THEMIS COMPETITION 2020

Semi-Final C

EU and European Civil Procedure

Rule of Law

and circulation of judgments in civil matters

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Part I - The circulation of judgments in civil matters within the EU: the status quo

1. From the 1968 Brussels Convention to the Brussels II-a recast: mutual trust and mutual recognition in EU regulations

The main tool for facilitating access to transnational justice is the principle of mutual recognition, based on mutual trust between Member States and judicial cooperation between courts of each Member State. Judicial cooperation in civil matters finds its basis in a) Ar. 81 TFEU; b) Protocols n. 21 and 22, annexed to the Treaties. Originally, judicial cooperation in civil matters was not one of the aims of EU. However, it was later included within the EU’s sphere of activity by the Treaty of Maastricht. The Treaty of Amsterdam brought judicial cooperation in civil matters within the Community sphere, although it did not make it subject to the Community method. The Treaty of Nice allowed measures related to judicial cooperation in civil matters - except in family law - to be adopted through the legislative co-decision procedure. The 1999 Tampere European Council laid
the foundations for the European Area of Justice\(^1\). Five years later, all States agreed with a programme for achieving important results in the area of freedom, security and justice called Hague Programme\(^2\), followed by the Stockholm Programme which represented the work schedule for future developments in the area of freedom, security and justice over the five-year’s period from 2010 to 2014 and lately by the strategic guidelines endorsed by the June 2014 European Council.

The Treaty of Lisbon makes all measures, in the field of judicial cooperation in civil matters, subject to the ordinary legislative procedure. However, family law remains subject to a special legislative procedure, where the Council acts after consulting the European Parliament. In the light of the above, it is now necessary to take a brief look at the main legislative measures adopted in the context of judicial cooperation in civil matters, from the 1968 Brussels Convention to Brussels III regulation: the principle of mutual trust has indeed maintained common features over the years, through the various tools that have followed over time. In general terms, international civil procedural law deals with three aspects: identification of cases in which national jurisdiction exists; procedures for the recognition of foreign decisions or orders; applicable Law. The Brussels Convention of 1968 established a uniform system of international law, with no absolute effect on all fields of civil law. Indeed, it does not apply matters relating to the status and capacity of people, the matrimonial property regime, succession and bankruptcy. In the EU area, Reg. (EC) n.44/2001 (hereinafter: Brussels I) replaced the Brussels Convention of 1968 among EU Member States. Consequently, among them, any reference to the 1968 Brussels Convention was intended to be referred to the Brussels I regulation, which concerns jurisdiction and enforcement of decisions in civil and commercial matters. It especially provides automatic recognition of decisions (art. 33) which have direct effect on the member States with no need for any deliberation. This Regulation also laid down limits to the recognition of decisions: art.34 and 35 required respect of public policy, intended to ensure the adversarial principle and the right of defence, the observance of international lis pendens and final judgment. During the period of validity of Brussels I, for the enforcement of the decisions, a declaration of enforceability was to be required to the competent authority of the state of destination, at the request by the interested party. Brussels I was later replaced by Reg. (EU) n.1215/2012 (hereinafter: Brussels I-bis), which has the same scope and has been applicable since 10th January 2015. This Regulation tries to harmonise the rules of conflict of jurisdiction within the

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\(^1\) In this occasion Member States set out the goal of creating “a genuine European area of justice” based on the fact that incompatibility or complexity of the legal and administrative systems of the Member States couldn’t prevent individuals and business from exercising their rights. The priorities for action, set by the Council, included better access to justice in Europe, mutual recognition of judicial decisions and greater convergence in the field of civil law.

\(^2\) This programme reflects the ambitions conveyed in the Treaty establishing Constitution for Europe and proceeds in implementing mutual recognition and involving new areas such as family property, successions and wills.

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Member States and to simplify the recognition and enforcement of decisions in civil and commercial matters. Its art. 36 states the principle of automatic recognition and Article 39 abolishes the *exequatur* for the enforcement of decisions. Concerning the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, the cornerstone of the family private international law is the Regulation (EC) n.2201/2003 (hereinafter: **Brussels II-bis**) which largely follows the rules of the 1996 Hague Convention on parental responsibility and measures for the protection of minors. According to the intentions of the legislator, Brussels II-bis was also to contain special rules for the cross-border child abduction by a parent within the European Union integrating and strengthening the application of the 1980 Hague Convention among member States to dissuade parents and third parties from arbitrarily abducting a child from the member State of habitual residence, or from not taking him back to that State. On parental responsibility issues, it covers the usual forms of parental duties such as the residence of the minor, the access rights, the protection of the minor heritage, the placement of the child by a public authority. The Regulation contains rules on jurisdiction, as well as on the recognition and enforcement of measures on parental responsibility. As for the rest, Brussels II-bis has reproduced the relevant rules of the Brussels II Regulation. Lastly, Reg. (EU) n.1111/2019 (which will likely be called as the **Brussels-III** regulation) abolishes *exequatur* for all family decisions on the one hand but adds purely national grounds for refusal of enforcement to the existing European ones, and whose content will be discussed in detail in the third paragraph which focuses on family matters.

2. **The (lack of a) commonly agreed definition of “judicial authority”**

An European concept of judicial authority is not extensively defined in any existing regulatory text: despite the diversity in national systems and the lack of European model of judicial authority, a comparative approach bears witness to the **common respect of the autonomy and the independence** (both internal and external) of the judiciary. Comparative constitutional experience offers differentiated solutions in the various countries. These **differences** mainly concern the **degree of autonomy and independence** of the judiciary from the other state powers, and a differentiated relationship between requesting judge and convening authority. Article 19 TEU requires effective judicial protection from independent courts as a concrete expression of the value of the rule of law. Having a look at the current EU regulations in civil and commercial matters, the few cases of definition of judicial authority therein find neither articles nor recitals explaining their requisites. These few cases consist in **partial definitions**, related to the particular scope of the

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3 According to this the Member State decision should not be subject to any kind of recognition procedure. Furthermore, the interested party could obtain a decision certifying the absence of any refusing reasons.

4 It states that “The decision issued in a Member State which is enforceable in that Member State is also enforceable in the other Member States without requiring a declaration of enforceability”.
relevant Regulations, that may be found in Reg. (EU) n.1215/2012, Art. 3; Reg. (EU) n 2201/2003, Art.2; Reg. (EU) n.1103-1104/2016, recital n. 29 art 3 n.2; Reg. (EU) n. 1111/2019, recital n.14, where – as already mentioned – neither articles nor recitals explain specific requirements that the judicial authority should possess. Furthermore, a common characteristic between them is that any definition is limited "for the purposes of this Regulation". Reg. (EU) n.650/2012 (Succession regulation) says that Notaries are included in the concept of judicial authority, providing the concept of ‘court’ within the meaning of the first subparagraph of Article 3(2). The conditions listed in the first paragraph of Article 3 of Regulation n.650/2012, guarantee respect of the principle of mutual trust in the administration of justice among the member States, which is the basis for the recognition and enforcement of decisions. In the context of judicial cooperation in criminal matters, an attempt to define the competent judicial authorities may be found in Art.6, paragraph 1, of Council Framework Decision 2002/584/JHA on the the European arrest warrant and the delivery between member States, according to which: “issuing judicial authority” means the judicial authority of the issuing member State which, under its law, is competent in issuing a European arrest warrant; on the other hand “judicial executing authority” means that the judicial authority of the executing member State, under the law of its State, is responsible for the enforcement of the European arrest warrant. The main purpose of another Decision (2003/577/JHA) is to establish the rules according to which a member State recognizes and executes, in its territory, a freezing order or evidentiary seizure issued in criminal case by a judicial authority from another Member State. In another occasion, the European Court of Justice (hereinafter: ECJ) in its judgment of 10 November 2016, C-477/16 PPU, Kovalkovas, par. 31-33, indicated the criteria that must be taken into consideration in order to achieve the uniform interpretation aforementioned, referring to the principle of separation of powers, which necessarily characterizes the functioning of a rule of law and according to which the judicial power must be distinguished from the executive power (see par. 36).

With three decisions of November 2016, the ECJ has returned to interpreting the Framework Decision 2002/584/JHA relating to the European arrest warrant, clarifying what is meant by "judicial authority" for the purposes of issuing an arrest warrant, stating that the term “judicial authority” does not designate only the judges or courts of a Member State, but may also refer to the Member State authorities that administer criminal justice (ECJ, IV Section, C-452/16 PPU, C-453/16 PPU, C-477/16 PPU).

Summing up, from the relevant legal texts and the case-law of the ECJ it does not seem possible to infer a single and coherent definition of judicial authority, but rather a set of criteria that will be examined later in this paper.
3. Family matters and civil and commercial matters: different approaches for the exequatur and ground for non-recognition and non-enforcement

There are differences between recognition and enforcement in civil and commercial matters and family matters: on the one hand, art.36 of Brussels I-bis states the principle of automatic recognition and art.39 abolishes the exequatur for the enforcement of civil and commercial decisions; on the other hand, in family matters the exequatur is abolished but with certain conditions (normal decisions within Brussels II-bis) or completely (privileged decisions in the same text). Lastly, Brussels III will abolish exequatur for all family decisions adding national grounds for refusing enforcement to the already existing European ones. Brussels II-bis states a presumption of recognition of the decision, which can be declared not recognizable only for typical reasons, and detectable ex officio, indicated in Art. 23, but lays down also restrictions regarding the review by the judicial authority, to whom recognition is requested. As regards, instead, the enforceability, which only refers to decisions on parental responsibility, the Brussels II-bis states that a decision issued by a judicial authority of a Member State, must be or cannot be declared enforceable in another Member State.

Brussels III confirms the particular regime of the decisions on access right and on the return of the abducted child, both travelling on a privileged lane, compared to all the others and provides for the abolition of the exequatur for all parental responsibility decisions that have executive effect in the member State in which they were issued; they will therefore be enforceable in another member State without requiring a declaration of enforceability (Artt. 39 and 41). Recognition of decisions (Art. 30 and following) remained substantially unchanged, compared to Brussels II-bis, and, in the same way, the reasons that can justify a refusal of recognition (articles 38 and 39), with the only relevant exception of the effects of not hearing the child (Art. 39, n.2). The new regulation contains important innovations to the recognition of public documents and agreements in separation and divorce that are automatically recognized in all member States, if they have mandatory effects in the country of origin (Art. 65). The reasons that can justify a refusal of recognition are the same as those for recognition of decisions. The main innovation concerns the stage of enforcement of decisions and the abolition of exequatur: it extends the abolition of the declaration of enforceability to all decisions relating to parental responsibility (Art. 34), whereas the current regulation provided this mechanism only for decisions regarding access right and return (privileged decisions). Moreover, it simplifies rules for recognition and enforcement (Art. 42-50). Nine certificate models,

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5 A judicial authority cannot control the jurisdiction; apply the public order criterion to the jurisdiction rules (established by articles 3 to 7 of the regulation); proceed with the review of the merit.

6 Such as those provided for by in Italy by Law n.162/2014 (assisted negotiation or separation and divorce agreements before the officer of marital status).
necessary for the stages, are attached to the Regulation as regards recognition and enforcement of matrimonial decisions (certificate no. II), in parental responsibility (n. III), visiting rights (n. V), return of the child (n. I, IV, VI and VII).

Overall, the new Regulation greatly simplifies the circulation of all decisions, especially those on parental responsibility, which are the majority, strengthening the protection of parties involved in transnational family matters and pursuing the aim of the EU, namely that borders between member States cannot represent an obstacle to the exercise of rights. This new approach concerning family matters is supposed moving towards the gradual uniformity of treatment to civil and commercial decisions.

4. The role of the public policy

The concept of “public policy” has not been considered by doctrine and jurisprudence in accordance with criteria homogeneous and consistent over time.

In Italy, the development of the judicial culture, raised by a more profound awareness of its constitutional grounds, has led judicial practice to draw some distinctions between different types of public policy. Whereas in origin, the concept of public policy was pervaded by political and ideological implications, the scope of domestic public policy has been widely enriched by 1947 Republican Constitution coming into force. This concept has been thus identified with the core of constitutional principles protecting every human person and their fundamental and inviolable rights, as an individual or within social groups, as well as the values on which the Italian Republic is built upon: solidarity, equality, rule of law, personal liberty and health. The first concept, internal public policy (ordine pubblico interno), applies only to purely national cases and broadly reflects the traditional approach, aimed to trace boundaries for contracting parties’ autonomy while carrying out agreements, which may conflict with imperative rights or constitutional values, a departure from which would be incompatible with the legal or economic system. International public policy (ordine pubblico internazionale), on the other hand, essentially applies in the context of private international law and features the characteristics above highlighted, arising in connection with the power of the courts to refuse to apply a foreign law, or recognise or enforce a foreign judgment, on the grounds of inconsistency with public policy. These categories, however, do not refer to clearly distinct types of rules. They show positions of on a continuum: at the end of the spectrum there are purely domestic considerations, viewed as matters of local policy. At the other end, most essential values are taken into account, such as fundamental human rights shared by all States as basic elements of public policy.

As we have seen before, the idea of international public policy is construed as a pluralistic, comprehensive and holistic model: the reasoning is conducted in a flexible way, and it is nourished by several sources, whose composition is also open and dynamic. Courts have therefore recently embraced a concept of public policy open to foreign laws and foreign legal systems: the body of fundamental human rights arising not only from the Constitution, but also from European Treaties, the Charter of fundamental rights and the European Convention on Human Rights, as well as from legal principles shared among EU Member States. This view is declined through a two-piers structure: substantive principles and procedural principles. As far as the substantive one is concerned, we may mention the principle of good faith and prohibition of abuse of rights, prohibition against uncompensated expropriation, provisions against discrimination and against activities that may harm vital interests of individuals, and often taken into consideration by criminal law sanctions, as to underline the importance for the society. The second “soul” of public policy is enlivened by concerns raised by failure to comply with the essential procedural guarantees required for a fair legal trial, such as the adversarial principle, the right to be defended, the right to equal conditions, the right to be judged by an impartial tribunal, the objective of avoiding decisions induced or affected by fraud or corruption, or inconsistent with court decisions or arbitral awards having “res judicata” effect, last but not least, the right to a reasonable duration of trials

Part II - Rule of law

1. Art. 2 TUE and the common values upon which the EU is founded

The European Union is a Union of sovereign Member States which have not renounced to their national sovereignty but have created together a “new legal order”⁸ that belongs to them collectively, is founded on values common to all Member States to ensure a level of homogeneity among them, while respecting their national identities⁹, and thus facilitate the development of a European identity. According to Article 2 TUE, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, including the rights of persons belonging to minorities. These values have been strengthened through the years, for example with the proclamation of the Charter of Fundamental Rights of the European Union in Nice in 2000, and enshrined in the EU Treaties and in the Charter of Fundamental Rights of the EU which has been legally binding since 2009. Those values are supposed to be an integral part of our European way of life, ensuring the legitimacy of the EU as founded on democratic values; moreover, the ECJ has stretched in its cases the fact that the EU is not only a community of

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⁸ See Case C-621/18 Wightman and Others, paras 44 and 45.
⁹ According to Art. 4(2) TEU the Union must respect Member States’ national identities.
law, but also a community of values\textsuperscript{10} which enjoy the so called “two-fold protection”: firstly, since the 1993 Copenhagen European Council, they form part of the accession criteria for candidates for EU membership\textsuperscript{11}; secondly, Member States must, following their accession, observe and promote those values. Among those values the Rule of Law (hereinafter: RoL) is of the utmost importance, since its respect is considered a prerequisite for the protection of all other fundamental values stated in Article 2 TEU\textsuperscript{12} and it is central to making the EU works well as an area of freedom, security and justice and an internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules\textsuperscript{13}. The RoL, before being a key value for the EU system is the \textbf{cornerstone of all modern constitutional democracies} and includes, among others, principles such as accessibility and predictability of the law, exclusion of discretion in the application of rights and liabilities, equality, good faith, adequate protection of human rights, conflict resolution on the basis of law, fair trial and compliance with the obligations under international law\textsuperscript{14}. Those principles have been recognized and elaborated both by the ECtHR and by the ECJ\textsuperscript{15}, the latter affirming – already in its 1986 seminal Les Verts judgment – that the EEC “is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”\textsuperscript{16}. Notably, RoL cannot exist without a \textbf{transparent legal system}, the main components of which are a \textbf{clear set of laws} that are freely and easily accessible to all, \textbf{strong enforcement} structures, and an \textbf{independent judiciary} to protect citizens against the arbitrary use of power by the State, individuals or any other organization\textsuperscript{17}.

As we will see in the third part of this paper, a judgment in civil and commercial matters of a national court is nowadays automatically recognized and enforced in another Member State and a European Arrest Warrant issued against an alleged criminal fully respected in all the other Member States. Violations of those fundamental principles undermine the reliance of citizens and companies on their rights and also diminish Member States’ trust in each other’s legal systems, but also between Member States in general\textsuperscript{18}. Failure to fully implement this principle within the EU calls

\textsuperscript{10}See Case C-64/16, Associacao Sindical dos Juizes Portugueses v. Tribunal de Contas; case C-216/18 PPU, LM; case C-621/18 Wightman and Others and case C-619/18 Commission v. Poland.

\textsuperscript{11}See Art. 49(1) TEU.

\textsuperscript{12}Viviane Reding, The EU and the Rule of law - What next?, Centre for European Policy Studies/Brussels.

\textsuperscript{13}The Commission’s first President, Walter Hallstein, called the European Community a “Community based on the rule of law”.


\textsuperscript{17}See Brunilda Bara, Jonad Bara, Rule of law and Judicial independence in Albania, in University of Bologna Law Review, vol 2, 2017.

\textsuperscript{18}See Emmanuel Crabit, Developing the EU Rule of Law Policy, in Rule of Law in Europe, Perspectives from practitioners and academics, EJTN, p. 86.
into question not only the public acceptance and unity of the EU, but also its external credibility\textsuperscript{19}. Unfortunately, \textbf{RoL cannot be taken for granted} and protecting such principle should be considered a shared responsibility of all Member States, as well as of the EU institutions\textsuperscript{20}. As the Commission underlined in its 2014 Communication to the European Parliament and the European Council: the different Constitutions and judicial systems of the EU Member States, in principle, appear to be well equipped to protect citizens against any threat to the RoL. However, recent events, have demonstrated that a lack of respect for the RoL can become a matter of serious concern. During these events, there has been a clear request for the Commission to take action. Results have been achieved. However, the Commission and the EU, as we will analyze, had to find \textit{ad hoc} solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective response to threats to the RoL\textsuperscript{21}. During the last years the Commission has gradually developed a so called \textit{“RoL toolbox”}: in particular, in 2014 it announced \textit{“A new EU framework to strengthen the Rule of law”}, a structured dialogue between the Commission and the Member State which gives not only instruments in case of a breach of the RoL, but also presents the instruments for promotion and prevention of RoL’s breaches\textsuperscript{22}. More recently, the First Vice-President Frans Timmermans, commenting the new 2019 Commission’s Communication entitled \textit{“Further strengthening the Rule of Law within the Union. State of Play and possible steps”}\textsuperscript{23}, underlined that: \textit{“The ECJ has recently reaffirmed that the RoL is essential for the functioning of the EU. Its importance is also recognized by an overwhelming majority of EU citizens. However, it has come under attack in several ways in the past five years. The European Commission has been fighting hard to resist these attacks with the tools available to us and will continue to do so. Today we have decided to further strengthen our toolbox, to promote, protect and enforce the rule of law”}. On 17 July 2019, the Commission issued another Communication “Strengthening the Rule of Law within the Union - a blueprint for action”\textsuperscript{24} which sets out a series of actions to prevent breaches of the RoL, to promote the “culture” of RoL and to ensure an effective response in case of violation of the principle.

\textbf{2. Upholding the Rule of Law: tools and mechanisms, the role of the EU Commission}

As for the prevention aspect, the Commission has, over the last years, developed a set of tools for monitoring Member States’ justice, such as the EU Justice Scoreboard within the

\begin{itemize}
  \item 20 See Nuria Diaz Abad, \textit{Judges, Presidents’ of courts and members of judicial councils}, in Rule of Law in Europe, Perspectives from practitioners and academics, EJTN, p. 48.
  \item 22 \textit{Id}.
\end{itemize}
institutional context of the European Semester\textsuperscript{25}, the EU’s annual cycle of coordination of economic policies, the Cooperation and Verification Mechanism (CVM) used to address shortcoming in judicial reform and the fight against corruption and organized crime\textsuperscript{26}, as well as the European Structural and Investment Funds (ESI Funds) used to provide support to countries’ efforts to improve the functioning of their justice systems\textsuperscript{27}. The main tools used to check on national justice systems are on one hand, the annual EU Justice Scoreboard and, on the other hand, the country specific assessments. The **EU Justice Scoreboard**, monitored by the Commission, evaluates the functioning of national justice systems in the EU, concerning in particular civil, commercial and administrative cases\textsuperscript{28} and should be considered a “comparative tool” which seeks to provide data on the justice systems in all Member States, mainly focusing on the quality, independence and efficiency of justice. Its “key findings”, connected with the “efficiency of proceedings”, include: the length of the proceedings, the clearance rate and the number of pending cases. It’s a **non-binding tool** in the sense that no sanctions are foreseen in the event that the justice system of a Member State is found to lack independence, but the Commission will highlight these findings in the next scoreboards.

This first tool is complemented by each Member State specific findings which allow a deeper assessment based on the specific national legal and institutional context and are presented every year in the “Annual Country Reports”. The combined findings of these two tools may lead the Commission to propose to the Council to adopt **Country Specific Recommendations** (“CSR”): for example, in July 2019, the Council adopted Country Specific Recommendations as regard the justice systems of seven Member States, included Italy\textsuperscript{29}. As for the EU reaction in case of breaches of the RoL, the two main instruments at the disposal of EU institutions are: firstly, the **infringement procedure based on Article 258 TFUE** which can be applied only with respect to violation of EU law. Surely the recent experiences have showed the effectiveness of the infringement procedure. We are referring specifically to the Poland cases where the Commission launched three infringement proceedings for violation of the principle of effective judicial

\textsuperscript{25} The EU Justice Scoreboard is a part of European Semester, which is a cycle of economic policy coordination and includes a supervision system for fiscal and macroeconomic indicators.


\textsuperscript{27} See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/improving-effectiveness-national-justice-systems_it

\textsuperscript{28} The first Justice Scoreboard was published by the European Commission in March 2013. See European Commission (2013), The EU Justice Scoreboard - A tool to promote effective justice and growth, COM (2013) 160 final, Brussels, 27 March.

protection and the right to an effective remedy guaranteed by Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights. In particular, the Commission launched an infringement proceeding with respect of the Supreme Court Judges’ retirement procedure; another regarding the introduction of different retirement ages between men (65 years) and women (60 years) for judges of Polish ordinary courts and public prosecutors and a law granting to the Minister of Justice the power to extend - at his discretion - the period of activity of judges who reached the retirement age. At present, a third infringement procedure has begun against Poland for breach of Article 19(1) TEU with respect to the introduction of a disciplinary regime for judges of the ordinary courts. On 24th June 2019 the ECJ issued a final judgment in the first case (i.e. Supreme Court judges), ruling that the Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court is contrary to EU law requirements regarding judicial independence; and on the 5th November 2019, in less than five months, the ECJ found Poland again in breach of Article 19(1) TEU.

Secondly, the mechanisms of Article 7 TEU: in particular, Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the RoL. Its scope is not confined to areas covered by EU law (like the infringement proceeding) but empowers the EU to intervene with the purpose of protecting the RoL also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that "if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its Members, whatever the field in which the breach occurs". The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort. There are situations where threats relating to the RoL cannot be effectively addressed by existing instruments, therefore the Commission has provided a process of dialogue with the Member States concerned, structured with opinions and recommendations from the Commission through the establishment in 2014 of the Rule of Law Framework. In this respect, the deterioration of the situation of the RoL in Poland led the Commission, to use the Rule of Law Framework in January 2016 and to initiate subsequently the

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30 See Martina Coli, The judgment of the CJEU in Commission v. Poland II (C-192/2018): The Resurgence of infringement procedures as a tool to enforce the rule of law?, in Dir. Comparato., 2019, p. 8 ss.
31 See Case C-619/2018 Commission v. Poland I.
32 See Case C-192/2018 Commission v. Poland II.
procedure set out in Article 7(1) TEU in December 2017\textsuperscript{35}. In September 2018, the European Parliament decided to initiate the same procedure of Article 7(1) as regard to Hungary. Another instrument that could become available in the future, is the \textbf{Regulation on protecting the EU budget in the event of a generalized treat as regard the RoL} in a Member State\textsuperscript{36} – not yet adopted by the Council and the Parliament – whose aim is to protect the EU budget when the Commission finds \textbf{generalized deficiencies} as regards the RoL through the suspension or reduction payments from the EU funding. Those mechanisms can be used for several different RoL related issues (\textit{i.e.} protecting the financial interests of the EU), but it is true that the \textbf{independence of the judiciary} remain the \textbf{main issue} at stake since all the other guarantees connected with the RoL will not have much impact if there are no independent judges to enforce them.

\textbf{3. The independence of the judiciary as a prerequisite for mutual trust}

As we said before, the RoL applies to all branches of government and even to all public bodies; however, judges have a special responsibility in protecting it as their function consists in settling disputes as well as authoritatively interpreting and applying the law. Professor Adam said that \textit{“Courts operate as the ultimate guardians of the Rechtsstaat [...]”}\textsuperscript{37}, therefore they must act \textit{independently}. Even though the \textbf{concept} of judicial \textbf{independence} is \textbf{not clearly defined}, and often varies from State to State, there are some core elements which describes it upon which there is universal agreement. In particular, fundamental to the concept of judicial independence is the idea that Courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. In order to determine whether a Court is independent, EU Courts - as we will see deeply in the last part of this paper - and academics have analyzed different aspects which indistinctly applies to EU Courts and Courts in the Member States. Those aspects can be divided in \textbf{external independence aspects} which depend on how judges are appointed, their term of office, and their remuneration; and \textbf{internal independence aspects} which refer more to the assignment of a case to a judge and his/her impartiality. In other words, judges should be subjectively impartial, which means that they must not show any bias in the case and also objectively impartial, therefore, they must offer sufficient guarantees to exclude any legitimate doubt in this respect\textsuperscript{38}. The main difficulty with the definition of “independence” is whether or not

\textsuperscript{35} See European Commission, Reasoned Proposal in accordance with Article 7(1) TUE regarding the rule of law in Poland; proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of law, COM (2017) 835 final, 20 December 2017.


\textsuperscript{37} See Stanislas Adam, \textit{Judicial independence as a functional and constitutional instrument for upholding the rule of law in the European Union}, in Rule of Law in Europe, Perspectives from practitioners and academics, EJTN, p. 15.

the body presents an **appearance of independence**, as an apparent lack of independence is sufficient for finding violation of the RoL even if bias cannot be proven. It’s really important that those seeking justice must be able to trust in the Courts’ independence, and the common law principle that “*justice should not only be done, but also be seen to be done*” is still very actual.\(^{39}\)

Risks for judicial independence have always been there and during the twentieth century new institutions were set up over time in most European countries in order to defend judicial independence internally, prior to a reference for preliminary ruling before the ECJ. As an example, many Constitutions established Councils of the judiciary as a safeguard against the pressures of the other powers of the State and a defense of the independence of the Judiciary. In this respect the **Magna Carta of Judges** approved in 2010 by the CCJE affirmed that “*to ensure independence of judges, each state shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organization, the functioning and the image of judicial institutions […]*”\(^{40}\). As the Consultative Council of European Judges pointed out in his opinion n. 19 (2016), also Court Presidents are responsible for defending the independence of judges, as their main duty “must be to act all times as guardians of the independence and impartiality of judges and of the court as a whole”\(^{41}\). Also, a **charge or a complaint against a judge** in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure, granting the judge the right to a fair hearing. The examination of the matter and its initial stage shall be kept confidential, unless otherwise requested by the judges, and they should be subject to suspension or removal only for unsuitability or behavior that renders them unfit to discharge their duties.

As we just said, one of the main problems connected with judicial independence is the perception of bias which is almost as problematic as bias itself. One way to avoid (appearance of bias) is **judicial self-recusal**, the act of voluntary abstaining from participation in an official action such as a legal proceeding due to a conflict of interest of the judge. Cases in which a judge should recuse himself include any case in which a judge might not be impartial or experience conflict of interest such as where a party in the case might be a company where the judge has invested or where a party may be a friend or a family member. While the exercise of judicial discretion resulting in self-recusal is preferable, judges might also be asked to recuse themselves by one of the lawyers in the case.

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\(^{39}\) See ECtHR judgment of 25 September 2018, Denisov v. Ukraine, par. 63.

\(^{40}\) See Magna Carta of Judges, point 13.

\(^{41}\) See CCJE Opinion no. 19, paragraph 7.
Having defined the main features of the RoL, and reflected upon the characteristics of a judicial authority, it seems now necessary to move further in our reasoning and investigate whether or not the lack of those characteristics – and possible breaches to the RoL – can have an impact in the circulation of civil and commercial decisions within the European Union.

Part III: Breaches to the Rule of Law and consequences for the circulation of judgments

1. Right to a fair trial: procedural public policy and guarantees for the parties

Within the European context the concept of international public policy has become of crucial importance in the framework of Brussels I Regulation subsequently replaced by Brussels-*bis* Regulation. According to its Article 36, a judgment given in a Member State must be automatically recognised in another member States, and any special procedure, such as the so called “exequatur”, is no longer required. Only in exceptional cases recognition may be refused; the most important ones, in terms for the scope of this paper, are provided for in article 45 which stipulates that, on the application of any interested party, the recognition is refused if manifestly contrary to public policy in the Member State addressed. As from the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters came into force, procedural aspects of the public policy have often been brought to the attention of ECJ (see, among others,: C-394/07; C-283/05; C-49/84; C-522/03) which has consistently held fundamental rights as an integral part of the general principles of law, whose observance must be ensured by the Court. For that purpose, the Court’s approach draws its inspiration from two sources: the constitutional traditions common to the member States and the guidelines supplied by international treaties, such as the ones in the matter of protection of human rights, of which member States are signatories. Particular significance, in this regard, must be attributed to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘the ECHR’).

Concerning the circulation of judgments in civil matters, the ECJ has often explored the right to a fair trial and the adversarial principle, mostly as enlightened by the ECtHR jurisprudence. The ECJ, indeed, has expressly enhanced the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (Case C-185/95, C-174/9). The circumstance that an accused person is not present at the hearing must not lead to forfeiting the entitlement to such right. ECJ case-law shows wide consistency in reminding that the observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law, which must be guaranteed (see, inter alia, Case C-135/92 and Case C-32/95). For

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example, the right to a fair trial involves the right to be notified of procedural documents and, more generally, the right to be heard.

To what extent are member States allowed to pass measures leading to a refusal to hear the defence of an accused person, who is not present at the hearing? Can they restrict the exercise of that right without incurring in a manifest breach of fundamental rights?

Though the specific detailed rules concerning the right to be heard may vary, according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees providing for an opportunity to challenge the measures adopted in urgency. If these conditions are not met, the mutual trust, which the recognition of judicial decisions is based on, may be compromised, and the circulation of judgments across the EU, hindered.

EU case-law shows a two-levels structure of control, in order to assess whether a breach of fundamental rights, such as the adversarial principle and right to a fair trial, occurred. The first mechanism of control is inherent to the very nature of judicial decision. Indeed, even though article 25 of the Brussels Convention refers, without distinction, to all judgments given by a court or tribunal of a Contracting State, for a judicial decision to fall into the scope of the Convention (and, we may assume, Brussels I-bis as well), the proceeding leading to the delivery of such judicial decisions must take place in such a way that the right of defence is upheld. In other words, it is not sufficient that a decision is issued by a judicial authority: it is also requires that the proceeding, at the end of which such a decision is taken, be carried out according to RoL principles.

However, the Court was satisfied with decisions being subject – in that State of origin and under various procedures – “of an inquiry in adversarial proceedings”, without requiring a more thorough analysis of in light of other principles (see ECJ, 21.05.1980, Denilauer, C-125/79). Therefore, though any judicial decision may end up being caught by the regulations, the public policy clause contains an important safeguard for RoL principles being upheld, by allowing member States to question the recognition of all judgments given by a court or tribunal of a Contracting State.

This is a “second level” of control, affirmed by the ECJ in an important interpretation of article 27 of the Convention, concerning the case of a defendant being excluded from the proceedings by an order, on the ground that he had not complied with the obligations imposed by an order made earlier; the recognition of a judgment may be questioned, in the light of the public policy clause referred to in that article, “if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and

44 The same definition is stated in Brussels I Recast: “Judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court” (article 1).
disproportionate infringement of the defendant’s right to be heard” (C-394/07). The second level of control, which operates “in concreto”, is meant to assess not only the legal framework of Member States where judicial authorities operate in, but the single, specific procedure leading to the judicial decision at stake. If the RoL principles are not met, the requested Member State may refuse the recognition or enforcement. In general, it is for the national courts to carry out a balancing exercise with regard to those various factors in order to assess whether, in the light of the efficient administration of justice, exception to fundamental rights may be tolerable. However, despite being a vital element of the RoL, the case-law approach appears to become more problematic when it takes into consideration other elements, embracing, for example, the concept of judicial authority and its role in the circulation of judgements.

2. The concept of (independent) judicial authority in the ECJ case-law

As we have seen in Part II chapter 3, under the RoL principle, all public powers always act within the limits set out by law, in accordance with the values of democracy and fundamental rights, under the control of independent and impartial courts. The circulation of judicial decisions within the EU relies on the principle of mutual trust between the Member States, which requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the RoL principle, as well as fundamental rights recognised by EU law (see C-404/15 and C-659/15).

An independent judiciary is always seen as important, in protecting the liberty of the individual from abuse of power by the executive, and this achievement traditionally stems from the doctrine of the separation of powers. Usually the Constitutions of member States embody this theory; however, to a historically variable extent, there might be some overlap among the three arms, leading to a debate about whether the judiciary is truly independent from other organs of the government. Within the procedure laid down by article 267 TFEU, among the questions referred for a preliminary ruling, the ECJ had a few opportunities to clarify and focus on the requirements of judicial authority, in the context of establishing whether a body making a reference to the ECJ constitutes a ‘court or tribunal’ for the purposes of Article 267 TFEU, and whether, therefore, this body is entitled to make such a reference. The Court took into account several elements, such as whether such a body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes (the “adversarial principle”), whether it applies RoL and whether it is independent (C-58/13 and C-59/13, C-203/14); whether its ruling can acquire the attributes of a judicial decision, in particular the force of “res judicata” (C-363/11). More
recently, the Court highlighted the idea that the independence is necessarily inherent in the judiciary, so that, in every legal system inspired by RoL, a deciding body is either independent, or it cannot be held as a part of the judiciary. In particular, the concept of independence of judiciary is composed of two features. The first one is external, and presumes that the court exercises its functions in full autonomy, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (C-58/13 and C-59/13, C-203/14). The ECJ stressed the need that a judicial body must be protected against external interventions or pressure likely to affect the independent judgment of its members as regards proceedings before them (C-506/04, C-222/13, C-203/14). The second aspect is internal, and is linked to impartiality, with the meaning of independence from bias: it seeks to ensure a level playing field for the parties and their respective interests involved in a dispute, also implying objectivity and absence of any interest in the outcome of the proceedings (C-506/04, C-222/13, C-203/14). It was therefore ruled that the Registrar – who under Spanish law examines actions for the recovery of legal fees – meets the internal aspect of the independence, as he carries out his duties with full objectivity and impartiality towards the parties and their respective interests (independence from bias and equidistance form the parties in the case). However the Court denied that such a body constitutes a judicial authority for the purposes of article 267 TFEU: “during that examination, the Secretario Judicial (Registrar) does not satisfy the external aspect of that requirement, which requires there to be no hierarchical constraint or subordination to any other body that could give him orders or instructions” (C-503/15). The existence of a hierarchical organisation – which the judiciary is meant to be part of – is considered incompatible with the idea of its independence. Therefore, if an authority entrusted with the power to issue decisions aimed to solve disputes is not independent, because it is part of organisations subject to an administrative hierarchy headed by a political body, said authority is not a “judiciary” for the purposes of requesting a preliminary ruling to the Court pursuant to article 267 TFEU.

That said, may the same authority, within the same structure, issue a “judicial decision” for the purposes of the recognition and enforcement of a judgment within the EU?

3. Decisions delivered by a non-independent judicial authority and their circulation: possibility to refuse their recognition and enforcement?

The principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they permit an area without internal borders to be created and maintained. Based on this, and going back to the question raised at the end of the previous chapter, if a decision is taken by an authority whose independence is denied or affected by
external pressure, can such a decision circulate across the EU in the light of mutual trust among member States? Or is it likely to be argued that a non-independent authority does not reflect RoL principles and therefore it cannot draw the mutual trust necessary to create an area of freedom, security and justice within the EU?

An answer to these questions may be provided by the **two-levels control** that judicial decisions become subject to when enforcement or recognition is sought among member States (see Part III chapter 1). As we pointed out before, any judgment issued by a “judicial authority” falls into the scope of EU regulations on circulation of judgments. But does a non-independent issuing authority meet the criteria for being held a “judicial authority” (and not, for example a mere administrative body, entitled by law under some circumstances to apply the law and solve disputes)? This concern significantly emerged in the context of the circulation of judicial decisions in the field of criminal law, although the relevant reasoning can be adapted to the civil justice context. In particular, Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States (hereinafter, the “Framework Decision”) triggered the most critical questions. This objective is achieved by imposing, on member States, the obligation to execute any European arrest warrant issued by a judicial authority in another member State (the “issuing judicial authority”). That said, is the European arrest warrant a “judicial decision” eligible for being executed with no resort to extradition procedure? The answer is affirmative, and it is laid down in article 1 of the Framework Decision, whose definition is construed around the concept of judicial authority (45). Therefore, in order for the reasoning not to become circular, we must establish what constitutes a “judicial authority”. Bearing in mind that under the provisions of the Framework Decision it is on Member States to designate the judicial authority with the competence to issue the European arrest warrant, the term “judicial authority” requires, throughout the Union, an autonomous and uniform interpretation. Therefore, the term “judicial authority” in the subject context is not limited to only referring to judges and courts of a Member State but extends to any authorities participating in administering the justice. Notwithstanding, the administration of justice must remain in compliance with the principle of **separation of powers** characterising the rule of law: police services do not form part of the judiciary, from which the former must “be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which are within the province of the executive” (C-452/16). Secondly, the

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45 “The European arrest warrant is a judicial decision issued by a member State with a view to the arrest and surrender by another member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”
principle of mutual recognition also requires **judicial decisions be subject to a judicial control or review** that guarantees fundamental human rights being upheld, especially, if the decision of issuing a judicial decision is preceded by a discretionary evaluation. This point explains why a police service cannot fall into the category of judiciary, irrespective of the position that the body covers within the administration of justice. These principles appear not to be so conclusive, when it comes to deciding whether other bodies called to participate in the administration of justice, such as Public Prosecutor’s Offices (PPO), fall into the term “judicial authority” as above outlined. In more recent decisions, the Court has pointed out that a judicial authority must satisfy two criteria: (i) being **part of the administration of justice** and, secondly, (ii) **operating independently** from any external direction or pressure. In particular, the Court was persuaded that the PPO plays a key role in handling criminal proceedings and participating in the administration of criminal justice. From this prospective the PPO holds a position within the judiciary and therefore meets the first criteria for being considered as a judicial authority. But this characteristic is not sufficient for it to be held as a part of the judiciary: as the authority responsible for issuing a European arrest warrant, it must act independently, even where the European arrest warrant is based on a prior national arrest warrant issued by a judge or a court. The **independence** requirement must rely on **statutory rules** and an **institutional framework** capable of guaranteeing that the issuing judicial authority is not exposed, when adopting such a decision, to any risk of being subject to instructions or pressure from the executive. As for PPO, the Court held that, if the legislation does not rule out their ability to make decisions to issue a European arrest warrant from being subject to instruction from the Minister of Justice, those public prosecutor’s offices do not appear to meet one of the requirements of being regarded as an ‘issuing judicial authority’, as a result of not acting independently when issuing it.

**Conclusions**

In the context of the circulation of judgments in civil matters within the EU, the concept of independent judicial authority has not been defined with the same clarity. Nonetheless there are reasons to believe that the **independence of judges** plays a central role in establishing whether a specific decision meets the criteria for seeking recognition or enforcement in another member State. Thus, in case the assessment of the institutional organisation of the judiciary raises doubts about the independence of the authority that issued a decision for which recognition or enforcement are sought, the very nature of such a decision as a judgement, and of the issuing authority as a judiciary, may be questioned, and the circulation refused. But even in case the outcome of this institutional assessment does not disclose general concerns, the second level of control highlighted by the ECJ
requires a more thorough evaluation of the specific judgment as well as the proceeding that led to the decision.

The objective is to assess whether there have been any restrictions of fundamental human rights or RoL principles, and whether these restrictions are tolerable because of objectives of public interest. Restrictions might be tolerated if they do not constitute, with regard to the aim pursued, a manifest or disproportionate breach of the rights guaranteed. The ECJ has indicated that it is the onus of member States to consider whether recognition or enforcement should be refused, had there been a such a breach, like, for example, an infringement of the defendant’s right to be heard, or the right to a fair trial: the concept of public policy entitles each member State to the refusal. The fundamental right to a fair trial can only be guaranteed if the trial is conducted before an independent tribunal, and lack of independence of judicial authorities - as a result for example of legal reforms foreseeing or allowing disciplinary proceedings to be used as instruments of political control over the judicial power - leads to real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. This view seemed to be adopted by the Italian Supreme Court: although arising in the criminal law field, it was ruled that Courts of merit may refuse the surrender of an accused or sentenced person if, as a result of a serious and accurate evaluation, they are persuaded that such a person may run a real risk of violation of fundamental human rights in the State requesting the surrender. The decision is worth highlighting because the reasoning of the Court was not only driven by concerns that the so-called issuing authority did not meet in general or theoretically the criteria of judicial authority under the above mentioned autonomous and uniform interpretation of the ECJ. Instead the assessment was developed “in concreto”, taking into account the specific case, as well as all the circumstances leading to the conclusion that the subject person runs a real risk of violation of his right to a fair trial before a third and independent judge, because of the political control exerted by political bodies - directly or indirectly - over the judiciary. If this concern is grounded, because during or at the end of the procedure leading to the decision the issuing judicial authority was not independent in releasing his judgment, the circulation of such a judgment may be questioned under the spotlight of the procedural public policy concept.

After decades of a long journey through uncertainties due to various and profound differences among legal systems and judicial cultures, mutual trust on an area of freedom, security and justice needs the safe harbour of an undisputed independent judicial power.

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46 See ECHR, Case C-216/18 PPU.