2010), and legislative proposals if appropriate"[10].

As we have just seen, the abolition of exequatur became a specific goal for the period 2006-2010 as a consequence of a subtle evolution from the Council plan of November 2004 to the Council and Commission Action Plan of August 2005. The evaluation of the existing instruments, which was required by the November Plan, was substituted by an evaluation of the possibilities of abolishing the exequatur. The result of this change is that no evaluation of the existing instruments (Regulation 2201/2003 and Regulation 805/2004) was made[11]. In spite of this fact, in the last years some new Regulations have carried on with the task of suppressing exequatur. These Regulations are Regulation

[7] See the Presidency Conclusions of the Brussels European Council of 4-5 November 2004 (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/82534.pdf). Point 3.4.2 (mutual recognition of decisions in civil matters) established the continuation of the implementation of the programme of measures on mutual recognition, but without any specific request of abolishing the exequatur. On the contrary, the Council recommended "a careful review of the operation of instruments that have recently been adopted". Moreover, it seems that in the absence of such previous review the adoption of new measures would not be advisable: see point 3.4.2 *in fine*, according to which "The outcome of such reviews should provide the necessary input for the preparation of new measures".

[8] Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final.

[9] *OJ*, C 198 of 12.8.2005.

[10] Point 4.3(l).

[11] See the contribution of the French Government to the Green Paper on the review of Regulation 44/2001 (http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm). This contribution points out that it would be advisable to test how the existing Regulations are working before eliminating exequatur in Regulation 44/2001. See also the contribution of the United Kingdom (*ibid.*), which indicates that "we would be interested to hear whether the Commission considers the experience that is currently available as to the practical operation of these instruments [Regulations 805/2004, 1896/2006 and 861/2007] is sufficiently positive to justify placing reliance on them as satisfactory models in the current exercise". In a similar sense, see also the contributions of Poland (p. 1) and of the *Zentralverband des deutschen Handwerks* (p. 1).

1896/2006 creating a European order for payment procedure[12], Regulation 861/2007 establishing a European Small Claims Procedure[13] and Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[14]. All these instruments provide that, in certain conditions, decisions given in a Member State can be recognised and enforced in another Member State without the adoption of an enforceability decision in the Member State where recognition or enforcement is sought. In these cases, no grounds for the refusal of recognition are admitted. This means that the foreign judgment or document has to be recognised and enforced under the same conditions as judgments or documents given in the Member State where recognition is sought. A refusal of recognition is therefore not possible[15].

B. Regulation 44/2001

After the "limited" experiments that we have just mentioned, the Commission started to work towards a most significant achievement: the transformation of the core instrument of European Judicial Cooperation in civil matters, Regulation 44/2001, into an "exequatur-free Regulation". A Green Paper on the review of this Regulation was presented in 2009[16]. In this paper, the Commission launched a discussion on the possibility of abolishing exequatur in all civil and commercial matters. The reason put forward to justify this abolition has to do with the expenses that must be paid when

[12] Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, *OJ* L 399, 30.12.2006.
[13] Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure *OJ*, L 199, 31.7.2007.
[14] Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7, 10.1.2009.
[15] See Regulation 4/2009, Art. 17: "Abolition of exequatur.- 1. A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition. 2. A decision given in a Member State bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability"; Regulation 861/2007, Art. 20.1: "A judgment given in a Member State in the European Small Claims Procedure shall be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition"; Regulation 1896/2006, Art. 19: "Abolition of exequatur.- A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."
[16] Green Paper on the review of Council Regulation (EC) nº 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, Brussels, 21.4.2009.

recognition or enforcement of a decision given in a Member State is sought in another Member State[17]. The Stockholm Programme, as we have pointed out, confirms this line of action. From the Commission and the European Council point of view, the internal market and the European Area of Justice require the abolition of exequatur. The existing intermediate measures are not compatible with an effective and true area of justice in civil matters. On 14 December 2010, the Commission published its proposal for a revision of Regulation 44/2001[18]. The proposal does abolish exequatur, but it establishes exceptions for judgments in defamation cases and in compensatory collective redress cases[19]. However, these exceptions are only transitional, as they could be removed after 2016[20]. More importantly, the proposal lays down some safeguards in order to protect the defendant's right to a fair trial[21]. Some of these safeguards have the same effects as some of the current grounds for refusal of recognition of foreign judgments[22].

Of course, it is highly likely that the final result of the review will differ from the Commission's proposal, and the purpose of this article is not to comment the proposal; but we will nevertheless take it into consideration when necessary in order to analyse some general problems related to the abolition of exequatur. Specifically, we will discuss the advantages and disadvantages of such abolition, bearing in mind that the abolition of exequatur can have two different meanings. First, we will consider the advantages and disadvantages of the abolition of the procedure of exequatur in a scenario where the grounds for the refusal of recognition of foreign judgments are maintained; that is to say, the advantages and disadvantages of the abolition of the formal procedure of exequatur, even in the case that in some circumstances the refusal

[17] See Green Paper, first question: "The existing *exequatur* procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad. If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the *exequatur* procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of *exequatur* should, however, be accompanied by the necessary safeguards".

[18] COM(2010)748/3. See MIGUEL ASENSIO P.A. DE, "La propuesta de revisión del Reglamento Bruselas I", *Pedro de Miguel Asensio*, pedrodemiguelasensio.blogspot.com; ARENAS GARCÍA R./ORÓ MARTÍNEZ C., "La propuesta de revisión del Reglamento 44/2001: algunos pasos en la dirección correcta", *Àrea de Dret Internacional Privat*, blogs.uab.cat/adipr/

[19] See Art. 37(3) and Arts. 40 to 44.

[20] See Art. 37(4).

[21] See Arts. 45 and 46.

[22] See *infra* III.3.

of the recognition would still be possible[23]. Second, we will deal with the possibility of completely eliminating the grounds for the refusal of recognition of foreign judgments given in another Member State of the EU.

Of course, both meanings of the abolition of exequatur are connected: if the grounds for the refusal of recognition are removed, then there is no justification for maintaining a formal procedure of exequatur. But even if these grounds are maintained, there are some reasons in favour of abolishing the procedure of exequatur. We will consider this question in the next section.

II. The exequatur as a procedure

As we have just pointed out, exequatur is a procedure; a particular procedure whose purpose is to make a foreign decision enforceable in the forum. The sole goal of this procedure is to verify that there are no grounds for refusing the recognition of the foreign decision. The decision issued in the exequatur procedure establishes whether the foreign decision can be accepted in the forum. When the procedure ends with a positive resolution, the foreign decision becomes effective in the forum. Usually both decisions, the foreign decision and the decision issued in the exequatur procedure, are required when a party seeks the effectiveness of the foreign decision in the forum. Without the decision adopted in the exequatur procedure, the foreign decision lacks any effect[24].

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[23] See MIGUEL ASENSIO P.A. DE (note 6), pp. 457-458; the Contributions to the Green Paper on the review of Council Regulation (EC) 44/2001 (http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm) of the United Kingdom House of Lords (number 30), of the *Associació d'Estudis Jurídics Internacionals (AEJI)* (p. 1), of Clifford Chance (p. 2), of the Financial Markets Law Committee (pp. 1-2), of Herber Smith LLP (p. 2), and of Prof. Magnus and Prof. Mankowski of the University of Hamburg (p. 2-3); see also ORÓ MARTÍNEZ C., 'Control del orden público y supresión del exequatur en el espacio de libertad, seguridad y justicia: perspectivas de futuro', *Anuario Español de Derecho internacional privado* 2009, pp. 201-224, p. 204; OBERHAMMER P., 'The Abolition of Exequatur', *IPRax* 2010, number 3, pp. 198-203, p. 200; CUNIBERTI G./ RUEDA I., 'Abolition of Exequatur. Addressing the Commission's Concerns', *Université du Luxemborug. Law Working Paper*, 2010-03 (also published in *RabelsZ*, 2011), p. 14. This is also the opinion of the European Parliament: see the European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0304&language=EN&ring=A7-2010-0219), point 2.

[24] See e.g. Arts. 951-958 of the Spanish *Ley de Enjuiciamiento Civil* (1881); these articles are still in force because the "new" *Ley de Enjuiciamiento Civil* (2000) does not cover the matter of the recognition of foreign judgments in Spain. See FERNÁNDEZ ROZAS J.C./ SÁNCHEZ LORENZO S., *Derecho internacional privado*, Cizur Menor (Navarra) 2009, p. 185.

Exequatur is, obviously, an "intermediate measure" in the sense of the Stockholm Programme[25]. Moreover, it is a procedure broadly used to make effective in the forum judgments issued abroad[26]. But by no means is exequatur the only way to achieve the extraterritorial effectiveness of judgments. In many cases, exequatur is only required if a party seeks one of the possible extraterritorial effects of foreign judgments, namely the possibility of opening an enforcement procedure. In such cases, the purpose of exequatur is to obtain a declaration of enforceability. But if a party does not seek to enforce the foreign judgment, then exequatur is not necessary. Regulation 44/2001 follows this model: only the enforcement of foreign judgments requires a declaration of enforceability, whereas no specific procedure is required for the recognition of such decisions. This implies that foreign judgments can be used to raise actions or defences based on *res judicata* without previously obtaining their exequatur. Similarly, records in public registers can be updated on the basis of a foreign decision without the need of a prior exequatur of the decision.

Recognition without exequatur (automatic recognition) does not mean that foreign judgments are always recognised, because automatic recognition is not the same as unconditional recognition[27]. The authority before which recognition is sought should (must) verify whether the foreign judgment meets the conditions required to become effective in the forum. Thus the abolition of exequatur does not necessarily mean that the grounds for non-recognition should also be abolished. If the procedure of exequatur is removed from Regulation 44/2001, the authority entitled to enforce a foreign judgment in the forum should control (*ex officio* or upon the request of the party against whom enforcement is sought) the conditions for recognition and enforcement of the foreign decision. Should this be the case, the abolition of the procedure of exequatur would imply that the recognition of a foreign judgment for the purpose of opening an enforcement procedure would follow the same regime as the other extraterritorial effects of this judgment: the automatic recognition established in Art. 33 of Regulation 44/2001 would also apply to the enforcement of the foreign decision, or, more

[25] See *supra* footnote n. 1.

[26] See e.g. GRUBBS S.R. (ed.), *International Civil Procedure*, The Hague/London/New York 2003, *passim*. See also RIGAUX F./ FALLON M., *Droit international privé*, Bruxelles 2005, pp. 429-430; LOUSSOUARN Y./ BOUREL P./VAREILLES-SOMMIERS P. DE, *Droit international privé*, Paris 2004, p. 706; FERNANDEZ ROZAS J.C./SANCHEZ LORENZO S. (note 24), p. 208.

[27] See FERNÁNDEZ ROZAS J.C./ SÁNCHEZ LORENZO S. (note 24), p. 205.

accurately, the recognition of the foreign decision would be an incidental question in the enforcement procedure[28].

Incidental recognition of foreign decisions in the framework of the procedure of enforcement would be something new in Brussels I. Neither the Brussels Convention, nor Regulation 44/2001, allow the enforcement of foreign decisions without a previous decision on their enforceability. However, incidental recognition of the enforceability of foreign decisions is compatible with the general structure of the Regulation. It could even be more accurate than the current procedure. Taking into account that the general principle of the Regulation is the automatic recognition of judgments given in another Member State, the requirement of a specific decision on the enforceability of foreign decisions should be carefully justified. In this sense, it is worth pointing out that when the Brussels Convention of 27 September 1968 entered into force in Spain, some Spanish Courts understood that judgments given in a State party to the Convention were enforceable without a previous exequatur. This misinterpretation of the Convention implied that in some cases a foreign decision was presented directly to the enforcement court, and this court accepted the enforcement claim![29]

Thus, if the formal procedure of exequatur is abolished, the grounds for the refusal of recognition could be verified in the enforcement procedure. Delays and costs in cross-border recovery would be reduced since one single procedure, the procedure of enforcement, would be necessary. The specific procedure aimed at controlling the conditions for the recognition would disappear, but the grounds for the refusal of the recognition would remain. From our point of view this is probably the best solution.

However, it must be pointed out that the abolition of the formal procedure of exequatur would bring about some problems. In the absence of a specific procedure aimed at controlling the conditions for recognition, the possibility now offered by Art. 33(2) of

[28] See Art. 33(3) of Regulation 44/2001: "If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question."

[29] See STS (Sala 1ª) of 12 November 1999, *Aranzadi Westlaw*, RJ 1999\8864. See ARENAS GARCÍA R., 'Primeros contactos del Tribunal Supremo con el Convenio de Bruselas de 1968. Una nueva esperanza. Comentario a la sentencia del Tribunal Supremo (Sala 1ª) de 12 de noviembre de 1999', *La Ley. Unión Europea* 2000, number 4994, pp. 1-4. See also Auto of the Audiencia Provincial de Vizcaya (Sección 4ª) of 19 June 1996 (*Revista de la Corte Española de Arbitraje* 1996, pp. 158-159; *REDI* 1996, pp. 281-282, with a comment by ESTEBAN DE LA ROSA G, *ibid.*, pp. 282-286; see also *id.*, 'El recuso de casación: última vía procesal en el sistema del Convenio de Bruselas. Comentario al auto 235/1996 de 19 de junio de la AP de Vizcaya', *La Ley. Unión Europea* 1997, number 4239, pp. 1-5; FUENTES CAMACHO V./MIGUEL ASENSIO P.A. DE, 'El control de la competencia del Tribunal de origen en el Convenio de Bruselas de 1968: litigios iniciados antes de su entrada en vigor (a propósito del Auto de la Aud. Prov. de Vizcaya (Sección 4ª) de 19 de junio de 1996)', *Revista de la Corte Española de Arbitraje* 1996, pp. 83-88).

Regulation 44/2001 would disappear. It may be useful to preserve it. When a foreign judgment is not recognised by the authority or person before whom it is presented, Art. 33(2) gives the claimant the possibility of obtaining a decision establishing in a definitive way that the foreign judgment fulfils the conditions of recognition. In some cases it would be preferable to open a proceeding in which recognition is the principal issue, rather than relying on the decision of the authority before whom the judgment is presented. Automatic recognition entails the impossibility of obtaining a definitive answer to the question of the recognition of the decision: each authority can adopt its own decision as regards the recognition of a specific decision, since authorities are not bound by the decisions previously adopted by other authorities. A specific procedure of exequatur eliminates the uncertainty of this situation. It is thus advisable to maintain the procedure foreseen in Art. 33(2), although this procedure should in no case be compulsory – not even for the enforcement of foreign judgments. When enforcement is sought, the competent authority will verify the conditions for recognition. This verification will take place in the procedure of enforcement; hence, the creditor who seeks the enforcement of a foreign judgment will not face much more delay and costs than in cases where the enforcement is based on a local judgment.

The proposal of the Commission on the review of Regulation 44/2001[30] partially follows this approach. Indeed, it intends to abolish the procedure of exequatur, and thus foreign judgments would be enforced without a previous declaration of enforceability, although the competent authority of the State where enforcement is sought would be able to refuse the enforcement in certain cases[31]. However, on the one hand, this refusal of enforcement would not always imply an incidental recognition of the decision[32], and on the other hand, the proposal fails to establish a non-compulsory exequatur procedure to be used by parties wishing to invoke in a Member State a judgment given in another Member State. Still, we consider that an incidental recognition of foreign judgments in the framework of the enforcement procedure, completed with a non-compulsory exequatur procedure, would be a simpler and cheaper solution than the alternative advanced by the Commission in its proposal, although in most cases the outcome of each of these possibilities would not significantly differ.

[30] See *supra* note 18.
[31] See Arts. 44 and 45.
[32] This matter will be analysed with more detail in section III.

III. Exequatur and grounds for the refusal of recognition

A. The mutual recognition of judgments

1. Mutual recognition and mutual trust

The principle of mutual recognition is often advanced as a nuclear argument in favour of the abolition of intermediate measures in the recognition and enforcement of judgments in Europe[33]. Sometimes it is also mentioned that "mutual trust" is a cornerstone in the construction of a true European judicial area[34]. In this contribution we will try to carefully delimit both concepts: on the one hand, mutual recognition, and on the other hand, mutual trust. Our thesis is that it is better not to use them as synonyms. Each one has a specific profile, and it is thus useful to consider them separately.

Obviously both concepts are closely related, as the Stockholm Programme correctly points out: e.g., point 3 ("Making People's lives easier: a Europe of Law and Justice") states that "In the Hague Programme, adopted in 2004, the European Council noted that in order for the principle of mutual recognition to become effective, mutual trust needed to be strengthened by progressively developing a European judicial culture based on the diversity of legal systems and unity through European law". As the Stockholm Programme also points out, the Hague Programme had previously linked the implementation of European rules on jurisdiction, recognition and conflict of laws with the adoption of measures aimed at building confidence and mutual trust among Member States[35].

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[33] See point B.VI of the Conclusions of the Tampere European Council in October 1999 (*supra* footnote n. 2), point 3.4.1 of the Presidency Conclusions of the Brussels European Council of November 2004 (*supra* footnote n. 7), point 4.3 of the Annex to the Communication from the Commission to the Council and the European Parliament on the Hague Programme (*supra* footnote n. 8) and point 3.1.2 of the Stockholm Programme (*supra* footnote n. 1). The principle of mutual recognition is essential not only as regards cooperation in civil matters, but also in criminal matters and, in general, for the strengthening of the European area of freedom, security and justice.

[34] See points 1.2.1 and 3 of the Stockholm Programme.

[35] See point 2.3 (9) of the Hague Programme: "A European area of justice is more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions. To this end, the Union must envisage not only rules on jurisdiction, recognition and conflict of laws, but also measures which build confidence and mutual trust among Member States, creating minimum procedural standards and ensuring high standards of quality of justice systems, in particular as regards fairness and

This is an accurate approach: on the one hand, mutual trust is a factual and political ground for the implementation of mutual recognition; and on the other hand, when mutual trust exists, mutual recognition should be improved[36]. Both concepts are interconnected, but must be carefully delimited. In the next section we will deal with mutual trust, but we will previously examine the principle of mutual recognition and its implications for the simplification of the recognition and enforcement of foreign judgments in the European Union.

2. The principle of mutual recognition

Firstly, mutual recognition of judgments is a goal, an objective. Every obstacle or limit to the extraterritorial effectiveness of judgments given in a Member State weakens the European Area of Justice; the easier the movement of judgments is, the stronger the European Judicial Area becomes. However, this does not mean that the goal justifies any measure adopted in order to achieve the free movement of judgments. This result, the free movement of decisions, must be compatible with the respect of other principles and rights. It is obvious that the goal (mutual recognition) is not *per se* an argument that justifies every measure adopted in order to facilitate the recognition and enforcement of judgments[37].

Therefore, mutual recognition of decisions is one of the objectives of the European Area of Freedom, Security and Justice. This objective must be achieved in criminal and in civil matters, and in this sense it inspires the new Regulations and the revision of the existing instruments. However, mutual recognition is also used in another sense: indeed,

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respect for the rights of defence. Mutual understanding can be further pursued through the progressive creation of a 'European judicial culture' that the Hague Programme calls for, based on training and networking. A coherent strategy in the EU's relations with third countries and international organisations is also needed."

[36] See GARDEÑES SANTIAGO M., *La aplicación de la regla de reconocimiento mutuo y su incidencia en el comercia de mercancías y servicios en el ámbito comunitario e internacional*, Madrid 1999, pp. 59-60. The author explains the relationship between mutual trust and mutual recognition in the framework of the free movement of goods.

[37] However, it must be pointed out that the Court of Justice of the European Union has already used this argument. See Judgment of 6 October 2009, C-123/08, *Dominic Wolzenburg*, especially number 58 of the Judgment. The Court's argument is nothing but an example of "the goal justifies the means" and must be criticised. See ARENAS GARCÍA R./GARDEÑES SANTIAGO M., "La discriminación por razón de nacionalidad es compatible con el Derecho comunitario", *Àrea de Dret Internacional Privat* (blogs.uab.cat/adipr), http://blogs.uab.cat/adipr/2009/11/05/la-discriminacion-por-razon-de-nacionalidad-es-compatible-con-el-derecho-comunitario/.

sometimes mutual recognition is conceived as a principle which imposes certain restrictions to the possibility of limiting the free movement of judgments in the EU[38].

It is true that the distinction between mutual recognition as a goal and mutual recognition as a principle is not always clear enough; but we consider that it is important to delimitate both meanings of mutual recognition. The principle of mutual recognition is a consolidated element in EU law, and it could play some role in the free movement of judgments. But in order to do so, we must rigorously examine this principle: not as a rhetorical argument, but taking into account its limits and consequences[39]. This task is nowadays absolutely necessary, since Art. 67(4) of the Treaty on the Functioning of the European Union provides that the principle of mutual recognition of judgments must be the basis of judicial cooperation in civil matters in the EU[40].

The principle of mutual recognition was "discovered" by the European Commission in its Communication of 3 October 1980, following the *Cassis de Dijon* decision of the Luxembourg Court[41]. According to this principle, the products lawfully produced and marketed in one Member State (A) may be sold in another Member State (B), "even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products" [products produced in Member State (B)]. "The importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products"[42]. The technical or quality requirements of the country of origin must be "recognised" in the importing country. This principle was soon adopted in the field of

[38] See, e.g. point 3.1 of the Stockholm Programme (*supra* footnote n. 1)

[39] MÖSTL M. ('Preconditions and limits of mutual recognition', *Common Market Law Review* 2010, number 2, pp. 405-436) establishes a clear distinction between, on the one hand, the principle of mutual recognition in the internal market and, on the other hand, the principle of mutual recognition in the Area of Freedom, Security and Justice (pp. 408-409). It is obvious that mutual recognition in the context of the internal market and in the context of the recognition of foreign judgments must be considered separately, and this is precisely our starting point, but, at the same time, we think that it is not impossible to consider the principle of mutual recognition (understood as a defined and mandatory principle of European Law) in the context of the Area of Freedom, Security and Justice.

[40] "The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."

[41] Judgment of the CJEU of 20 February 1979, C-120/78, *Rewe-Zentral AG v. Bundesmopolverwaltung für Branntwein*. The Communication was published in *OJ*, C 256, 3.10.1980. See GARDEÑES SANTIAGO M. (note 28), p. 59.

[42] See Communication from the Commission, *loc. cit.*, p. 3.

technical analyses or certificates[43] and as regards the freedom to provide services[44]. Nowadays there is no doubt that mutual recognition is a cornerstone in the internal market.

The question is how to transfer the concept of mutual recognition from the internal market (free movement of goods and freedom to provide services) to the extraterritorial effectiveness of judgments. It is true that the word "recognition" is used both in the concept "principle of mutual recognition" and in the field of "recognition of judgments", but it is far from evident how recognition must be understood in each of these fields. We will first consider the principle of mutual recognition, and we will afterwards deal with its transposition to the recognition and enforcement of judgments.

Mutual recognition implies –in its original meaning– that it is not justified, and thus forbidden, to impose controls or verifications in a Member State when they have already been carried out in another Member State. The controls that have been made in the State of origin cannot be ordered again in the State of destination. The rationale behind this prohibition is that the authorities of the latter State must recognise the certificates and permissions obtained in the State of origin. Of course, this prohibition of repeating controls is only justified when the control carried out in the State of origin is equivalent to the control required in the State of destination. The rules of the State of origin must be equivalent to the rules of the State of destination. Without this equivalence, mutual recognition does not work[45]. In this sense, we must distinguish between the cases in which mutual recognition applies to products or services which are subject to harmonization measures at the EU level, and the rest of cases, i.e., where such harmonization does not exist. In the second scenario, the authorities of the State of destination are allowed to verify if the level of protection in the State of origin is equivalent to the level of protection in the State of destination[46].

Therefore, equivalence is a key element for mutual recognition. Only when the rules in force in the State of origin are equivalent to the rules of the State of destination does the principle of mutual recognition apply.

[43] See GARDEÑES SANTIAGO M. (note 36), pp. 61-65; see Judgment of the CJEU of 17 December 1981, C- 272/80, *Frans-Nederlandese Maatschappij voor Biologische Producten BV*.
[44] See GARDEÑES SANTIAGO M. (note 36), pp. 65-68.
[45] *Cf.* GARDEÑES SANTIAGO M. (note 36), p. 86.
[46] *Cf.* GARDEÑES SANTIAGO M. (note 36), p. 87.

Taking into account the importance of equivalence for the principle of mutual recognition, it is rather doubtful that this principle could lead to a simplification of the intermediate measures currently in force. Not only Regulations 44/2001, 2201/2003, or even the Brussels Convention of 1968, but also the internal laws of many countries go far beyond the requirements of the principle of mutual recognition. Since a review as to the substance of the foreign judgment is not admitted[47], it is possible to recognise a judgment that applies legal rules which are not equivalent to the rules in force in the State of destination.

Therefore, a strict consideration of the principle of mutual recognition in the field of recognition and enforcement of foreign judgments would entail the need to control that the law applied in the State of origin is equivalent to the law of the State of destination, at least in matters which are not subject to harmonization. Of course this is not the goal pursued by the Council, the Commission and the European Parliament. As we have seen in section I, the aim is to eliminate all grounds for the refusal of recognition, not to introduce new ones; and even though a complete harmonization of law could be a long-term objective, such harmonization is not considered a pre-requirement for the abolition of exequatur and elimination of the conditions for the recognition and enforcement of judgments given in another Member State.

Does this mean that the principle of mutual recognition is not useful for the revision of Regulation 44/2001? I do not think so. Indeed, it is possible to examine whether the existing grounds for the refusal of recognition are (or are not) coherent with the principle of mutual recognition. In the next section we will deal with this problem. We are going to examine whether the present grounds for the refusal of recognition in Regulation 44/2001 are consistent or not with mutual recognition, so as to determine which of these grounds must be removed in order to adjust Regulation 44/2001 to this principle.

3. The grounds for the refusal of recognition

a) Introduction

[47] See REMIRO BROTONS A., *Ejecución de sentencias extranjeras en España. La jurisprudencia del Tribunal Supremo*, Madrid 1974, pp. 191-192; VIRGÓS SORIANO M./ GARCIMARTÍN ALFÉREZ F.J., *Derecho procesal civil internacional. Litigación internacional*, Cizur Menor (Navarra) 2007, pp. 635-636.

As we have seen in the precedent section, the principle of mutual recognition bans the repetition of controls or verifications already carried out in a Member State. When a verification has already been made in a Member State it is not possible to require a new verification in another Member State. Taking this into account, we are going to examine the different grounds for the refusal of recognition. It must be highlighted that we will not follow the order of Articles 34 and 35 of Regulation 44/2001: the last ground to be considered will be the public policy of the Member State in which recognition is sought, and the first condition to be analysed will be the examination of the jurisdiction of the court which delivered the judgment. The reason which justifies this option is that, among all the grounds for the refusal of recognition, contrariety with public policy is the most difficult to connect with the principle of mutual recognition. As we will immediately see, the relationship between the remaining grounds for the refusal of recognition or enforcement and the principle of mutual recognition is much simpler.

b) Examination of the jurisdiction of the court which delivered the judgment

Article 35 of Regulation 44/2001 establishes that a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72. The Regulation provides here two different grounds for the refusal of recognition. The first one is related to the compliance with the jurisdiction rules on insurance contracts, consumer contracts and the grounds of exclusive jurisdiction. The second one regards the situation in which a Member State has agreed with a non-Member State that, in certain circumstances, it will not recognise judgments given in other Member States against defendants domiciled or resident in that non-Member State. The principle of mutual recognition affects each of these cases in a very different way, and thus they must be considered separately.

We will first deal with the ground for refusal of recognition based on the lack of compliance with the jurisdiction rules of Sections 3, 4 and 6. It is clear that the examination of the jurisdiction taken in relation to cases of exclusive jurisdiction, insurance contracts and consumer contracts is not compatible with the principle of mutual recognition[48]. With such a review, the authority of the State of destination would

[48] See the Contribution of Herber Smith LLP to the Green Paper on the review of Regulation 44/2001 (http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm) p. 2: "There is an

merely repeat a control that was already carried out in the State of origin. The principle of mutual recognition does not allow this result, and therefore the control must be eliminated in order to make the Regulation coherent with mutual recognition.

It is worth pointing out that the control must be abolished even when the court of the State of origin applied its own internal law[49]. In such case, the authority which must decide on the recognition or enforcement should take into account the internal law of the court that was seised of the matter, rather than the law that the courts of the State of destination would have applied if they had been seised. Let us examine a case in which an action is filed in Germany requesting the dissolution of a company registered in England and whose real seat is located in Germany. German courts will consider – applying their own rules of private international law– that the company has its seat in Germany. The judgment on the dissolution of the company given in Germany should be recognised in England, notwithstanding the fact that English courts would have considered that the company had its seat in England. In the proceeding of recognition, English authorities should only verify whether German courts correctly took jurisdiction. And in this hypothesis, German courts correctly considered, under Article 22(2) of Regulation 44/2001, that the seat of the company was in Germany, since this is the solution that results from applying the rules of private international law of the courts that have been seised of the matter.

As we have just seen, the examination of the jurisdiction of the court of origin in cases of exclusive jurisdiction, insurance contracts and consumer contracts is not compatible with the principle of mutual recognition, and therefore this control should be abolished[50]. On the contrary, the analysis of the second possibility of control of the jurisdiction taken by the court which has given the judgment[51] leads us to a very different result.

These cases arise when the Member State of destination has agreed with a non-Member State to refuse recognition of decisions coming from another State, provided that, on the one hand, the defendant is domiciled or resides in this non-Member State and, on the

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argument for deletion of Article 35 which allows for limited review of jurisdiction as it should be assumed, based upon the principles of mutual trust, that the original Member State courts will have applied the Regulation's jurisdiction rules correctly".

[49] For example, in order to determine the domicile of a party (Article 59) or the domicile of a company (Article 22(2)).

[50] The proposal of the Commission eliminates this control even in those cases in which the declaration of enforceability is required on a transitional basis; Art. 35 of the Regulation is removed.

[51] Which, as we have seen, is regulated in Article 72.

other hand, the court of origin took jurisdiction on the basis of an exorbitant ground of jurisdiction. When this is the case, the control carried out in the State of destination is not a repetition of a control already done in the State of origin. The international agreement that must be applied by the authorities of the State where recognition is sought is not binding in the State were the judgment was given, and thus the courts of the latter State decided over their jurisdiction without considering such agreement. The control established by Article 35 in connection with Article 72 is, therefore, compatible with the principle of mutual recognition.

In any case, it would certainly be possible to eliminate the obstacle to recognition established by Articles 35 and 72; but I am not sure that this would be advisable. Considering that agreements between Member States and non-Member States cannot be revoked by EU Regulations, Member States are bound by these agreements regardless of the obligations imposed by those Regulations. Therefore, it would be advisable to maintain the ground for the refusal of recognition based on the existence of an agreement between the Member State where recognition is sought and a non-Member State. The proposal of the Commission on the review of Regulation 44/2001[52] eliminates Art. 35, but it maintains Art. 72 (now Art. 83). This provision would suffice to justify the refusal of recognition of judgments given in a Member State when such recognition would be contrary to agreements concluded between the requested Member State and the non-Member State where the defendant is domiciled or resides.

c) Conflict with another decision

Paragraphs 3 and 4 of Article 34 establish that a judgment shall not be recognised if it is irreconcilable with another judgment. The proposal of the Commission on the review of Regulation 44/2001 maintains this control even in those cases where exequatur is abolished[53]. The analysis of this ground for non-recognition must be made taking into account different factors: on the one hand, whether the irreconcilable judgment was handed down in the State where recognition is sought, in another Member State, or in a

[52] See note 18.

[53] See Art. 43: "The competent authority in the Member State of enforcement shall, on application by the defendant, refuse, either wholly or in part, the enforcement of the judgment if (a) it is irreconcilable with a judgment given in a dispute between the same parties in the Member State of enforcement; (b) it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties provides that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement." This control also applies in those cases where exequatur is maintained on a transitional basis. See Art. 48, paragraphs 3 and 4.

non-Member State; and on the other hand, whether the irreconcilable judgment was given before or after the judgment whose recognition is sought. Each of these possibilities deserves a particular consideration in relation with the principle of mutual recognition.

We will first examine the relevance of the moment in which the irreconcilable judgment was given, distinguishing between judgments given before the judgment whose recognition or enforcement is sought, and judgments given after the decision whose recognition or enforcement is requested. In the present state of law, when the irreconcilable judgment was handed down later than the judgment whose recognition is sought, recognition will only be rejected when the irreconcilable judgment was given in the requested State. In such case (i.e., irreconcilable judgment given in the State where recognition is sought *after* the decision which is intended to be recognised was given), the control carried out in the State of destination is obviously not a repetition of a control already done in the State of origin. Since the irreconcilable decision is subsequent to the decision whose recognition is sought, it was impossible for the court of the State of origin to control this ground of non-recognition. Therefore, denying recognition on the basis of an irreconcilable decision given in the requested State is coherent with the principle of mutual recognition when the latter decision is subsequent to the decision of the State of origin.

When the irreconcilable decision was handed down previously to the judgment whose recognition is sought, it is necessary to distinguish between cases in which the decision was given in a Member State (including the State where recognition or enforcement is sought) and cases in which the decision was given in a non-Member State. As we will immediately see, when the decision was handed down in a Member State, controlling the irreconcilability of the decisions is not coherent with the principle of mutual recognition if the irreconcilable judgment was given *before* the judgment whose recognition is sought.

When refusal of recognition is based on the irreconcilability of a decision given in a Member State (either the requested Member State or another one) prior to the decision whose recognition is sought, the incompatibility with the principle of mutual recognition derives from the fact that the courts of the State of origin were able to take into consideration the existence of this previous judgment in order to avoid the

irreconcilability of decisions. Right from the moment when the first judgment was handed down, it was possible to submit it in any proceeding before a court of a Member State. The second court had to take into account the prior decision, and was therefore not allowed to hand down a decision incompatible with it. Hence, the control of the irreconcilability of decisions had to be carried out in the second court, i. e., in the State of origin of the judgment whose recognition is sought. Denying recognition (or enforcement) on the basis of such irreconcilability would entail a repetition of a control that should have been carried out in the State of origin.

However, in a few cases the control in the requested State will be compatible with the principle of mutual recognition: namely when the prior judgment could not be recognised in the State where the second judgment was given. But of course, the fewer the grounds for non-recognition, the fewer the cases in which it will be justified to control in the requested State the irreconcilability of the judgment whose recognition is sought with a previous decision given in a Member State.

When the previous irreconcilable decision was handed down in a third State, control by the authorities of the requested State is compatible with the principle of mutual recognition, since the verifications carried out in the State of origin and in the State of destination are different. Since the irreconcilable decision was given in a non-Member State, its recognition in the Member States will be governed by the internal rules of each of them. This entails that the conditions for the recognition in the State of origin of a decision given in a non-Member State are not the same as the conditions for the recognition of the same decision in the State of destination. It is therefore possible for a judgment given in a non-Member State not to be recognised in the State of origin, but to be recognised in the State of destination.

Of course, if the scope of Regulation 44/2001 is extended so as to include recognition and enforcement of judgments given in third States[54], the ground for non-recognition based on the irreconcilability with a decision given in a non-Member State would become incompatible with the principle of mutual recognition. Indeed, in this case the rules applied by the authorities of the State of origin and the rules applied by the authorities in the State of destination would be the same. However, such an extension of the scope of the Regulation is currently not likely, since the proposal of the Commission

[54] See MIGUEL ASENSIO P.A. DE (note 6), pp. 460-466. See also Question 2.3 of the Green Paper on the review of Regulation 44/2001.

on the review of Regulation 44/2001[55] does not apply to recognition and enforcement of judgments given in third States.

As we have seen, the grounds for the refusal of recognition established by Articles 34(3) and 34(4) are only partially compatible with the principle of mutual recognition. To be sure, it is coherent with mutual recognition to refuse recognition when the irreconcilable judgment is either subsequent to the judgment whose recognition is sought, or when it was handed down in a non-Member State, as well as in cases where the irreconcilable judgment was given in a Member State and its recognition was impossible in the State of origin. But aside from these cases, this ground for non-recognition is not compatible with the principle of mutual recognition.

d) Inappropriate service

Article 34(2) of Regulation 44/2001 provides a defence against recognition and enforcement based on inappropriate service to the defendant. This ground for the refusal of recognition is coherent with the principle of mutual recognition, since, as we will see, the control carried out in the requested State is not a mere repetition of the controls already done in the State of origin.

As it is widely known, in Regulation 44/2001 the ground for non-recognition based on defective service to the defendant requires, firstly, that the judgment was given in default of appearance; secondly, that the defendant was not served with the document which instituted the proceedings (or equivalent document) in sufficient time and in such a way as to enable him to arrange for his defence; and thirdly, that the defendant did not fail to commence proceedings to challenge the judgment in the State of origin when it was possible for him to do so. If any one of these requirements is not fulfilled, recognition must be granted. But none of these conditions can be properly controlled in the State of origin: indeed, usually the proceedings can go on even if the defendant fails to appear[56], and effective service is not always a necessary condition in order to give a judgment[57].

[55] *Supra* note 18.
[56] See RODRÍGUEZ VÁZQUEZ MªA., *Denegación de la eficacia de sentencias europeas por indefensión del demandado*, Barcelona 2001, pp. 35-40.
[57] See Articles 26(3) and 26(4) of Regulation 44/2001. These provisions establishes that Article 19 of Council Regulation 1348/2000 of 20 May 2000 [now Article 19 of Council Regulation 1393/2007; see

As the ground for the refusal of recognition is not a repetition of a control already carried out in the State of origin, this obstacle to recognition is compatible with the principle of mutual recognition. However, the situation would change if Article 26 of Regulation 44/2001 was reviewed so as to eliminate the possibility of giving a judgment when the defendant was not served in sufficient time and in such a way as to enable him to arrange for his defence. Should this be the case, then the ground for the refusal of recognition based on defective service would be contrary to the principle of mutual recognition.

Although the control of the service is –as we have just seen– compatible with the principle of mutual recognition, the proposal of the Commission on the review of Regulation 44/2001[58] eliminates this control[59]. The defendant who did not enter an appearance in the Member State of origin would nevertheless have the right to apply for a review of the judgment before the competent court of the State of origin[60]. The basis of this application would be that the defendant "was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence" or that "he was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part". The application would not be accepted if the defendant failed to challenge the judgment when it was possible for him to do so.

e) Public policy

As we have previously pointed out, public policy is the ground for non-recognition that requires more attention when examining the way in which the principle of mutual recognition affects the recognition and enforcement of foreign decisions. Non-recognition based on contrariety with the public policy of the requested State fulfils

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Annex III of the latter Regulation] and Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters apply when the document instituting the proceeding or an equivalent document had to be transmitted to a Member State or to a State party in to the Hague Convention. According to Article 19 of Regulation 1393/2007 and Article 15 of the Hague Convention, is it possible to give a judgment even if no certificate of service or delivery has been received.

[58] See *supra* note 18.

[59] With the exception of judgments concerning defamation cases and compensatory collective redress cases. See *supra* note 19.

[60] See Art. 45.

different objectives, all of which are highly relevant. On the one hand, this control enables States to make sure that foreign judgments are not recognised when this recognition would be contrary to human rights law[61]; and on the other hand, this ground for the refusal or recognition prevents a collision between EU law and national constitutions[62]. We will not directly consider public policy from this point of view, since the purpose of this article is to confront the grounds for non-recognition with the principle of mutual recognition; however, it will be inevitable to take into consideration these implications of the public policy exception to recognition.

Controlling whether the recognition of a decision is contrary to the public policy of the requested State will be compatible with the principle of mutual recognition if this verification is not a mere repetition of a control already done in the State of origin. Thus, if a control is a mere reconsideration of a previous control, the principle of mutual recognition requires its abolition, i.e., the elimination of the second control.

In the case of the recognition in a Member State of a judgment given in another Member State, we must take into account that an important part of public policy will be common to both the State of origin and the requested State. Indeed, the protection of human rights, which constitutes the core of public policy nowadays in Europe, is based in all State Members on the same rules, particularly on the European Convention of Human Rights[63]. As we have already seen, the principle of mutual recognition forbids the reiteration in the requested State of the controls that have already been carried out in the State of origin. Therefore, it would be incompatible with mutual recognition to deny recognition on the basis that a foreign judgment is contrary to public policy if the ground for such contrariety is a rule that should have been applied in the State where the judgment was given.

This result does not change even if the authorities of the State of origin made a "bad" application of the rule[64]. The principle of mutual recognition relies on mutual trust, i.e. on the assumption that the authorities of the State of origin and the authorities of the State of destination both legitimately apply the rule. If the rule is the same in the State

[61] See e.g. the contribution of the United Kingdom to the Green Paper on the review of Regulation 44/2001 (http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm). The United Kingdom makes clear that it is necessary to ensure that Member States are able to comply with their obligations under the European Convention on Human Rights (number 6 of the contribution).

[62] *Cf.* ORÓ MARTÍNEZ C. (note 23), p. 219.

[63] See, e.g., CUNIBERTI G./ RUEDA I. (note 23), p. 9.

[64] For a different approach see CUNIBERTI G./RUEDA I. (note 23), p. 9 and references in footnote 42. See also ORÓ MARTÍNEZ C. (note 23), p. 216.

where the judgment was given and in the State where recognition is sought, there is no reason to think that the authorities of the requested State are better placed than the authorities of the State of origin to make a "correct" application of the rule.

Nevertheless, what we have just said does not entail that the principle of mutual recognition requires the abolition of the ground for non-recognition based on the contrariety of the recognition (or enforcement) of the foreign judgment with the public policy of the requested State. Public policy is more than the international regulation of human rights: to be sure, it also covers other matters and, more importantly, in all countries the regulation of human rights is not limited to international rules[65]. There are also national regulations that affect this matter, and these national rules on human rights are usually also considered as a part of public policy. Hence, the control of public policy will be compatible with the principle of mutual recognition when the refusal of recognition relies on the part of public policy of the requested State which differs from the rules of the State of origin. The public policy ground for non-recognition or non-enforcement of foreign decision will therefore only be compatible with the principle of mutual recognition provided that this control is limited to the particularities of the public policy of the requested State, and thus as long as the control of the part of public policy that is common to the State of the origin and the State of destination is forbidden.

The proposal of the Commission on the review of Regulation 44/2001[66] fully maintains this control, on a transitional basis, for judgments concerning privacy and rights relating to personality and in collective redress cases[67], and it partially maintains it in the remaining matters. Art. 46 allows a party "to apply for a refusal of recognition or enforcement when such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial". Of course, public policy is more than the right to a fair trial, but so far procedural rights have been the most relevant issue in the operation of Regulation 44/2001. Therefore, the provision of Art. 46 should suffice to solve most of the cases where recognition or enforcement in a Member State of a judgment given in another Member State would violate the public policy of the former. The question, however, is what should be done if, in a single case,

[65] See ORÓ MARTÍNEZ C. (note 23), pp. 220-221. The author shows how at present it is still not possible to rely on a European public policy, common to all Member States.
[66] See note 18.
[67] See *supra* note 19.

the recognition or enforcement of a judgment given in a Member State is contrary to the public policy of the requested Member State, and Art. 46 does not apply. According to the Regulation and to EU law, the recognition or enforcement has to be granted. On its part, the national Constitution requires to refuse the recognition or enforcement. What will the competent authority of the requested Member State do? It should be noted that, in our view the answer to this question constitutes the key to a correct understanding of the functioning of the European legal system as a whole, i.e., the sum of the legal systems of all the Member States plus the legal system of the EU.

B. The quest for mutual trust

We have already pointed out the differences between the principle of mutual recognition and mutual trust. From our point of view, both concepts must be carefully distinguished. The principle of mutual recognition is a legal principle of EU law, a cornerstone of the internal market and also a fundamental principle in the judicial cooperation in civil matters[68]. Mutual trust is of a different nature. In one sense, mutual trust can be understood as the obligation of all the authorities of a Member State to trust the authorities of the other Member States, and therefore, to assume their decisions. In this sense, mutual trust and mutual recognition are equivalent.

This being so, mutual trust is a legal obligation, but it can also be seen as a fact. In other words: the authorities of one Member State must trust the authorities of the other Member States; but do they really trust them? We must point out that the answer to this question has no legal consequences. If the authorities of a Member State assume the decisions given by the authorities of another Member State, it is irrelevant whether the authorities of the requested State actually trust the authorities of the State of origin. Thus, the existence of genuine trust between the authorities of the Member States is not a legal requirement for the effectiveness of the principle of mutual recognition. Nevertheless, it is of course very relevant from a political point of view, and it must be taken into consideration in order to orientate the legislator. The question is then how to make mutual trust become real, i.e., how to achieve *actual* mutual trust.

[68] See *supra* footnote 36.

One of the measures that it could be advisable to adopt would be to carefully review the existing instruments. We have already seen that the Council recommended this review in 2004[69], something which is nowadays even more necessary. Of course, this review should not consist in merely confirming that decisions given in a Member State are usually recognised and enforced in other Member States without problems. In the case of the European Enforcement Order (EEO), the problem is that even when an EEO has been inappropriately granted in the State of origin, its recognition and enforcement in another Member States is mandatory. Therefore, the review we call for must consist of a thorough examination of the whole proceeding: that it so say, also examining, e.g., whether decisions were correctly certified as a EEOs or, on the contrary, whether certifications were granted in relation to judgments that did not fulfil the requirements to become an EEO[70].

This verification is important, because –although it may be nothing but an "urban (legal) legend"– it is sometimes said that there have been cases of judgments that did not arise from uncontested claims but which were nevertheless certified as EEOs. And once the judgment has been certified as an EEO, there is no possibility of contesting the correctness of the certification in the requested State[71]. Of course, it is possible to contest the EEO in the State of origin[72], but this possibility must be used only very exceptionally. The abolition of the grounds for non-recognition is only advisable when the authorities of the State of origin actually act correctly; simply establishing that all authorities of the Member States must trust the authorities of the rest of Member States is not enough. Mutual trust should be real. Otherwise, the system could collapse at any moment.

[69] See *supra* footnote 7.

[70] This was already proposed by the AEJI in its contribution to the Green Paper on the review of Regulation 44/2001 (see *supra* footnote 23), p. 1.

[71] However, the European Parliament considers that an exceptional proceeding in the State where the enforcement is sought must be possible. See the European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*supra* footnote 23), point 2: "Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect rights of the party against whom enforcement is sought, takes the view that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought." This was also suggested by the contribution of the Council of Bars and Law Societies of Europe to the Green Paper on the review of Regulation 44/2001 (http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm). See point 1.4 of the contribution.

[72] See Article 10 of Regulation 805/2004.

How would it be possible to achieve real mutual trust? The review of the present situation would be a good start. But obviously, once the picture is clear enough, it would be necessary to implement some measures – measures that would not be directly linked to the rules on recognition and enforcement of decisions. Indeed, these measures should be related with the integration of the judicial structures of the Member States. Without a certain degree of integration, mutual trust will only be a mere rhetorical argument[73].

The integration of the judicial structures of the Member States is not an objective of the European Union at the present stage; but I think that it would be advisable to begin to consider this possibility. For example, it could be possible to establish that the certification that must be granted to the judgment in the State of origin[74] should be made by an EU authority, rather than by the authorities of the State of origin[75].

Another possibility would be to establish that issues such as the nullity of the foreign judgment or the defectiveness of the certification should be raised before an EU authority in the State of destination, in order to avoid the problems and expenses derived from the obligation to litigate in the State of origin.

The proposal of the Commission on the review of Regulation 44/2001[76] explores another way of integrating the judicial structures of the Member States. The proposal establishes an obligation of communication between courts in different States. In this sense, Art. 45 is particularly relevant. According to Art. 45(3), the application for a review of a judgment in default (either on the basis of an inappropriate service of the document instituting the proceedings, or when the defendant was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances) may be submitted to the competent court of the Member State of enforcement. This court shall transfer the application to the competent court in the Member State of

[73] See the contribution of the AEJI to the Green Paper on the revision of Regulation 44/2001 (note 23), p. 2. The link between the reduction of the grounds for the refusal of recognition and the integration of judicial structures was already advanced by ARENAS GARCÍA R., 'La litispendencia internacional. El artículo 21 del Convenio de Bruselas de 1968 y el control de competencia del Tribunal de origen. Comentario a la STJCE de 27 de junio de 1991', *Noticias/C.E.E.* 1992, number 91/92, pp. 103-109, p. 108.

[74] E.g., Annex V of Regulation 44/2001, or Annex I of Regulation 805/2004.

[75] See the contribution of the *AEJI* to the Green Paper on the review of Regulation 44/2001 (note 23), p. 2.

[76] See note 18.

origin[77], which will be competent for deciding on the review of the judgment. As we have just seen, the obligation to contest the judgment in the State of origin could become an excessive burden for the party against whom recognition or enforcement is intended; but if this party has the possibility to submit an application in the State of enforcement, it will be easier to admit that the competence to decide over the application remains with the authorities of the State of origin.

In the proposal we can find more examples of direct communication between courts of different States[78], but we will not consider them here. Our intention is simply to point out that the proposal shows an initial, yet still weak, integration between the judicial structures of the Member States. This integration is limited to the communication between competent authorities, but if we consider it as a first step, we can assume that this is a step in the right direction.

To conclude, we would like to stress that the possibilities of integration of judicial structures that we have previously advanced are nothing but initial approaches. The aim of this article is not to analyse mutual trust, but to distinguish it from mutual recognition and to underline the different nature of both concepts. Since the latter (mutual recognition) is more useful for lawyers than for politicians, and the former (mutual trust) is more interesting for politicians than for lawyers, this is the point in which this piece of work, which is intended to be an article about law, must be concluded.

IV. Conclusion

The abolition of exequatur can be understood in two different ways: on the one hand, we can consider the abolition of the exequatur as a procedure (formal exequatur); on the other hand, we can see it as the abolition of all the grounds for the refusal of recognition.

The abolition of exequatur as a procedure does not raise particular problems. The grounds for non-recognition can be controlled in the enforcement procedure, and thus the abolition of the exequatur procedure does not imply a change in the essence of the

[77] Art. 87 establishes that the Member States shall communicate to the Commission "the means of communications accepted in the Member State of origin for receiving applications for the review pursuant to Article 45".

[78] See Arts. 29(2) or 31.

system of enforcement. However, it would be advisable –if the exequatur as a procedure were to be abolished– to maintain the possibility for interested parties to apply for a decision on recognition in a procedure where the question of the recognition of the judgment would be the principal issue.

The abolition of the grounds for the refusal of recognition poses more problems than the mere abolition of the proceeding of exequatur. The principle of mutual recognition is often invoked in order to justify the free movement of judgments in Europe. In this article we have tried to show how the principle of mutual recognition affects the recognition and enforcement of judgments in the EU. We have reached the conclusion that some grounds for non-recognition are not compatible with the principle of mutual recognition. The examination of the jurisdiction taken by the court of the State of origin is not compatible with the principle of mutual recognition, with the exception of the case established in Article 72; the ground for the refusal of recognition based on the conflict with another decision is only compatible with the principle of mutual recognition in two cases: when the conflicting decision was given after the decision whose recognition is sought, and when the conflicting decision was given in a non-Member State. The ground of non-recognition based on the inappropriate service to the defendant is compatible with the principle of mutual recognition if a judgment could be given in the State of origin even in the absence of service. Finally, the refusal of recognition based on public policy grounds is compatible with the principle of mutual recognition only as long as there is a difference between the public policy in the State of origin and the public policy in the requested State.

Mutual trust between the authorities of the Member States is an obligation, but it is also a fact. The abolition of all the grounds for non-recognition in the absence of genuine mutual trust between these authorities is possible, but probably not advisable. Strengthening mutual trust requires a careful review of the operation of the existing instruments, and also a certain degree of connection between the judicial systems of the Member States.

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