Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law
Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law

STUDY

Summary

This study, authored by Prof. Burkhard Hess and Prof. Thomas Pfeiffer, Heidelberg University, provides for a comprehensive analysis of the interpretation of the public policy exception in EU instruments. The assessment is based both on statistical data and the experience of stakeholders. Encompassing the relevant case-law of the ECJ as well as of civil courts in 23 EU Member States, the study evaluates the practical relevance as well as the content and scope of the public policy clauses. In practice, public policy is often invoked, but seldom applied. In procedural law, the difference between substantive and procedural public policy is recognised and the procedural public policy is much more often invoked and applied than substantial public policy. The content of the clause is determined by the fundamental guarantees of Articles 6 ECHR and 47 ChFR. In addition, there is a trend in the case-law that procedural irregularities must be remedied in the Member State of origin.
This document was requested by the European Parliament’s Committee on Legal Affairs.

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<td><strong>BAG</strong></td>
<td>Bundesarbeitsgericht (German Federal Labour Court)</td>
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<td>CLIP</td>
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**EEC**  European Economic Community

**E. L. Rev.**  England Law Review

**e. g.**  for example (exempli gratia)

**EIPR**  European Intellectual Property Review

**EO**  Executionsordnung (Austrian Enforcement Code)

**EPIL**  Max Planck Encyclopedia of Public International Law

**et al.**  et alii (and others)

**et seq.**  et sequens/sequentes

**EU**  European Union

**EuGH**  Europäischer Gerichtshof (European Court of Justice)

**EuGVÜ**  Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidung in Zivil- und Handelssachen (Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters)

**EuJL**  European Journal of Law Reform

**Eur TL**  European Transport Law

**Euro. C.L.**  European Current Law

**E.W.C.A. civ**  Court of Appeal (Civil Division)

**ex.**  example

**FamRZ**  Zeitschrift für das gesamte Familienrecht (German legal journal)

**FIFA**  Fédération Internationale de Football Associations

**FRF**  French franc

**F.S.R.**  Fleet Street Reports

**GBP**  Pound Sterling

**GG**  Grundgesetz (German Constitution/Basic Law)

**GIE**  Groupement d’intérêt économique (economic association)

**GmbH**  Gesellschaft mit beschränkter Haftung (German private limited company)

**GRUR**  Gewerblicher Rechtsschutz und Urheberrecht (German legal journal)

**GRUR Int**  Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (German legal journal)
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<td>RdC</td>
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<td>Schip en Schade (Dutch legal journal)</td>
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<td>SLT</td>
<td>Scots Law Times</td>
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<td>StPO</td>
<td>Strafprozessordnung (German Code of Criminal Procedure)</td>
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<td>T.B.H</td>
<td>Revue de droit commercial belge (Belgian legal journal)</td>
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<td>TGI</td>
<td>Tribunal de Grande Instance (French Regional Court)</td>
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TRIPS  Agreement on Trade-Related Aspects of Intellectual Property Rights
UKHL  House of Lords of the United Kingdom
USD  United States Dollar
UWG  Gesetz gegen den unlauteren Wettbewerb (German Unfair Competition Act)
VersR  Versicherungsrecht (German legal journal)
VV-RVG  Vergütungsverzeichnis Rechtsanwaltsvergütungsgesetz (German Act of the remuneration of lawyers)
VzGR  Voorzieningengerecht (Dutch court)
WFO  World-wide freezing order
WL  Westlaw Transcripts
WLR  Weekly Law Reports
WM  Wertpapiermitteilungen (German legal journal)
ZEuP  Zeitschrift für Europäisches Privatrecht (German legal journal)
ZfRV  Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht (Austrian legal journal)
ZfRV-LS  Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht Leitsätze (Austrian legal journal)
ZInsO  Zeitschrift für das gesamte Insolvenzrecht (German legal journal)
ZIP  Zeitschrift für Wirtschaftsrecht (German legal journal)
ZPO  Zivilprozessordnung (German Code of Civil Procedure)
ZSR  Zeitschrift für Schweizerisches Recht (Swiss Legal journal)
ZZP  Zeitschrift für Zivilprozess (German legal journal)
ZZPInt  Zeitschrift für Zivilprozess International (German legal journal)
EXECUTIVE SUMMARY

In the European instruments, the public policy clauses are a ground for the non-recognition of a foreign judgment and for the non-application of foreign laws. In practice, public policy is often invoked, but seldom applied. This is mainly due to the exceptional character of these clauses which only apply in extreme cases and require a “manifest” contradiction to fundamental values. In procedural law, the difference between substantive and procedural public policy is recognised and the procedural public policy is much more often invoked and applied than substantial public policy. However, there is a trend in the case-law of some Member States that procedural irregularities must be remedied in the Member State of origin.

With regard to the content of the exception, the ECJ underlines the difference between the content of the public policy exception as determined by national law and the limits of its application as controlled by the Court. However, the decisions in Krombach and in Gambazzi demonstrate that the ECJ does not only set the limits of the application of public policy under Regulation (EC) No 44/2001, but also determines its content positively. Recent case-law on Regulation (EC) No 2201/2003 demonstrates that the Charter of Fundamental Rights of the European Union is going to reinforce recourse to and the elaboration of European constitutional standards in European procedural law.

Since Krombach, most of the national courts determine the content of (procedural) public policy by a direct reference to Article 6 of the European Convention on Human Rights and to the ECJ’s case-law. As a result, the recourse to national law (including national constitutional laws) has been largely replaced by a reference to European standards. However, there are still some Member States where the courts define the content of public policy according to national law. Nevertheless, in these Member States we found the predominant opinion that the national and the European standards are largely converging.

With regard to procedural public policy, the ECJ has clearly elaborated that the constitutional guarantees are not absolute, but can be restricted and justified by overriding public interests. However, any restriction of fundamental rights must be proportionate. Only a manifest or a disproportionate breach of a fundamental right (to defend a claim or to be heard) entails the non-recognition of a foreign judgment. In this context, the ECJ stressed that all Member States are bound by the European Convention on Human Rights and that the courts of one Member State can trust that these guarantees are respected by all courts in the European Judicial Area.¹

With regard to substantive public policy, the constitutional standards of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights seem to be less elaborated. One of the most prominent results of this study is the almost lacking case-law in this area – even in the field of the protection of privacy. Several factors may explain this finding: First, mandatory provisions aimed at the protection of the weaker party (consumers, insurants and employees) are usually implemented by the courts of the Member State where the “weaker party” resides. Consequently, cross-border enforcement of judgments against the protected person only occurs in exceptional cases. Secondly, Article 36 and Article 45(2) of Regulation (EC) No 44/2001 forbid any substantive review of the foreign judgment. Thirdly, the limited scope of the European instruments avoids that the recognition of judgments entails conflicts relating to sovereign concerns of EU Member

¹ Judgment of 22 December 2010 in Case C-491/10 PPU, Aguirre Zaraga v Pelz, para 67 et seq.
States. However, in the case-law of the ECJ there is a clear tendency that substantive public policy shall only apply in exceptional cases where the recognition of the foreign judgment would entail unreasonable results. Thus, substantive public policy is generally subject to a principle of proportionality.

With regard to the public policy clauses in Regulations (EC) Nos 593/2008 and 864/2007, there is no ECJ case-law directly addressing the relevant provisions, which is due to the relative newness of these instruments rather than to the irrelevance of the respective provisions. However, there is ECJ case-law addressing cases where public policy played or potentially played a certain role in the underlying national proceedings. This ECJ case-law supports two conclusions, the first of which is that public policy still may have some relevance for the application of the laws of other Member States. The second is that European Union law sets outer limits for any application of the respective public policy clause. The former conclusion also finds support from Member State cases or legal writing which relates to the law applicable prior to the enactment of Regulations (EC) Nos 593/2008 and 864/2007 but is still relevant.

As case-law of the ECJ and of the courts of EU Member States demonstrates, a clear tendency of cross-referring among the different instruments is found with regard to the interpretation of the public policy clauses. In this respect, the ECJ’s case-law relating to Regulation (EC) No 44/2001 has been transferred to the interpretation of Regulation (EC) No 1346/2000 on insolvency proceedings and vice versa. However, any transfer requires a similarity of the underlying factual and legal circumstances. With regard to Regulations (EC) Nos 593/2008 and 864/2007, the legal literature largely refers to the case-law of the ECJ on Article 34(1) of Regulation (EC) No 44/2001. At present, it remains to be seen to what extent the ECJ will take up this approach.

According to the proposal of the European Commission on the reform of Regulation (EC) No 44/2001\(^2\), the exequatur procedure of the Regulation shall be replaced by a system of automatic recognition. However, the abolition of the specific exequatur procedure shall not entail the complete abolition of grounds for non-recognition. As a matter of principle, procedural deficiencies shall be remedied in the EU Member State of origin (see Article 45 of the draft Regulation for default judgments, Article 46(7) of the draft Regulation for other procedural defects). Extraordinary relief is granted in the Member State of enforcement if the judgment infringes fundamental principles underlying fair trial, Article 46(1) of the draft Regulation. Thus, the Commission proposes that the substantive public policy exception shall cease to exist and procedural public policy shall be substituted by a direct reference to fundamental principles underlying fair trial as determined by Article 47 of the Charter of Fundamental Rights of the European Union.

These proposals seem to be in line with the results obtained in this study. According to our findings, the case-law of the ECJ which interprets procedural public policy by referring to Article 6 of the European Convention on Human Rights (and Article 47 of the Charter of Fundamental Rights of the European Union) has been accepted by the practice of the courts of most Member States. Furthermore, the basic idea of the draft that relief against procedural irregularities should be primarily obtained in the Member State of origin corresponds to the current practice in many Member States and mirrors the basic structure of the Regulation. However, the question remains whether the extraordinary remedy (Article 46 of the draft Regulation) should be limited to the violation of fundamental procedural standards. Although the study did not reveal much case-law, there remains a danger that a disproportionate judgment might infringe the debtors’ legal position. Thus, it

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seems advisable to cautiously supplement the proposed reference to procedural public policy by a parallel provision aimed at avoiding the enforcement of “clearly disproportionate” results of a foreign judgment.

The most important improvement for the practical application of the Regulation relates to the abolition of the exequatur procedure. When a limited review of substantive policy should be maintained under the recasted Regulation, the basic assumption must be clear: normally, the debtor must challenge the litigation (and the corresponding judgment) in the Member State of origin. In addition, it seems to be possible to sanction the (unsuccessful) invocation of substantive public policy by the obligation of the losing party to fully reimburse the litigation costs of the opponent.
1. INTRODUCTION

1.1. Aim, Scope and Methodology of the Study

1.1.1. Main Purposes of the Study

This study provides a comprehensive analysis of the interpretation of the public policy exception in EU instruments of private international and procedural law. It is based on a comprehensive, empirical approach, focusing on statistical data and the experience of stakeholders. It encompasses the pertinent case-law of civil courts in Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and the United Kingdom (England/Wales and Scotland). Thus, the major focus of this report relates to the case-law of the ECJ and to the judicial practice in 23 EU Member States.

The study covers three main aspects of the interpretation of the public policy clauses in the relevant EU instruments: first, it assesses their practical relevance on the basis of statistical data. Secondly, it examines their content with particular emphasis on the question whether the judicial practice relates primarily to the infringement of procedural guarantees or to substantive public policy. This aspect is specifically examined in the field of family law. Thirdly, the study attempts to assess whether the public policy exceptions are interpreted rather broadly or narrowly and to what extent the ECJ and national courts developed limits to their application. Finally, the study addresses the issue whether the content of public policy is mainly derived from national law or directly based on general principles of European Union Law, especially the European Convention on Human Rights (hereinafter referred to as ECHR) and the Charter of Fundamental Rights of the European Union (hereinafter referred to as CFR). Using the results of these examinations as a starting point, the study further analyses whether national judicial interpretations show a tendency to converge progressively into a uniform concept of European public policy. In procedural law, it also addresses the concepts of mutual trust and mutual recognition which are aimed at abolishing exequatur proceedings and the public policy exception in the European Judicial Area.

1.1.2. Scope of the Study

The study encompasses public policy clauses in different areas of law such as family law, insolvency and cartel damage claims. In this respect, the scope of the study corresponds to the present stage of European private international and procedural law where provisions on public policy are relatively widespread in the pertinent EU instruments. In particular, the following Regulations have been identified as relevant for the purposes of this study:

- Regulation (EC) No 44/2001
- Regulation (EC) No 2201/2003
- Regulation (EC) No 1346/2000
- Regulation (EC) No 1347/2000
- Regulation (EC) No 1206/2001
- Regulation (EC) No 593/2008

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Regulation (EC) No 864/2007. The study also encompasses new EU instruments without any public policy provisions such as Regulation (EC) No 4/2009. In this respect, the study scrutinises the practical impacts of abolishing exequatur clauses.

Among these legal instruments, particular attention shall be given to the public policy clause of Regulation (EC) No 44/2001. This approach is justified by the great practical importance of this instrument which has just been designated the “matrix of civil judicial cooperation in the European Union”. Accordingly, the large majority of the relevant case-law of the ECJ and of national courts detected by this study concerned point (1) of Article 34 of Regulation (EC) No 44/2001.

The geographical scope of the study was determined in order to assure balanced and representative results. In accordance with the tender of the European Parliament (IP/C/JURI/IC/2010-076), some Member States under scrutiny belong to the common law legal system, whereas others are counted among the Continental or the Scandinavian system. With the Baltic countries and Hungary, Poland and Slovenia, some of the so-called new Member States are equally included.

The temporal scope of the research covers the whole time period since the coming into force of the respective EU instruments. Under the Amsterdam Treaty, the first instruments of European private international and procedural law entered into force on 1 May 2000. Since the pertinent instruments are secondary European Union Law (usually regulations), this momentum is identical in all Member States. However, since some of the Member States acceded to the European Union at a later point in time, the entry into force of the EU instruments corresponds to the moment of their accession to the Union. However, the temporal scope of the research is not applied restrictively. Pertinent decisions relating to former EU instruments such as the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as the Brussels Convention) and the Convention 80/934/ECC on the law applicable to contractual obligations (hereinafter referred to as the Rome Convention) as well as to national laws are equally taken into account. Their relevance for the present practice is derived from the so-called principle of uniform interpretation. According to this principle, the case-law on the predecessors of the Regulations must be considered for the interpretation of the new instruments. The inclusion of former instruments is of practical

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6 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
10 COM (2010) 748 final, p. 3.
11 OJ 1998 C 27, pp. 1 to 27.
13 See, e.g., Recital (19) of Regulation (EG) No 44/2001 which reads as follows: “Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when this Regulation enters into force.”
relevance as well: due to the long duration of proceedings in some Member States, most of the relevant case-law rendered in the recent years still applies the Brussels Convention.15

1.1.3. Methodology
The structure of the study complies with the tender of the EU Parliament (IP/C/JURI/IC/2010-076) to assure a coherent and logical progression of the examination. The basic approach is documented by the structure of the study. The following report is divided into four main sections:

First, the introduction provides for the basic definitions and problems. It briefly designates legislative concepts of the European Union in the fields of international private and procedural law and elaborates the concept of public policy in the two areas of the study. The following section elaborates the legal framework in which the case-law of the ECJ and of the courts of EU Member States has been developed and is still developing. The definitions and concepts of the public policy exception in the respective legal instruments are explored and the relevant case-law of the ECJ is assessed. The text of the Regulations and the respective recitals to the pertinent provisions formed the starting point. In addition, relevant legal literature, especially commentaries on the EU instruments, are also taken into account.

The third part of the study comprises the information of the national reports of the chosen Member States. The reports successively refer to the respective regulations. Following the structure of the questionnaire, each part is subdivided in the assessment of statistical data, an analysis of the case-law relating to the content and an analysis concerning the scope of the public policy exception in the practice of the respective EU Member States. The presentation of this part largely corresponds to the methodology of the study.

As case-law forms the principal basis of this part of the study, extensive research was carried out as a first step. To that end, a questionnaire addressing the relevant aspects was consigned to selected experts in mid-October 2010. The large geographical scope of the study was covered by the targeted choice of eight regional reporters who were familiar with their own systems and with legal systems closely related to their home state.16 Thus, the national reports strongly reflect the judicial practice of the respective legal systems.

Since the authors’ experience in collecting statistical data already indicated that this part of the research might prove to be difficult17, the regional reporters were asked not only to look for official statistics but to consult national databases and to directly address the competent courts as well. The first responses to the questionnaire were sent to Heidelberg in November 2010, the last ones arrived in March 2011. However, their evaluation revealed that the collection of statistical data has been difficult and that, in total, accessible case-law dealing with public policy in EU instruments is very rare: for example, only two judgments regarding the public policy exceptions of the Rome Regulations (Regulations (EC) Nos 593/2008 and 864/2007) have been reported due to their recent entry into force.18

15 E.g., the last decision of the ECJ on public policy related to Article 27 of Regulation (EC) No 44/2001: , Judgment of 4 February 2009 in Case C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company.

16 Two of the regional reporters indicated difficulties in getting access to the case-law of Slovenia and Poland. Consequently, the general reporters asked colleagues in the respective Member States for additional information.

17 Cf. Hess/Pfeiffer/Schlosser, 2008, para 37 et seq.

Furthermore, in some jurisdictions, especially in the new Member States such as Hungary, Slovenia and the Baltic states, only very few or even no cases dealing with public policy as referred to in EU instruments were found. Therefore, the authors of the study considered it appropriate to enlarge the scope of the examination by the addition of two further aspects: first, the regional reporters were asked to consider the respective legal literature in order to get an impression of the Member State’s position on the interpretation of the respective public policy clause. This approach was given particular attention regarding the Rome Regulations. Secondly, the regional reporters investigated the interpretation of public policy clauses in the respective national systems as well. This encouraged the regional reporters to indicate whether such case-law is relevant for the future interpretation of EU instruments.

The following experts elaborated the regional and national reports:
Meike Bever, Heidelberg (Germany and Austria)
Prof. Remo Caponi, Firenze (Italy, Spain and Portugal)
Prof. Gilles Cuniberti, Luxemburg (Belgium, France, Luxemburg)
Prof. Andrew Dickinson, London/Melbourne (United Kingdom)
Prof. Alec Galic, Ljubliana (Slovenia)
Dr. Konstantinos Giannopoulos, Athens (Greece and Cyprus)
Prof. Dr. Miklos Kengyl, Pecs (Hungary and Slovakia)
Dennis Lievens, LL.M, Heidelberg (Netherlands)
Paulina Ptak, LL.M, Strasbourg (Poland)
Dr. Eva Storskrubb, Helsinki (Finland and Sweden)
Dr. Vigita Verbreite, Vilinus (Baltic States)

Finally, the collection of national data and the evaluation of case-law were intensively discussed at a conference held in Heidelberg in February 2011: all regional reporters and several experts on private international law assessed intensively the results of their research with the authors of this study. This conference was organised with the support of the Thyssen Foundation. In summary, the third part of the study is based on comprehensive empirical research in order to present the national peculiarities as accurately as possible. This conference was financed by the Thyssen Foundation.

The final part comprises a comparative analysis of the national case-law and answers the central question whether the interpretation in the Member States tends to progressively converge into a uniform notion of public policy. It also addresses the possibility of reducing the scope of the public policy exception in intra-community situations.

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19 For a detailed indication of the research undertaken by the regional reporters and the difficulties encountered see below in Part V of the Study.

20 Georgia Koutsoukou, doctoral student at Heidelberg University assisted the completion of the questionnaire with regard to Cyprus.

21 Sarah Marks, Heidelberg University, provided linguistic support; Robert Arts and Norbert Pelzer, Heidelberg University, gave technical support for the final version of this study.
1.2. The Role of the Public Policy Clause in European Private International and Procedural Law

1.2.1. Private international and procedural law in the European Judicial Area

The scope of this study covers two different, but related areas of law: private international law and international procedural law. It seems appropriate to clarify the relationship between the two areas first. Private international law determines the applicability of specific rules of law in situations involving a choice between the laws of different countries.22 International procedural law also determines the applicable procedural law in litigation involving a foreign element. However, the main objective of international procedural law is to coordinate litigation between different courts by providing for rules on jurisdiction, *lis pendens* and the recognition of foreign judgments.23 These areas of law are closely related as they both address problems resulting from the presence of an international (or foreign) element in a legal dispute. Yet, the scope of private international law is wider than the scope of its sibling. As a matter of principle, private international law is not confined to intra-community situations, but equally determines the application of private law of non-EU Member States.24 However, the main focus of European international procedural law is the coordination of civil litigation among the courts of different EU Member States.25

This difference entails important consequences regarding public policy. Public policy operates as a safeguard against unacceptable provisions of foreign law and against unacceptable foreign judgments.26 However, the growing harmonisation of the legal systems of the Member States and their common basic values is beginning to reduce the need for a safeguard to avoid the application of unacceptable legal provisions of other Member States. Although experience demonstrates that extraordinary situations continue to arise where recourse to public policy is still needed in the European Union, the practical importance of the public policy clause in procedural law has been reduced considerably. In this respect, the practical importance of the public policy exception relates to procedural irregularities which are not remedied in the Member State of origin. In private international law, the situation is similar with regard to intra-community situations. However, with regard to third states there is still a need for a genuine public policy clause. The EU instruments, however, do not specifically distinguish intra- and extra-community situations.

1.2.2. Free circulation of civil judgments in the European Judicial Area

The specific function of the public policy exception in European procedural law is closely related to the specific legislative concepts in this area of law, the principles of free movement of judgment and of mutual trust and recognition.

At present, the autonomous procedural laws of the EU Member States are coordinated by European Union Law. The technical term for this coordination is described as judicial

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22 Pfeiffer, 2011, para 1.

23 Hess, 2010, § 1 I, para 3 et seq.

24 According to Article 2 of Regulation (EC) No 593/2008 and to Article 3 of Regulation (EC) No 864/2007 "any law specified (...) shall be applied whether or not it is the law of a Member State", Dickinson, 2008, para 3.293 et seq.

25 The situation will change to some extent if the proposals of the European Commission for the recast of the Regulation Brussels I are adopted. According to these proposals, the future Regulation shall also address the jurisdiction with regard to non EU Member States. However, the proposals do not address *lis pendens* and the recognition of judgments coming from non-EU Member States.

cooperation in civil matters in Articles 67 and 81 TFEU. Article 81 TFEU confers legislative competences in private international and procedural law. Yet, the legislative activities of the Union in this field are based on specific concepts which transgress the traditional techniques of private international and procedural law. The basic approach to European judicial cooperation can be found in Article 67(4) TFEU, which stipulates that the European Union shall in particular facilitate access to justice by the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. The principles of free movement of judgments and of mutual trust among the judicial authorities of the Member States are the cornerstones of the judicial cooperation in civil matters. The legislative concept is further explained by 81(1) TFEU, according to which the “European Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.” The pertinent provisions of the TFEU clearly demonstrate that the concept of mutual recognition is essential for the development of the European law of civil procedure which has become a distinct area of policy action of the Union.

During the last decade, the number of instruments of European law of civil procedure has increased considerably. Since 1999, when the new competence of the Amsterdam Treaty in private international and procedural law entered into force, the European Union adopted eleven different instruments covering a wide range of areas such as jurisdiction and the free movement of judgments, return of children, service of documents, insolvency, legal aid, mediation, small claims and maintenance proceedings. The activities of the European Union pursue an ambitious objective: according to a Communication of the European Commission to the Council and the Parliament published in the wake of the new competence, the situation of litigants in cross-border settings in the European Judicial Area shall be assimilated to the situation of litigants in purely domestic cases. However, the European Commission is well aware of the obstacles in cross-border litigation at each stage of the process: the first stage is aimed at the coordination of the national procedural systems, the second allows direct cross-border activities (such as the taking of evidence in other Member States or the (direct) attachment of bank accounts located abroad and the recognition of foreign judgments without exequatur). The third stage involves the creation of specific procedures for cross-border litigation which provide for uniform rules in all Member States. It goes without saying that these developments influence and transform

27 According to Article 67 TFEU the judicial cooperation in civil matters forms part of the European policy of setting up an area of freedom, security and justice.


29 See generally Möstl, 2010, p. 405 (this article does not specifically address civil procedural law).

30 Storskrubb, 2008.


34 Hess, 2010, § 3, paras 13 to 33.
in equal measure the procedural systems of the Member States which now openly compete in the attraction of profitable litigation.35

1.2.3. Mutual recognition and mutual trust as legislative concepts

At the special summit conference on the creation of an area of freedom, security and justice at Tampere (Finland) in October 1999, the European Council decided to rely on the concept of “mutual recognition”.36 In the area of civil procedure, its objective is to abolish exequatur procedures. These shall be replaced by the introduction of a “country of origin” principle in procedural law.37 The scope of this concept can be demonstrated by its general application to the Internal Market.

The principle of mutual recognition was developed with the free movement of goods within the European Community (Articles 28 and 30 of the EC Treaty of 1993)38. This concept initially concerned rules for the admission of goods to the Market – e.g. the approval of foodstuffs.39 Later, it was expanded so that the cross-border delivery of goods and services which were admitted to the stream of commerce by the national authorities of the country of origin had to be on an equal basis with treated comparable goods and services of the country of destination. Therefore, a second administrative admission procedure in the country of destination was forbidden. The principle relies on the presumption that the standards of protection in one Member State are considered to be of equal value in all Member States.40 Nevertheless, the importing state may impose protective measures unless these comply with the requirements of the so-called “Cassis de Dijon Formula”.41 According to this formula, control procedures must enforce recognised fundamental interests (e.g. consumer protection, environmental protection) and the rules of the importing country may not be applied discriminatorily or disproportionately to the interest sought to be protected.42 Functionally, this formula provides for a public policy clause.43

In the concept of European integration, however, the Cassis de Dijon formula is only considered a preliminary step. Within the boundaries of the “harmonised” Internal Market the concept of “mutual recognition” takes on a further significance: here, foreign goods and services are to be admitted into the importing state without restriction as well. Yet, all secondary controls and procedures are completely precluded. As the requirements for admission of goods and services have been harmonised within the European Community, one control of the compliance of those goods and services with the Community standards is sufficient. This control is exercised by the authorities of the Member State where the

35 The more the national systems are coordinated, the more the competition is intensified. Catchwords are: "Paris, home of arbitration"; "London - world capital of divorce"; "Düsseldorf, venue for European patent litigation" etc. Attraction may also be obtained by (rather) "slow" judicial European systems such as the "Belgian or the Italian torpedos". In 2009, the German government and the bar started an initiative to make Germany more attractive as a place of litigation; see German Federal Ministry of Justice (ed.), 2009.


37 Hess, 2001, p. 578 et seq.

38 Now Articles 34 and 36 TFEU.


41 ECJ, 2/20/1979, Case 120/78 Rewe v Bundesmonopolverwaltung [1979] ECR 649 (Cassis de Dijon).

42 Grundmann, 1999, p. 82, para 111 et seq.

product first enters the Internal Market first.\textsuperscript{44} The decision establishing compliance of the product with the Community standards, and therefore allowing its entrance into the Internal Market, has a Community-wide binding effect. Sometimes, it is formally referred to as the so-called “Europass” (“passeport judiciaire”)\textsuperscript{45}. Examples of its application include the areas of bank supervision\textsuperscript{46} or insurance controls\textsuperscript{47} and in the area of capital market laws\textsuperscript{48}.

The intended advancements in the harmonisation of procedural law blend flawlessly with the concept of mutual recognition as described above. The exequatur procedure under Article 31 et seq. of the Brussels Convention and the simplified procedure pursuant to Article 38 et seq. of Regulation (EC) No 44/2001 correspond to the first step of the concept of mutual recognition: as the procedural rules of the Member States have not yet been harmonised, minimum substantive legal and procedural standards will be enforced through the exequatur procedure as a consequence of the recognition impediments of Article 27 of the Brussels Convention and Article 34 of Regulation (EC) No 44/2001.\textsuperscript{49}

Against the backdrop of the EU Council’s concept on the harmonisation of procedural law, which was formulated at the Tampere summit, the current legal status quo is merely an intermediary step in the process. If solely the principle of mutual recognition mattered, the ongoing harmonisation of private and procedural laws would necessarily lead to the abolition of secondary controls in the Member States. From this perspective, actual free movement of judgments will only be achieved when all judgments within the European Judicial Area circulate without the necessity of undergoing a prior recognition procedure in the enforcing state\textsuperscript{50}. Against this backdrop, the abolition of the exequatur is consistent with the logic of the integration process. In a more political sense, it should reflect the status which was achieved in the meantime by the harmonisation process: the civil courts of the Member States increasingly decide cross-border disputes on the basis of harmonised laws, thereby applying European Union law on a decentralised basis.\textsuperscript{51}

As a result, mutual recognition of judgments in civil matters has become a genuine legislative concept which is not only aimed at facilitating the coordination of the autonomous procedural laws of EU Member States, but which shall equally link national procedures at a higher level. In this context, mutual recognition is the recognition of foreign judgments without any exequatur proceedings and additional formalities in the Member State of enforcement. A creditor may directly apply for the enforcement of an enforceable title in all Member States without any intermediary procedure (one-stop shop). In addition, mutual trust also permits a close cooperation between judicial authorities in different Member States (i.e. between the court of the main proceedings and the court granting provisional relief or between enforcement authorities of different Member

\textsuperscript{44} Götz, 1998, p. 763, 778.

\textsuperscript{45} The introduction of a “European Passport” in the field of procedural law was proposed by de Leval, 2000.

\textsuperscript{46} Calliess, 2000, p. 432 et seq.

\textsuperscript{47} Cf. Section 110a German Versicherungsaufsichtsgesetz, Hübner in Dauses (ed.), 2010, E IV R 46 et seq.

\textsuperscript{48} Kurth, 2000, p. 1521 et seq.


\textsuperscript{50} On the interpretation of the free movements of judgments as the unwritten “fifth freedom of the EU law” see Hess, 2001, p. 302.

Furthermore, judicial cooperation within the European Judicial Area permits direct cross-border judicial activities without any review of the judicial authorities of the affected Member State. Lastly and most importantly, the perspective has changed: cooperation among courts and other judicial authorities in civil matters is aimed at implementing the substantive and procedural rights of the parties. This concept transgresses the traditional forms of judicial assistance under public international law which are mainly based on the concept of judicial assistance between sovereign states.

During the last decade, the European Union adopted a multitude of specific instruments in European procedural law which are based on the concept of mutual recognition. These so-called instruments of the second generation adopt a different legislative approach. They are directly based on the principles of mutual trust, access to justice and fair trial. The abolition of exequatur does not entail that the cross-border enforcement of foreign titles ensues without any control of their procedural regularity. Yet, in these instruments this control is no longer exerted in the form of exequatur proceedings, but rather takes place in the Member State where the judgment is given. Additionally, the new instruments – with the exception of Regulation (EC) No 4/2009 – contain specific provisions which address the most crucial procedural irregularities and establish minimum standards of procedural fairness. These specific provisions address the content of the complaint, its service on the defendant, the information of the defendant regarding the initiation of proceedings and of accessible remedies. The most elaborate instrument in this regard is Regulation (EC) No 861/2007, which contains a comprehensive European procedure implementing the constitutional requirements of Article 47 CFR.

The latest development with regard to the implementation of mutual recognition is taking place in the context of the reform of Regulation (EC) No 44/2001. On 14 December 2010, the European Commission published a proposal for far-reaching amendments of the most important instrument of European civil procedure. According to this proposal, the exequatur procedure of Articles 32 and 38 et seq. of Regulation (EC) No 44/2001 shall be replaced by a system of automatic recognition. Under the proposed draft Articles 38 and 42, a judgment of a Member State shall be accompanied by a form and shall be directly enforceable in other EU Member States. On application, the court of origin shall issue the

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53 Hess, 2011c.
54 Storskrubb, 2008, p. 307 et seq.
56 Hess, 2010, § 7 V, para 95 et seq.
58 The proposed Article 38 reads as follows:
"(1) Subject to the provisions of this Chapter, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required and without any possibility of opposing its recognition.

(2) A judgment given in one Member State which is enforceable in that Member State shall be enforceable in another Member State without the need for a declaration of enforceability."

59 The proposed Article 42 defines the formalities for the initiation of the enforcement proceedings in another Member State. According to this draft provision, a creditor must present a copy of the judgment and the form set out in Annex 1. Usually, a translation of the (whole) judgment shall not be necessary.
60 The judgment must be declared enforceable according to the new procedure under the proposed Articles 51 to 63.
accompanying form, which shall certify the enforceability of the judgment and specify its content including its terms and additional decisions on interests and costs (see draft Article 42 and Annex 1 thereto). The form shall enable the competent enforcement agents in other Member States to understand the foreign title and to immediately commence enforcement proceedings. As a result, the judgment of another EU Member State will be adjusted to the judgment of the courts of the Member States of enforcement. However, the proposal excludes two sensitive areas from mutual recognition: violations of privacy and collective litigation.61

The abolition of exequatur proceedings shall not entail the abrogation of the grounds for the refusal of recognition in equal measure. Although the draft aims at reducing the grounds for non-recognition, it nevertheless provides for remedies where some of the grounds of non-recognition shall be verified. However, the most important objection in practice (improper service of default judgments) shall be verified in the Member State of origin. In this respect, the defendant will be given an opportunity to contest a default judgment in the Member State of origin should he not have been properly informed about the proceedings (draft Article 45).62 These proceedings shall be based on a mandatory form (as provided for in Annex III of the draft Regulation) which will be completed by the simple ticking of boxes and which does not permit the raising of any additional objection (especially based on other grounds). A Member State shall permit the filing of the claim via the internet. The application for review shall be filed within a period of 45 days; the court shall give its judgment within 30 days. If the court decides that the review is justified, the judgment will be declared null and void.63

In addition, the Regulation shall provide for an extraordinary remedy against procedural irregularities of the judgment in the Member State of enforcement: draft Article 46 shall enable the defendant to contest any procedural defect which might have arisen in the course of the proceedings in the court of the Member State of origin and which infringes the guarantees of fair trial.64 The reference to “fundamental principles underlying fair trial” must be understood as a limited public policy clause which refers to procedural public policy.65 Its content, however, shall be determined by European Union Law (Article 47 CFR)

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61 See proposed Articles 37(3) and 47-63 of the amendment. For these judgments, the old set of rules of the Regulation Brussels I will be maintained for a transitional period.


63 A similar proposal was made by the Heidelberg Report, see Hess/Pfeiffer/Schlosser, 2008, para 564 et seq.

64 The remedy is found in proposed Article 46 which reads as follows:

“(1) In cases others than those covered by Article 45, a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial.

(2) The application shall be brought before the court of the Member State of enforcement listed in Annex III. ...

(7) The court seized of an application in accordance with this article may stay its proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. Where the time for such an appeal has not yet expired, the court may specify the time within which such appeal is to be lodged.”

65 For the distinction between procedural and substantive public policy see Hess/Pfeiffer/Schlosser, 2008, para 491.
and not by the respective standards of the Member States. The wording of draft Article 46 clearly excludes substantive public policy.

The new remedy shall replace the former appeal against the decision granting or refusing exequatur (Article 43 of Regulation (EC) No 44/2001) and shall be decided by the courts of appeal in the Member State of enforcement. The procedure shall be governed by the law of the Member State of enforcement; the court shall render its decision within 30 days under its procedural law; surprisingly, the use of a mandatory form is not prescribed. However, according to draft Article 46(7) the court of the Member State of enforcement shall stay its proceedings if an ordinary appeal in the Member state of origin is available. If the court in the Member State of enforcement decides that the application is justified, the recognition shall be refused. Against the judgment of the appellate court on the (non-) recognition, a second appeal shall be opened at the supreme courts of the Member States, draft Article 45(6). In addition, the competent authorities shall refuse the enforcement of the judgment if it is irreconcilable with another judgment among the same parties in the Member State of enforcement or with another judgment from a third State which fulfils the conditions for recognition in the Member State of enforcement (draft Article 43). In this respect, the proposed amendments still provide for a “controlled free movement of judgments”.

The proposed mechanism of the Commission opens up a possible midway among the two competing concepts of mutual recognition on the one hand, and the system of Article 32 et seq. of Regulation (EC) No 44/2001, which are modelled according to the old paradigm of recognition on the other hand. The renunciation of exequatur proceedings will certainly be functional in most cases of judgments concerning the payment and delivery of goods. In these constellations, the formal granting of exequatur does not seem to be necessary. However, under the proposed draft most of the grounds for non-recognition of Article 34 of Regulation (EC) No 44/2001 will be raised in the procedures provided for by draft Articles 43, 45 and 46. In this respect, the proposed amendments still provide for a “controlled free movement of judgments”.

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66 Cf. draft Recital (24). The reference to EU standards deviates from the present situation under point (1) of Article 34 of Regulation (EC) No 44/2001 where national standards are applied, see Hess, 2010, § 6 III, para 199 et seq.

67 Substantive public policy will be implemented by the pertinent provisions of Regulations (EC) Nos 593/2008 and 864/2007.

68 It seems advisable to provide for a mandatory form which reduces the range of possible arguments against recognition to procedural public policy as foreseen by draft Article 46.

69 The provision shows that the extraordinary control in the Member State of enforcement shall only apply when the remedies in the Member State of origin have been exhausted. The proposal corresponds to the case-law of the Member States with regard to fraud and abuse of procedure, Hess/Pfeiffer/Schlosser, 2010, paras 481–490.

70 The Proposal does not specify whether the enforcement organs or the court supervising the enforcement proceedings shall be competent. It seems advisable, however, to concentrate the competence for this review at the courts which are competent under Article 46, see infra at fn.

71 Although the proposed article corresponds to the solution in the parallel instruments (i.e. Article 21 of Regulation (EC) No 805/2004 and – principally – to Article 34 points (3) and (4) of Regulation (EC) No 44/2001, the better solution would be to refer to the moment of pendency and to give priority to the judgment whose proceedings were initiated earlier, see Hess/Pfeiffer/Schlosser, 2008, paras 497 and 559.


73 It should be noted that, at present, most judgments (for payment) fall into the scope of Regulations (EC) Nos 805/2004 and 1896/2006 and are subject to mutual recognition under these instruments. Thus, the practical impact of the proposed amendment will be rather limited.

74 The draft abolishes the residual control of mandatory heads of jurisdiction under Article 35 of Regulation (EC) No 44/2001.
1.2.4. Private international law in the European Judicial Area

As far as European law in the field of conflict of laws is concerned, Regulations (EC) Nos 593/2008 and 864/2007 (Rome I and Rome II) recently entered into force. Both instruments contain provisions on public policy and on mandatory rules of the forum. As the Regulations are applied universally and thus designate the law of non-Member States as well, this approach is not surprising in the first place. Yet, furthermore, these Regulations do not limit the scope of these public policy reservations to a control of non-Member State laws. Thus, the legislative concept of these new Regulations underlines the ongoing relevance of the public policy exception in substantive European private international law. Thus, on the one hand, it will have to be investigated whether this ongoing relevance gives any indication with regard to the relevance of a public policy reservation in general. On the other hand, it will have to be examined whether the existence of a public policy clause can still be justified against the background of mutual trust when it comes to the application of the law of another Member State.

Finally, there are strong interactions between the relevant instruments of European procedural law and of conflict of laws. Their close connection is already indicated in Article 81 TFEU and is due to the importance of the harmonization of rules on conflict of laws including the preferably uniform handling of a public policy clause for the possibility of a direct enforceability. The close relationship can be demonstrated by the following examples: Article 16 et seq. of Regulation (EC) No 4/2009 abolish exequatur proceedings only for judgments given in a Member State bound by the Hague Protocol of 2007 on the Applicable Law on Maintenance Claims.77 Judgments from Member States not bound by the Hague Protocol (i.e. the United Kingdom) will still be subject to specific exequatur proceedings. Furthermore, the recent proposal of the European Commission on the reform of Regulation (EC) No 44/2001 justifies the retention of exequatur with regard to defamation judgments with the absence of harmonised conflict rules and provides in this area of law for a public policy exception.

With regard to the development of the case-law based on Regulations (EC) Nos 593/2008 and 864/2007, it needs to be borne in mind that both constitute rather new instruments. Therefore, a comprehensive view will also have to include public policy cases based on former autonomous national law, which, in most legal systems, is considered to also give some guidance for the application of the new European instruments.

1.3. Public policy in private international and procedural law

1.3.1. Definition and objectives of public policy

The main function of public policy is to protect the fundamental values of the forum state against unacceptable results which may derive either from the application of foreign law or from the recognition of foreign judgments. Worldwide, there is a consensus that the

75 For details see infra 2.5.1 and 2.6.1.
77 Hess, 2011b, p. 9 et seq.
79 Cf. the exception in Article 1(2)(g) of Regulation (EC) No 864/2007.
80 COM (2010) 748 final, p. 7; see also Hess, 2011a, p. 125 et seq.
81 Gebauer, 2011, para 1.
public policy clause operates as an exception – the respective provisions of the European instruments require the threshold of a manifest contradiction to public policy. Consequently, the provisions on public policy are interpreted narrowly and the reliance on public policy must be specifically justified. The exceptional character of public policy is derived from the underlying assumption of private international and procedural law that foreign law and foreign decisions in general have the same value as their domestic counterparts.

Public policy clauses usually operate in a negative way as they prohibit the application of foreign law or the recognition of a foreign decision contrary to the fundamental values of the lex fori. In this respect, public policy is used as a “shield” barring negative results from the forum. Further, in private international law there is also a so-called positive function of public policy as the competent courts may implement mandatory rules of their own system to a case which is subject to foreign law. This operation is described by the French term “lois d’application immediate” or “lois de police”. The concept is also recognised by Article 9 and Recital (37) of Regulation (EC) No 593/2008. The same formulation is found in Article 16 of Regulation (EC) No 864/2007. Recently, the ECJ equally held with regard to the Rome Convention that mandatory rules aimed at protecting the employee in cross-border situations must be interpreted broadly. The application of mandatory provisions operates differently from the recourse to public policy as it often refers to specific legal provisions and to legislative polices. In the literature, the operation of the positive function is described as a “sword” to enforce the law of the forum. In procedural law, the positive function is not present, as public policy is only used as a barrier against the recognition of a foreign judgment.

1.3.2. National and European public policy

One of the most disputed issues surrounding public policy relates to the question of whether it refers to fundamental principles of the domestic laws of EU Member States and/or to European principles. Taking up a middle position, as the relevant literature often does, public policy refers equally to fundamental principles of the national laws to principles of European Union Law such as the ECHR.

This issue was debated in the European Parliament and the Council when Article 23 of Regulation (EC) No 864/2007 was enacted. The European Parliament’s 1st Reading Position of Article 26 provided for a list of specific examples where the circumstances would permit invoking the public policy exception. The list referred to the ECHR, national

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82 Since ECJ Case C-145/86 Hoffmann v Krieg [1988] ECR 645.
84 Dickinson, 2008, para 15.10.
86 Pfeiffer, 2011, para 21.
87 Dickinson, 2008, para 15.04.
88 E.g. ECJ, Judgment of 15 March 2011 in Case C-29/10 Heiko Koelzsch v État du Grand-Duché de Luxembourg, para 46: “Furthermore, as stated in Recital (23) in the preamble to that regulation [i.e. Regulation (EC) No 593/2008], the interpretation of that provision must be prompted by the principles of favor laboratoris in that the weaker parties to contracts must be protected ‘by conflict-of-law rules that are more favourable.’”
89 Pfeiffer, 2011, para 21.
90 Dickinson, 2008, para 15.08.
91 European Parliament, 1st Reading Position, Article 24(4) – Amendment 50.
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constitutional provisions and international humanitarian law. However, the European Commission rejected the proposal because there were too many variations between the public policies of the Member States, and preferred a more open approach. This position, also taken up by the Council, was finally endorsed. However, there is a consensus that the ECHR and the CFR significantly determine the content of the public policy clause. The additional question is whether and to what extent the public policy clauses are applied as referring to fundamental principles and mandatory provisions of the national laws of the Member States. The aim of this study is to provide a comprehensive answer to this question.

1.3.3. The content of the public policy clauses

All pertinent provisions on public policy are drafted as general clauses and refer to fundamental principles in different areas of law. Accordingly, the content of public policy can only be derived from the legal provisions referred to. However, the limited scope of the public policy exception entails that only basic values of the forum and fundamental rights are addressed. Normally, the courts refer to constitutional principles which are derived from their respective constitutions.

In private international law, the application of the public policy exception requires a sufficient link between the case at issue and the law of the forum – in this respect, the application of ordre public is a matter of degree. The greater the influence of the application of the foreign provision on the outcome of the case, the less likely it is that the degree of unacceptability will be required and vice versa. Accordingly, the application of the public policy exception to an incidental question occurs only rarely.

In procedural law, the (sufficient) link between the application of the exception and the forum results from the fact that the foreign judgment shall not only be recognised, but also be enforced. However, it seems that the dividing line in procedural law relates to the distinction of procedural and substantive public policy. Procedural public policy refers to procedural irregularities (such as fraud) and to procedural provisions in the Member State of origin (i.e. an excessive debarment order) which are considered to contradict fundamental procedural principles such as fair trial and the right to be heard. Substantial public policy, on the other hand, refers to the content of the foreign judgment which shall enforce substantial law considered to contradict fundamental principles or mandatory provisions of the Member State of enforcement (i.e. a judgment on excessive damages).

92 International humanitarian law is excluded from the scope of the European instruments which apply to civil and commercial matters, Dickinson, 2008, para 15.09.


94 Dickinson, 2008, para 15.08.

95 Lagarde, 1988, para 11-38 et seq.
2. THE RELEVANT EU INSTRUMENTS AND THE PERTINENT CASE-LAW OF THE ECJ

2.1. Regulation (EC) No 44/2001 (Brussels I)

2.1.1. The public policy exception

Point (1) of Article 34 contains the public policy clause of Regulation (EC) No 44/2001. This provision reads as follows: “A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;...” In addition, Article 36 explicitly prohibits any review of the substance of the foreign judgment.

According to the wording, point (1) of Article 34 only applies as far as the recognition of judgments of other Member States is concerned. It equally applies to the recognition of settlements and authentic acts according to Articles 57 and 58, which directly refer to the public policy exception.96 These enforceable titles are recognised by the courts of the first instance on the basis of a form without any review of grounds for non-recognition (Articles 38 to 42). However, the debtor may appeal the decision granting exequatur (Article 43) and challenge the foreign judgment as contrary to the ordre public of the Member State of enforcement.97 However, these provisions are considered to be an impediment to the principle of the free movement of judgments.

In addition, point (2) of Article 34 provides for a specific ground for non-recognition if the defendant was not properly informed about the proceedings in the Member State of origin. This provision mainly applies to default judgments which occur frequently in the European Judicial Area. In practice, most of the problems relate to the service of the document instituting the proceedings. In this context, the application of Articles 14 and 19 of Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters has proved to be difficult.98 However, due to the amendments of point (2) of Article 34 in 2001, its practical impact has been reduced considerably.99 Case-law shows that the formerly popular defence of a defendant, that the document instituting the proceedings was not served properly and punctually, is no longer successful.100 Systematically, point (2) of Article 34 can be regarded as a specific case of the general public policy provision of point (1) of Article 34.101

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96 Article 57(1) of Regulation (EC) No 44/2001 reads as follows: “A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed...”.

97 Hess, 2010, § 6 IV, para 226 et seq.

98 Several practical problems were addressed by the ECJ, 10/13/2005, Case C-522/03 Scania Finance France S.A. v Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co. [2005] ECR I-8639.


101 Geimer in Geimer/Schütze, 2010, Art. 34 EuGVO, para 89.
2.1.2. The pertinent case-law of the ECJ

On several occasions, the ECJ had to deal with the application of the public policy exception of point (1) of Article 34. The pertinent case-law also relates equally to the predecessor of the present provision, point (1) of Article 27 of the Brussels Convention. However, this case-law is still of practical importance as the pertinent provisions are drafted similarly. The only considerable change in the wording relates to the express provision of point (1) Article 34 that the violation of public policy must be manifest. As this wording corresponds to the case-law of the ECJ on Article 27 of the Brussels Convention, this case-law is equally relevant for the interpretation of point (1) of Article 34 of Regulation (EC) No 44/2001. Accordingly, the practice of the ECJ on point (1) of Article 27 of the Brussels Convention is equally taken into account.

The first judgment of the ECJ addressing public policy explicitly was Hoffmann v Krieg. In this case, a German creditor sought the enforcement of a German judgment on maintenance for (married) spouses in the Netherlands. In Holland, the debtor had registered a decision on the dissolution of the marriage. At that time, the Dutch decision could not be recognised in Germany. The Hooge Raad asked the ECJ, inter alia, whether the dissolution of the marriage barred the recognition of the German order on maintenance under the public policy clause of point (1) of Article 27 of the Brussels Convention. The ECJ referred to the Jenard Report and held that, “according to the scheme of the Convention”, the public policy exception “ought to operate only in exceptional cases”. In addition, the Court held that the public policy exception was “in any event precluded”, if a different ground for non-recognition listed in Article 27 of the Brussels Convention was applicable (para 21). As a result, the ECJ elaborated the strictly subsidiary character of public policy. The Court deducted this result from “the scheme of the Convention”.

The second case was Krombach v Bamberski. It concerned the recognition and enforcement of a French judgment in Germany. The judgment arose out of criminal proceedings. A German doctor, Krombach, had been accused to be guilty for causing the death of Mr Bamberski’s minor daughter in Germany. When the German prosecution had acquitted the suspect, the Criminal court at Paris (Cour d’Assises) took up the case basing its jurisdiction on the French nationality of the victim. The Court ordered Mr Krombach to appear in person, but Mr Krombach did not comply since he feared to be arrested. As a result, the Paris court applied a contempt procedure pursuant to Article 627 et seq. of the French Code of Criminal Procedure, which allowed the court to render its decision without a hearing of the person in contempt. The French lawyers of Krombach were not permitted to defend the case. Finally, the criminal court sentenced Mr Krombach to prison for 15 years after finding him guilty of violence resulting in involuntary manslaughter. Some days later, the Cour d’Assises, ruling on the civil claim, ordered Mr Krombach, again as being in contempt, to pay compensation to Mr Bamberski in the amount of FRF 350.000. A few months later, Bamberski sought the recognition of the payment order in Germany and obtained a declaration of enforceability. Krombach finally appealed at the Bundesgerichtshof and contended that he had not been able to effectively defend his case in the French proceedings. The Bundesgerichtshof referred the question of whether the recognition of the French judgment was excluded by point (1) of Article 27 of the Brussels Convention to the ECJ.

103 Jenard, 1979.
In its judgment, the ECJ first stressed the starting point that the Brussels Convention provides for an autonomous system of recognition and enforcement, aimed at facilitating the free movement of judgments and that the Convention must be applied uniformly within the Member States (para 19 et seq.). Furthermore, the court referred to its decisions in Solo Kleinmotoren\textsuperscript{105} and Hoffmann\textsuperscript{106} and stated that the public policy exception – being an obstacle to the free movement of judgments – must be interpreted strictly and could only be applied “in exceptional cases”. However, the ECJ held that the Member States may determine the content of the public policy exception “according to their own conceptions” but that its task was to review “the limits within which the courts … may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State” (para 22 et seq.).

The Court concluded that recourse to the public policy clause could be envisaged only where recognition or enforcement of the foreign judgment “would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order” (para 37).

The ECJ stressed the fundamental importance of the right to a defence, stating that its violation may entail the refusal of the recognition and enforcement: “this (the right to a defence) occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States. More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing” (para 38 et seq.). Furthermore, it held that “even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing” (para 43).

The German Bundesgerichtshof implemented the judgment of the ECJ and did not recognise the French judgment. However, the case between Bamberski and Krombach was not over. In 2010, Bamberski organised the kidnapping of Krombach to France where he was delivered to the French criminal authorities. On March 29, the Cour de Paris opened the criminal proceedings against Krombach for the (alleged) rape and killing of Bamberski’s 14 years old daughter in 1982. However, criminal investigations were also initiated against Bamberski for organising the kidnapping of Krombach\textsuperscript{107}.

A few weeks after Krombach, the ECJ had again to decide on point (1) of Article 27 of the Brussels Convention. In Régie Nationale des Usines Renault SA v Maxicar and Formento\textsuperscript{108}, the Cour d’Appel of Dijon had originally found Mr Formento guilty of forgery for having manufactured and marketed body parts for Renault vehicles. It also declared him jointly and severally liable with Maxicar, the company of which he was director, to pay FRF


\textsuperscript{107} Frankfurter Allgemeine Zeitung, 3/30/2011, No 75, p. 9.

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100,000 by way of damages to Renault, which had applied to join the proceedings as a civil party. When the judgment had become final, Renault applied for a declaration of enforceability under Articles 31 and 32 of the Brussels Convention in Italy. The Corte d'Appello di Torino referred to the ECJ the question whether the free movement of goods and the prohibition of abusive dominant positions under the EC Treaty prohibit the recognition of a judgment under point (1) of Article 27 of the Brussels Convention, which – allegedly – contravenes these fundamental freedoms.

The ECJ first referred to its pertinent case-law, especially to Krombach, and repeated that the public policy exception must be “interpreted strictly” and only applies “in exceptional cases”. Although the courts of the Member States were free in determining the content, the limits of the exception were supervised by the ECJ (para 26 et seq.). Furthermore, the Court held that was not admissible to refuse to “recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin. Recourse to the clause on public policy in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order” (para 29 et seq.).

The following section of the judgment stated that a violation of the fundamental freedom of free movement of goods and the freedom of competition under the EC Treaty did not per se modify these standards of review. To the contrary, the prohibition to review a judgment as to its substance and thus to examine whether the court of origin had properly decided the case included the prohibition of reviewing the correct application of Community law (para 32 et seq.). In these constellations, an infringement of public policy could only be considered if the remedies in the state of origin did not ensure sufficient protection of the parties (para 33). As a result, the Court did not find that public policy had been violated.

The relationship between the scope of application of Regulation (EC) No 44/2001 and the public policy exception was an issue in Apostolides v Orams. In this case, Mr Apostolides, a Cypriot Greek, had instituted civil proceedings against the English couple Mr and Mrs Orams and sought the restitution of a plot of land located in the northern part of the island. Apostolides was the owner of the land when the Turkish army invaded Cyprus in 1974 and was forced to flee to the southern part of Cyprus. In 2002, the Orams bought the land “in good faith” from the local authorities of the non-recognised government of North Cyprus. In 2004, Apostolides filed an action against the Orams in the court of Nicosia. The complaint (written in Greek) was handed over to Mrs. Orams by a Cypriot process server who had crossed clandestinely the border between the two parts of the country. The jurisdiction of the court in Nicosia was based on a Cypriot law which provides for jurisdiction in rem for plots of land located in the northern part of Cyprus. The Orams engaged a lawyer in Nicosia, but their defence was rejected as lacking any valid title for the land under Cypriot law – the laws of the “Republic of Northern Cyprus” were not recognised and applied by the court in Nicosia.

In October 2005, Mr Apostolides sought the recognition and enforcement of the Cypriot judgment in England. The High Court of Justice ordered that the judgment should be declared enforceable in England pursuant to Articles 32, 38 et seq. of Regulation (EC) No 44/2001. Again, the Orams appealed in order to set aside the registration, \textit{inter alia} on the ground that Regulation (EC) No 44/2001 was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Article 1 of Protocol No. 10 to the Treaty of Accession of the Republic of Cyprus to the European Union. The Court of Appeal stayed the proceedings and referred to the ECJ the question of whether the Cypriot judgment had to be recognised in England.

The question referred to the ECJ concerned the issue whether the suspension of the application of the \textit{acquis communautaire} in the northern area of Cyprus – which is provided for in Article 1 of Protocol No. 10 – leads to the result that the application of Regulation (EC) No 44/2001 is precluded with regard to a judgment given by a Cypriot court of the area controlled by the government, concerning, however, land situated in the Northern area. With regard to this question the ECJ stated that Article 1 of Protocol No. 10 referred only to the application of the \textit{acquis communautaire} in the northern area, i.e. according to the Court, the suspension provided for by that Protocol is limited to the application of Community law in the Northern area. The ECJ relied on the fact that the case concerned a judgment given by a court situated in the government-controlled area. According to the Grand Chamber, the fact that the judgments of the Cypriot courts concern land situated in the Northern area did not preclude this approach.\textsuperscript{110} The crucial issue was, however, whether the judgment of the European Court of Human Rights in the case \textit{Loizidou v Turkey}\textsuperscript{111} imposed a different outcome. In this (and several other) cases, the European Court of Human Rights had held that the expropriation of land following the occupation of Northern Cyprus was invalid and did not change the ownership of the Greek refugees. However, after diplomatic negotiations, an Immovable Property Commission had been established which sought a reconciliation between the Greek landowners and the possessors of the land. In the proceedings at Luxemburg, the European Commission submitted that this parallel litigation before the European Court of Human Rights had to be taken into consideration and that the specific compensation regime should be considered neither as a civil matter (precluded by Article 1 of Regulation (EC) No 44/2001) nor as a specific convention in terms of Article 71(1) of Regulation (EC) No 44/2001. However, the litigation was between private litigants (and therefore private) so that Article 71 of the Regulation was not directly applicable. Therefore, this argument was rejected by the Advocate General\textsuperscript{112} as well as by the Court.\textsuperscript{113} Both relied on the formalistic argument that the civil claim for restitution was not affected by the specific regime of the Immovable Property Commission. As a result, the ECJ held that the Cypriot judgment had to be recognised and enforced in England and that any application of the public policy clause of

\textsuperscript{110} From the perspective of point (1) of Article 22 of Regulation (EC) No 44/2001, this finding is not convincing: the head of jurisdiction gives jurisdiction \textit{in rem} which is normally based on the consideration that the litigation pertains to plots of land located in the court’s circuit and controlled by the latter and on the availability of evidence related to the land.

\textsuperscript{111} ECHR, 12/18/1996, \textit{Loizidou v Turkey}, Reports and Decisions 1996 IV.

\textsuperscript{112} Conclusions of GA Kokott of 18 December 2008, Case C-420/07 para 43 et seq.

\textsuperscript{113} ECJ, 4/28/2009, Case C-420/07 \textit{Apostolides v Orams} [2009] ECR I-03571. At para 40 et seq., the Court basically followed the argumentation of the AG and argued that in the present case no public authority was acting in the exercise of its public powers, but that the dispute was rather between individuals.
point (1) of Article 34 was inappropriate. The mere fact that the judgment could not be enforced in Northern Cyprus was not considered as a violation of public policy.\textsuperscript{114}

The last judgment where the ECJ addressed public policy was \textit{Gambazzi v Mellon Trust et al.}\textsuperscript{115} The proceedings originated from the famous \textit{Stolzenberg}\textsuperscript{116} litigation on the fraudulent loss of about 600 million CAD of Chrysler’s pension funds by offshore transactions in early 1990.\textsuperscript{117} The pension funds initiated litigation against several defendants in London and sought worldwide Mareva injunctions against several defendants. One of them was Marco Gambazzi, a Swiss resident. In 1997, the High Court of Justice had issued an order restraining Gambazzi from dealing with his assets ("freezing order") and instructed him to disclose some details of his assets and some documents concerning the principle claim against Mr Gambazzi ("disclosure order"). However, Mr Gambazzi did not comply with the disclosure order and the court made an order which excluded Mr Gambazzi from the further proceedings (debarment), unless he had complied with his obligation to disclose the aforementioned information within a certain time period ("unless order"). Several appeals led by Mr Gambazzi against those orders ended unsuccessfully, but nevertheless he did not comply with the orders. Finally, the High Court considered him to be in contempt of court, excluded him from the hearing (debarment) and finally gave a default judgment ordering him to pay damages of CAD 169.752.058, CAD 71.595.530 and USD 129.974.770. The Canadian plaintiffs sought the enforcement of the English judgment in Italy. Gambazzi appealed the declaration granting exequatur in the Corte d’appello di Milano and contended that the judgment was contrary to public policy because it violated his right to a defence and the adversarial principle. The Court of Appeal referred to the ECJ the question whether the exclusion of the defendant from the English proceedings amounted to a violation of public policy.

First, the ECJ stated that the English default judgment was an enforceable decision under Article 25 of the Brussels Convention and Article 32 of Regulation (EC) No 44/2001 (paras 24 et seq.). Then the Court examined point (1) of Article 27 of the Brussels Convention. As a starting point, it referred to the \textit{Krombach} decision and held that it was not responsible for defining the content of the public policy of a Contracting State, rather for reviewing the limits of the application of the clause by the courts of Member States. With regard to the threshold, the ECJ held that a violation of public policy required a manifest breach of a fundamental principle. In this respect the Court found that the right of defence had, as a matter of principle, to be considered a fundamental right (para 26 et seq.). However, the right to defence – being a principle of European constitutional law – could be restricted in favour of overriding public interests unless such restriction would not “constitute, with regard to the aim pursued, a manifest or disproportionate breach of the right thus guaranteed” (para 29). In the present case, the Court recognised that the plausible objective of the debarment orders was to avoid delaying tactics of the defendant, but the exclusion could entail a denial of justice for the claimant. Accordingly, the Court held as a matter of principle that these constellations might justify a restriction of the right of

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\textsuperscript{114} In view of the ECJ’s ruling, on 19\textsuperscript{th} January 2010, the Court of Appeal finally decided that the judgment of the court in Nicosia has to be enforced in the UK, \textit{Meletios Apostolides v David Charles Orams & Linda Elizabeth Orams}, Court of Appeal (Civil Division) [2010] EWCA Civ 9.

\textsuperscript{115} \textit{Canada Trust Company v. Stolzenberg and Gambazzi and others} [2000] 3 WLR 1376 (UKHL).

\textsuperscript{116} This case arose out of a series of frauds, involving hundreds of millions of dollars, against Canadian pension funds and other trustees. The anchor defendant in the London proceedings, Mr Stolzenberg was alleged to be the mastermind. DaimlerChrysler Canada and CIBC, two victims of the frauds, brought proceedings against him and a number of associates in London under Article 6 point (1) of Regulation (EC) No 44/2001.

defence. However, regarding that exclusion from the proceedings as the “most serious restriction possible on the right of the defence”, the ECJ noted that such a restriction had to meet strict requirements in order to avoid a manifest disproportionate limitation. The ECJ did not answer the question directly, referring the detailed assessment to the court at Milan (para 34), but indicated the following criteria as conductive to the correct outcome:

First, the court addressed the possible influence of a judgment of the Swiss Federal Tribunal118 which had denied the enforceability of the English judgment against Gambazzi in Switzerland.119 The Federal Tribunal had held that the exclusion of Mr Gambazzi was not per se contrary to public policy under point (1) of Article 27 of the Lugano Convention, but that additional circumstances of the English proceedings entailed a violation of the Swiss public policy under Article 27 Lugano Convention.120 The ECJ held that due to the principle of uniform interpretation of the Lugano and the Brussels Convention, the national court should take the findings of the Federal Tribunal into account although they were not formally binding (para 36). In addition, the ECJ referred to its decision in Eurofood and urged the national court to regard the foreign proceeding as a whole and to consider all circumstances of the pertinent case (para 40 et seq). When assessing the case, the national court should especially consider the place at which Mr Gambazzi was given an opportunity to express his opinion before the orders were made; whether the well-foundedness of the claims had been examined and whether Gambazzi could challenge the orders in the court of origin. The court should also take into account the failure of the defendant to comply with the order and whether the disclosure of information would oblige him to risk infringing professional secrets (para 41 et seq.).

The ECJ concluded that these guidelines should not be misunderstood as permission to examine the foreign judgment as to its substance rather as criteria to be considered with the sole purpose of carrying out a “balancing exercise” in order to assess whether there was a manifest and disproportionate breach of the right to a defence (para 47 et seq.).

Finally, the Italian court did not admit Gambazzi’s argument that public policy had been infringed. The Corte d’appello of Milan121 held that, in the light of all the circumstances of the case, it appeared that the English order of debarment did not constitute a manifest and disproportionate infringement of Mr Gambazzi’s right to be heard, although such kinds of order are unknown in Italian civil litigation. In particular, the Court stated that the English order of debarment was not a manifest and disproportionate breach of due process because Mr Gambazzi had no valid reason not to comply with it (such as violating professional secrecy) and that he had been duly informed about the sanction. Furthermore, he had been given the opportunity to be heard and, indeed, participated actively during the first stages of the English proceedings.

Assessment: The five judgments of the ECJ clearly demonstrate that the public policy exception of point (1) of Article 34 of Regulation (EC) No 44/2001 is regarded as an exception which applies only in extreme cases. The case-law of the ECJ clearly sets this threshold as the starting point. In addition, the case-law shows that the application of the clause depends on the circumstances of each individual case and that the application

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118 The Tribunal Fédéral is the highest Court in Switzerland.
120 The Swiss Court based its findings on the fact that the English Court refused to grant access to Mr Gambazzi’s legal file. The High Court did so because after Mr Gambazzi had changed lawyers, his former lawyers retained the documents until he paid the lawyers’ fee and a grant of access by the court would have frustrated the lawyers’ right of retention.
121 Corte d’appello Milano (court of appeal Milan), 14 December 2010 – see infra at 3.2.2.a.
requires a balancing of the pertinent principles and conflicting positions. With regard to the content of the exception, the ECJ underlines the difference between the content of the public policy exception as determined by national law and the limits of its application as controlled by the Court. However, the decisions in *Krombach* and in *Gambazzi* demonstrate that the ECJ does not only set the limits of the application of public policy under the Brussels I Regulation, but also determines its content. In *Krombach*, the ECJ clearly addressed the relationship between the ECHR and public policy and concluded by a direct answer that there was a manifest breach of the fundamental right to be heard. In *Gambazzi*, the ECJ even went a step further and developed a yardstick for the appropriate application of the public policy exception by the national court. Although the ECJ did not give a clear answer on the infringement of public policy, it nevertheless elaborated close guidelines for the final decision of the referring court. Not much room was left for the application of Italian standards and the Corte d’Appello at Milan finally closely endorsed the parameters of the ECJ.

**2.2. Regulation (EC) No 2201/2003 (Brussels II<sup>bis</sup>)**

**2.2.1. The pertinent provisions of the Regulation**

Regulation (EC) No 2201/2003 shall coordinate judicial proceedings pertaining to divorce and parental responsibility. Accordingly, the Regulation provides for rules on jurisdiction, *lis pendens* and the recognition of judgments in matrimonial matters and an additional set of rules for the coordination of litigation pertaining to parental responsibility. The recognition of foreign judgments is based on the principle of mutual trust and follows the model of Regulation (EC) No 44/2001. In matrimonial matters, the recognition of a judgment relating to divorce, legal separation or marriage annulment entails an updating of the civil status records. The applicant shall produce a copy of the pertinent judgment and the form set out in Annex I to the Regulation (Articles 37 to 39).

According to Article 28(1) and Article 31 of Regulation (EC) No 2201/2003, judgments on parental responsibility must be declared enforceable, unless one of the reasons specified in Articles 22 et seq. of Regulation (EC) No 2201/2003 applies. The grounds for non-recognition are verified by the court of first instance. Furthermore, Article 33(1) of Regulation (EC) No 2201/2003 provides for an appeal against the declaration of enforceability, which can be based on the same grounds.

In matrimonial matters, Article 22 of the Regulation contains the following exception of public policy: “A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought; ...”.

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124 Corte d’Appello Milano, 24 December 2010, see infra at 3.2.2.a.


126 See Recital (21): "The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required".

127 In Germany, the form provided for by Article 39 of the Regulation is seldom used; see Dutta, 2011, p. 33 et seq.

128 Divorce judgments do not require a declaration of enforceability; their recognition entails an update of the civil records on application of the interested party, Article 21(2), Shúilleabháin, 2010, para 6.20.
Article 25 specifies the review of the foreign judgment as follows: “The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts”. This provision shall prevent a jurisdiction with relatively narrow divorce grounds from refusing to recognise a judgment based on a more liberal divorce regime.129

With regards to judgments relating to paternal responsibility, Article 23 of the Regulation states: “A judgment relating to parental responsibility shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interest of the child; (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; (c) ...”.

Articles 24 and 26 encompass the review of divorce judgments and of judgments on parental responsibility. Article 24 stipulates that “the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14”.

2.2.2. The case-law of the ECJ

As yet, there has been no pertinent case-law of the ECJ on the application of Articles 22 and 23 of Regulation (EC) No 2201/2003. However, this first impression seems to be misleading. In practice, the provisions on the recognition and enforcement of decisions on parental responsibility are seldom applied since these decisions are usually made by the courts at the habitual residence of the child (cf. Article 8 of Regulation (EC) No 2201/2003). In these cases, there is no need for a cross-border recognition and enforcement of decisions under Article 23 of Regulation (EC) No 2201/2003.

Nevertheless, the cross-border enforcement mainly relates to return orders under Articles 11 and 40 to 42 of Regulation (EC) No 2201/2003. This case-law relates to the return of children who were wrongfully removed by one parent to another Member State. In these cases, the Regulation reinforces the return mechanism of the Hague Convention on Child Abduction of 1980 by a mechanism of immediate return which is based on the principle of mutual recognition. In particular, Articles 12 and 13 of the Hague Convention of 1980, which contain a (limited) public policy provision, were replaced by a mechanism of cooperation of the family courts of the EU Member States. According to this mechanism, the court competent for the decision on the parental responsibility has the final say with regard to the return of the child. Under the Regulation, an order ordering the immediate return of a child (in the case of Article 11(8)) is immediately enforced in every other Member State without any declaration of enforceability and any possibility of opposing its recognition.131 However, the practical application of these provisions has proved difficult since they generally restrict the public policy exception. During the last few months, national courts referred several cases to the ECJ for an interpretation of Regulation (EC) No

129 This provision was introduced at the request of the Nordic States who were concerned that judgments based on their liberal divorce regimes would not be recognised in other EU Member States, cf. Shúilleabháin, 2010, para 6.44.

130 This provision reads as follows: “Under no circumstances may a judgment be reviewed as to its substance”.

131 According to Article 11(8) of the Regulation, Articles 40 to 42 apply to the cross-border enforcement of return orders. These provisions do not contain any public policy exception.
2.3. Regulation (EC) No 1346/2000

2.3.1. The pertinent provisions of the Regulation

Regulation (EC) No 1346/2000 coordinates collective insolvency proceedings and their cross-border effects in the Internal Market. It provides for rules on jurisdiction and on the recognition and enforcement of judgments handed down by insolvency courts. Article 3 of the Regulation confers the jurisdiction for the (main) insolvency proceedings to the courts of the Member State where the centre of the main interests of the insolvency debtor is situated. The opening of insolvency proceedings is recognised in all other EU Member States (Article 16). The Regulation provides for a mechanism which shall facilitate the coordination of related proceedings and the cross-border cooperation between insolvency administrators and courts. Hence, the main proceedings may be supported by secondary insolvency proceedings in other Member States. In these proceedings, the insolvency administrator represents the claims of the creditors of the main proceedings and has a privileged legal position. Creditors are entitled to lodge their claims in the primary and in the secondary proceedings by a form. Furthermore, judgments of the insolvency court are recognised in all other EU Member States in accordance with Articles 38 et seq. of Regulation (EC) No 44/2001 (Article 25).

According to Article 26 of Regulation (EC) No 1346/2000, the requested State “may” refuse recognition and enforcement “where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”. This public policy clause relates in equal measure to the recognition of the decision on the opening of the insolvency proceedings and to the recognition of all other judgments handed down in the context of the insolvency. With regard to the latter, Article 25(3) of Regulation (EC) No 1346/2000 provides for a specific public policy exception. According to this provision, Member States are not obliged to recognise or enforce a judgment “which might result in a limitation of personal freedom or postal secrecy”.

2.3.2. The case-law of the ECJ

The ECJ addressed the public policy exception of Regulation (EC) No 1346/2000 in the Eurofood decision which arose out of the insolvency of the Italian nutrition group Parmalat SpA. Eurofood was an Irish limited company and a wholly owned subsidiary of Parmalat SpA. Its main objective was the provision of the financing of the Parmalat group.


133 See infra at 3.4.

134 Hess, 2010, § 9 II, para 19 et seq.

135 Hess, 2010, § 9 II, para 58 et seq.

In December 2003, the Parmalat group collapsed and was admitted to extraordinary administration proceedings by the competent Italian Ministry for Production. Mr Bondi, a lawyer, was appointed extraordinary administrator of the undertaking. Formally, the insolvency proceedings were opened on 9 February 2004. In the meantime, on 9 February 2004 creditors of Eurofood had applied in Ireland for the opening of winding up proceedings against Eurofood. On 10 February 2004, an application was lodged before the District Court at Parma for declaration that Eurofood was insolvent. Finally the Irish Supreme Court referred a preliminary question to the ECJ of whether insolvency proceedings in Ireland could be opened or whether the parallel Italian insolvency had to be recognised under Article 16 of Regulation (EC) No 1346/2000. In addition, the Supreme Court asked the ECJ whether the insufficient respect of the creditors’ right to be heard amounted to a manifest violation of the public policy exception.

Although Eurofood mainly addressed jurisdictional issues of Article 3(1) of the Regulation, the Court also addressed public policy: In this respect the ECJ examined whether a Member State was required to recognise an opening decision under Articles 16 and 17 of the Regulation when fundamental procedural guarantees had been disregarded (para 60 et seq.) The Court referred to Recital (22) of the Regulation which refers to the principle of mutual trust and states that the grounds for non-recognition should be principally “reduced to the minimum necessary” (para 61). Referring to Krombach, the ECJ repeated that the application of public policy was “reserved for exceptional cases” and that, although the Member States were free to determine the content of public policy, the ECJ reserved its competence to delineate the limits of the exception. Furthermore, the Court elaborated that recourse to public policy could only be envisaged where recognition or enforcement would be “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle” and that “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order” (para 63).

Referring again to Krombach, the ECJ explicitly recognised that the right to fair trial was a fundamental principle since it was derived from the constitutional traditions of all Member States and from the ECHR (para 65). It classified the right to be notified of procedural documents and, in general, the right to be heard as being pivotal components of the right to a fair trial. However, the Court held that the specific rules concerning the right to be heard may vary according to the urgency for a ruling to be given and that any restriction must be duly justified and surrounded by procedural safeguards. The final answer to the fifth question was that only a “flagrant breach of the fundamental right to be heard” in the opening proceedings would entitle the courts of other EU Member States to refuse recognition under Article 26 of Regulation (EC) No 1346/2000 (para 67).

As a result, Eurofood elaborated the conception of the ECJ according to which any violation of ordre public requires a considerable degree of a breach of the pertinent fundamental guarantees. The Court also clearly stated that a restriction of the fundamental rights may be justified and balanced by the opposing interests of the other party. In Eurofood, the Court directly applied the fundamental guarantees of Article 6 ECHR and did not leave much manoeuvre of the Member States for defining the content of (procedural) public policy. As a result, the notion and the concept of public policy were largely derived from European law (including the ECHR).

2.4. Regulation (EC) No 1206/2001

The Regulation shall improve the judicial cooperation in the field of cross-border taking of evidence. By providing for a direct cooperation between the requesting and the requested
court it improves and facilitates the traditional judicial cooperation which is executed according to the procedural law of the requested court. In addition, Article 17 permits the direct taking of evidence in the jurisdiction of another Member State by the court deciding the substance of the case. However, Article 17 contains several safeguards which aim to protect witnesses and other persons who are directly examined by the foreign judicial authority.

Generally, Regulation (EC) No 1206/2001 does not contain any public policy exception. However, Article 17(5)(c) of the Regulation provides that the requested State may refuse the direct taking of evidence by the requesting State if this is "contrary to fundamental principles of law". According to its wording, Article 17(5) of the Regulation stipulates a public policy exception.

With regard to Regulation (EC) No 1206/2001, only sparse case-law of the Member States has been reported so far. The ECJ has not had any opportunity to elaborate the scope of the limited exception of Article 17(5). However, in a judgment of 15 February 2011, the Court was asked whether the requested court is entitled to a reimbursement of the costs of the taking of evidence. The ECJ considered Article 14 of the Regulation, which provides that a request for the hearing of persons shall only be refused in the case of a prohibition of evidence or if the requesting court does not advance the costs for an expert witness. The ECJ interpreted the Regulation strictly and held that a request may only be refused in certain cases described by the Regulation. As a result, the ECJ interpreted the Regulation in such a way that obstacles to the taking of evidence derived from the laws of the Member States are only permitted when Regulation provides for an exception. In addition, the Court interpreted the exceptions of the Regulation restrictively, because they could impede the efficiency of the judicial cooperation. It seems to be likely that these standards will also apply to the interpretation of Article 17(5)(c) of Regulation (EC) No 1206/2001.

### 2.5. Regulation (EC) No 593/2008 (Rome I)

#### 2.5.1. The pertinent provisions of the Regulation

According to Article 21 of the Regulation, the application of a provision of the law of another country may be refused "if such application is manifestly incompatible with the public policy (ordre public) of the forum".

Furthermore, Article 9 addresses the application of so-called “overriding mandatory provisions”. These mandatory overriding provisions are relevant in the context of public policy because they address a similar problem. Whereas Article 21 serves as a (negative)

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137 The ECJ recently stressed the objectives of the Regulation to facilitate and to simplify the judicial cooperation among the judicial authorities of the Member States, ECJ, Judgment of 17 February 2011 in Case C-283/09 Artur Weryński v Mediatel 4B spółka z o.o., para 62.


139 ECJ, Judgment of 17 February 2011 in Case C-283/09 Artur Weryński v Mediatel 4B spółka z o.o., para 47 et seq.

140 ECJ, Judgment of 17 February 2011 in Case C-283/09 Artur Weryński v Mediatel 4B spółka z o.o., para 53. The Court stated: "...Furthermore, Recital (11) in the preamble to Regulation No 1206/2001 states that, to secure the effectiveness of the regulation, the possibility of refusing to execute the request for the performance of taking of evidence should be confined to strictly limited exceptional situations. It follows that the grounds on which execution of such a request may be refused are those exhaustively listed in Article 14 of the regulation."

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“shield” against an application of foreign provisions based on public policy, Article 9 reflects the positive function of public policy, which therefore is relevant in this context. Moreover, Article 9 is the result of a rather intensive debate in the Member States, which can be interpreted as a significant indicator for the relevance of a public policy reservation in this area. Under Article 9, overriding mandatory provisions actively implement important public policies of the forum state. They are described in Article 9 as provisions “the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

2.5.2. The case-law of the ECJ

As of today, there is no ECJ case-law available that directly decides legal questions under either article 9 or article 21 of Regulation (EC) No 593/2008. There is also no case-law with regard to the parallel provisions in the former Rome Convention on the law applicable to contractual obligations. However, that must not be misread as sign for practical irrelevance of the public policy clause with regard to contractual obligations. As far as the reporters are aware, no ECJ case-law at all with regard to Regulation (EC) No 593/2008 and only a very limited number of decisions with regard to the Rome Convention, its predecessor instrument. Thus, the case-law of national courts, to a large extent based on the Rome Convention or the Member State transformation of this convention, still is the most significant source for determining the practical significance of the public policy clause in contract law.

There is however ECJ case-law which relates to the public policy reservation indirectly. In Ingmar GB, the ECJ had to decide about a choice of law clause included in a contract between a self-employed commercial agent and a principle established in a non-Member State (USA, State of California). Whereas, under the contract, the agent had to carry out its activities in the Member States, the contract provided for the applicability of the law of California. The ECJ had to decide whether the parties, by means of a choice of law clause, can deviate from the standards provided for by Council Directive (EEC) No 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents. The ECJ ruled that the Directive “must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the

141 Pfeiffer, 2011, para 21.
142 It should be noted in this context that the definition of overriding mandatory provisions is taken from the ECJ 23/11/1999 Cases C 369/96 and C 376/96 Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and against Bernard Leloup, Serge Leloup and Sofrage SARL, para 30. In this judgment, however, this definition was used in order to define public policy under article 3 of the Belgian Civil Code, which demonstrates that the definition of overriding mandatory provisions is a derivative of the public policy reservation.
144 OJ C 334/1 of 30/12/2005.
145 ECJ, 6/10/2009, Case C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV [2009] ECR I-9687; ECJ, Judgment of 15 March 2011 in Case C-29/10 Heiko Koelzsch v État du Grand-Duché de Luxembourg. The small ECJ case-law basis, also with regard to the Convention, can be interpreted as a consequence of two facts, (i) that the two Protocols on the interpretation by the Court of Justice of the European Communities (OJ C 334/20 and 334/26 of 30/12/2005) only became effective as of 1 August 2004 and (ii) that under these Protocols a reference to the CJEU was optional and not mandatory.
law of that country.” In its reasoning, the Court justified this decision with the mandatory nature of the Directive’s protective provisions within the single market. Based on the before mentioned reasoning, Ingmar GB was one of the main causes for including the new provision of Article 3(4) into Regulation (EC) No 593/2008. Within the traditional categories of private international law, Ingmar GB is a public policy decision rather than a decision that relates to mandatory provisions. For the purposes of this report, this, firstly, underlines that overriding mandatory provisions on the one hand and the definition of public policy on the other are rather similar with regard to both their underlying principles and the relevant provisions. Secondly, it demonstrates that, in European contract law, a “joint” European public policy comes into existence for those aspects of the law which are harmonised to a sufficient degree for defining such policies.

Another – maybe even more significant – judgment for the purposes of this report is the Arblade case of 1999148, where French companies had deployed workers in order to carry out construction works in Belgium. In this case, the Belgian authorities had commenced criminal proceedings against the French companies and certain individuals related to these companies based on alleged violations of certain obligations for employers under Belgian law. The accused companies argued that they had complied with all requirements of the applicable French labour laws, whereas the Belgian authorities relied on the public policy reservation of Article 3 of the Belgian Civil Code. The reference by the Belgian Tribunal Correctionnel de Huy to the ECJ raised the question whether an application of the relevant Belgian rules constituted a violation of the freedom to provide services.

The ECJ ruled that an application of national public policy rules is subject to a control under the (then) EC Treaty (now: TFEU). Furthermore, the Court decided that some of these provisions are acceptable under the freedom to provide services and others are not. The same principles have also been applied to other similar cases where the ECJ ruled that national law may provide for an application of certain of its mandatory laws to cases where another Member State’s contract law applies and that, under certain circumstances, this application is acceptable under the EC Treaty (or TFEU).149 Arblade and its aftermath demonstrate that different national public policies still may exist under a joint European regime. Their scope is subject to certain limitations by EU law; within these limits, their effect, however, is not excluded.

2.6. Regulation (EC) No 864/2007 (Rome II)

2.6.1. The pertinent provisions of the Regulation

Pursuant to Article 26 of the Regulation, the application of a foreign provision may be refused “if such application is manifestly incompatible with the public policy (ordre public) of the forum”.

2.6.2. The case-law of the ECJ

There is no ECJ case relating to this provision. Again, this is rather a consequence of the newness of this instrument than of a lack of relevance of the public policy clause.

147 For an analysis see Pfeiffer, 2004, pp. 25-36.
There are, however, cases indirectly touching on private international law relating to public policy with regard to extra-contractual obligations. In the *Laval* case, the ECJ had to decide in a case concerning damage claims in the context of an industrial dispute.\(^{150}\) A Swedish trade union had taken collective actions against a Latvian Construction Company having deployed workers to Sweden in order to obtain a collective agreement. The judgment answers the question, whether national regulation of collective action may be applied to a foreign service provider in such circumstances. Whereas the details of this decision are not of interest here, two aspects should be noted:

Firstly, European Union law may to a certain extent also reinforce national public policies, which can be seen from answer no. 2 of the *Laval* decision, which states that "[w]here there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 and 50 of the EC Treaty preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly" – in other words: according to Articles 49 and 50 of the (then) EC Treaty, Sweden had to apply certain provisions of its laws, regardless of the general applicability of Swedish law, in order to avoid discrimination of foreign workers. Whereas the need for a non-discriminatory application of national laws, regardless of national laws, may also arise elsewhere, the application of forum law in cases like *Laval* does not necessarily require any reference to public policy in the sense of private international law. European Union law, as far as directly applicable, always takes precedence over national laws without any need for an explicit reference to public policy. Secondly, the ECJ ruled that certain measures of collective action ("blockades"), if imposed on a foreign service provider, constitute an infringement of the freedom of service under the (then) EC Treaty (now: TFEU). Seen from a private international law perspective, this indicates that, also in the area of extra-contractual obligations, European Union law may provide for some outer limits for invoking national public policies.

Another example for this effect may indirectly be taken from the ECJ decision in the case of the law suit of the Austrian *Bundesland Oberösterreich against ČEZ*, the company running the nuclear power plant Temelin, Czech Republic.\(^ {151}\) The setting of this case is a classic with regard to private international law in cross-border environmental cases. The claimant sought the cessation of nuisance from the plant in an Austrian forum under Austrian law. Under Czech law, such a claim would be excluded as a consequence of the permission (and its private law effects) granted by Czech authorities to ČEZ. Such a public permission would not have any effect under Austrian administrative law so that a valid claim under Austrian law might exist. The standard answer for these issues in private international law is that (1) countries other than the one where the plant is located may apply their tort laws to such cases, (2) there is no general obligation under international law to recognise a cross-border effect of public permissions of other states but (3) that a state may agree to give effect to such a permission by international treaties or other international instruments. It has also been discussed in legal writing that EU law may provide for such an obligation in cases involving the laws of different Member States.\(^{152}\) In the *Temelin* case, the ECJ stated that Austria is obligated to a non-discriminatory application of its laws with regard to the private law effect of public permission. While this is, again, no public policy decision, it is


\(^{152}\) For an extensive analysis see Pfeiffer, 2000, pp. 263-314.
nonetheless relevant here. Even if Austria had, in general, given effect to public permissions from other Member States, it might have been not unlikely that it invoked its public policy against nuclear power plants against a Czech permission. As can be seen from the judgment, this would have been inadmissible under EU law, which is a further demonstration that European Union law may state limits for an application of national public policy.
3. THE COMPARATIVE RESEARCH: THE MAIN FINDINGS OF THE NATIONAL REPORTS

3.1. Introductory remark

For a better understanding of the results obtained by the comparative research, it seems advisable to describe briefly the unfolding of the national reports in an introductory remark. As indicated above, the authors of the study first formulated a questionnaire addressing statistical data, the content and the scope of the public policy exception in the various relevant EU instruments. It was distributed among experts in private international and procedural law. The following specialists agreed to contribute to the study as regional reporters: Prof. Dr. Gilles Cuniberti (Belgium, France, Luxembourg); Prof. Dr. Nikolaos Klamaris (Cyprus and Greece); Vigita Vebraitė (Estonia, Latvia, Lithuania), Paulina Ptak (Poland); Dr. Eva Storskrubb (Finland and Sweden); Meike Bever, Prof. Dr. Burkhard Hess and Prof. Dr. Thomas Pfeiffer (Austria, Germany), Dennis Lievens, LL.M. (the Netherlands); Prof. Dr. Miklos Kengyel (Hungary); Dr. Andrew Dickinson (Ireland and the United Kingdom); Prof. Dr. Remo Caponi (Italy, Portugal, Spain); Prof. Ales Galic (Slovenia).

According to the regional reports, the questionnaires were answered on the basis of the following sources of information:

**Austria**: Meike Bever, research assistant at the Heidelberg Institute, accessed several databases and contacted the Federal Ministry of Justice. Although no general statistics were available, it was possible to search the pertinent Austrian case-law comprehensively.

**Baltic States**: As these Member States acceded to the Union only in 2004, it proved to be difficult to find much pertinent case-law. However, the regional reporter accessed the relevant databases and contacted competent courts.

**Belgium**: The regional reporter, Prof. Cuniberti, made requests directly at several courts and conducted several comprehensive research of law reviews and databases.

**Cyprus**: As Cyprus acceded to the Union in 2004, it was difficult to find much pertinent case-law. However, the regional reporter, Dr. Giannopoulos, contacted practicing lawyers in Nicosia and accessed relevant databases. G. Chronoupoulou, research assistant at the Institute, accessed the most important database.

**Finland**: The Finnish reporter, Dr. Eva Storskrubb, contacted the largest Finnish district court (Helsinki) as well as the six appeal courts in order to obtain relevant data and case-law. Furthermore, she consulted the general Finnish database. With regard to Regulation 1206/01, she conducted a phone call with Judge Jukka Jaakkola of Helsinki District Court, who is in charge of the division of the Court dealing with requests under this Regulation.

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153 Ms Ptak, a doctoral student at the Heidelberg Institute, joined the project when the regional reporter informed us that access to information in Poland proved to be difficult.

154 Prof. Galic joined the project when the regional reporter informed us that access to information in Slovenia proved to be difficult.


156 www.finlex.fi.
and with Outi Kemppainen at the Ministry of Justice, who is the national contact person for the European Judicial Network.

France: In France, courts were directly approached but refused to provide data on exequatur without being expressly authorised by the Ministry of Justice, which then persistently processed the query including a complete translation of the questionnaire. The reporter, Prof. Dr. Cuniberti, thus had to rely on the examination with the aid of national databases.157

Germany: In Germany, available databases158 were extensively searched. Furthermore, the Higher Regional Courts of Karlsruhe, Cologne and Munich were contacted in order to gather additional statistical data and relevant case-law. As a result, all (publicly) accessible case-law has been reviewed; unofficial sources of information were also included.

Greece: The regional reporters contacted the Courts in Athens and searched the pertinent databases.

Hungary: In Hungary, the regional reporter Prof. Dr. Miklos Kengyel had access to official statistics concerning Regulation (EC) No 44/2001 which had been collected by the Office of the National Judicial Council. However, this data only revealed the number of applications of the Regulation as such without referring to its various fields of application (jurisdiction, recognition and enforcement, etc.), obliging him to consider the data provided by the trial judges.

Decisions concerning public policy exemption were not found in official statistics and databases. Consequently, judges were interviewed at the Central District Court of Buda, which is competent for the declaration of enforceability.

Italy: The Italian reporter, Prof. Dr. R. Caponi, submitted the questionnaire to several judges and received a written answer from the Court of Milan based on its own statistics and data. Furthermore, he conducted extensive research of databases159 and law reviews. Regarding the application of Article 17(5)(c) of Regulation (EC) No 1206/2001, Prof. Caponi contacted the Ministero della Giustizia-Dipartimento, affari di giustizia-Direzione generale della giustizia civile ufficio 2.

Ireland: In order to obtain relevant data, direct requests at Irish courts were made by the competent reporter, Prof. A. Dickinson.

Luxembourg: Prof. Dr. Cuniberti comprehensively consulted national databases160 and law reviews.

The Netherlands: Mr Lievens, LL.M., research assistant at the Heidelberg Institute, accessed the relevant (public) database and reviewed published case-law.

Poland: The regional reporter for Poland finally stated that it was not possible for her to obtain specific information. However, additional research was undertaken by Ms Paulina Ptak, a Polish research assistant at the Heidelberg Institute.

Portugal: The regional reporter for Portugal, Prof. Dr. Remo Caponi, entrusted two Portuguese judges with the elaboration of the Portugese report (José Mouraz Lopes Coimbra Court of Appeal, and Paulo Duarte Teixeira, Court of Santa Maria de Feira). They

159 www.dejure.giuffre.it; www.giuridico.zanichelli.it; www.leggituditaliaprofessionale.it; www.ipsoa.it.
160 Such as www.jurisedit.lu.
conducted extensive research of the principal national database and of published case-law.\textsuperscript{161}

\textit{Slovenia}: The regional reporter for Slovenia tried to contact Slovenian judicial authorities several times, but without success. Additional research was undertaken by Prof. Dr. Ales Galic, University of Ljubljana.

\textit{Spain}: The regional reporter for Spain, Prof. Dr. Remo Caponi, entrusted two Spanish colleagues of the university of Madrid with the elaboration of the Spanish report (Prof. Dr. Maria Luisa Villamarín López, who answered parts A, B and C (except for question A.III.6), and Prof. Dr. Enrique Vallines, who answered question A.III.6 and parts D, E and F). They had access to the statistics of the Spanish Council of the Judiciary\textsuperscript{162} but reported that statistical data in Spain only refer to the number of cases dealing with "EU Recognition and enforcement of judgments", without any further specifications. Thus, they reviewed the case-law of the last seven years with the aid of the official case-law database\textsuperscript{163}.

\textit{Sweden}: The reporter for Sweden, Dr. Eva Storskubb, conducted a comprehensive research of national databases\textsuperscript{164} and got access to the data of the centralised court for all applications of Regulation 44/2001 (Svea Hovrätt).

\textit{United Kingdom}: The reporter for England and Wales, Prof. Andrew Dickinson, had access to the Register of Judgments held by the High Court in London which, however, did not contain any specifications regarding the application of the public policy exception. In Scotland, no official statistics were available either. Thus, he extensively consulted commercial databases\textsuperscript{165} and law reviews.

In conclusion, it can be stated that the accessibility of statistical data and relevant case-law in the Member States turned out to be very different.\textsuperscript{166} The differences encountered were due to several reasons: First, comprehensive statistics do not generally existent (they were only found in England and Wales, Hungary, Spain and in the Baltic countries though in detail, they took on various different forms). Secondly, gathering information by contacting the competent courts directly was sometimes difficult. One example was the reluctance of French courts to give information without express authorisation by the Ministry of Justice. Another example was the emphasis of the English family court with regard to the confidentiality of private data. Furthermore, the fact that judgments in matrimonial matters are not formally (recognised and) enforced contributed to the reduced amount of detectable case-law in this context.

With regard to the statistical relevance of the public policy clauses, it is not possible to draw general conclusions. However, some reliable information could be gathered by a combination of the described research methods. Generally speaking, one striking result of the study is the low number of cases where the public policy exception was addressed by the courts. In the overwhelming majority, the application of the public policy exception did not entail a refusal of recognition.

\textsuperscript{161} www.dgsi.pt.


\textsuperscript{163} I.e. the so-called "Fondos de jurisprudencia del CENDOJ (TS, AN, TSJ y APS), available at http://www.poderjudicial.es/search/indexAN.jsp; webpage last visited 27/11/2010. Furthermore, the reporters consulted www.vlex.com.

\textsuperscript{164} www.infotorg.se; www.rattsinfosok.dom.se (Domstolsverket).

\textsuperscript{165} Such as www.bailii.org.

\textsuperscript{166} The same factual difficulties occurred when the Heidelberg Report on the Application of Regulation (EC) No 44/2001 was elaborated, see Hess/Pfeiffer/Schlosser, 2008, para 5 et seq.

3.2.1. Statistical data

According to Articles 38 and 41 of Regulation (EC) No 44/2001, judgments given in a Member State are immediately declared enforceable in another Member State on the application of any interested party. According to Articles 43 and 45 of the Regulation, the debtor may appeal against the declaration of enforceability and claim, inter alia, that, pursuant to point (1) of Article 34 of the Regulation, a judgment shall not be recognised “if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought”. Against this background, the statistics provided by the following table could be drawn up. The scrutinised time period begins with the entry into force of Regulation (EC) No 44/2001 in the respective Member State. Decisions which have been rendered within this time period but refer to the Brussels Convention of 27 September 1968 have been taken into consideration as well.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of requests of enforceability</th>
<th>Number of refusals of enforceability</th>
<th>Number of objections of the public policy exception</th>
<th>Number of cases where the objection was successful</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Numbers mentioned by enforcement judges rated from 30 per year to 15 in 8 weeks</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Belgium</td>
<td>No information available</td>
<td>No information available</td>
<td>10 since 1984</td>
<td>1</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No case-law has been reported yet</td>
<td>No information available</td>
<td>No information available</td>
<td>No information available</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>693</td>
<td>6 (2 reversed on appeal)</td>
<td>8</td>
<td>3 (one reversed on appeal)</td>
</tr>
<tr>
<td>Estonia</td>
<td>Approx. 40 per year</td>
<td>0</td>
<td>No statistics available</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>No precise data available</td>
<td>1 (out of 19 appeals)</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

167 According to the national report for England and Wales, the following figures are consistent with the pattern of decisions rendered in earlier years.

168 In the largest (out of 54; since 1 Jan 2010 27) district courts (Helsinki), there have been approximately 115 applications registered under the reference number for enforcement cases under the Lugano Convention, which is sometimes used for cataloguing enforcement cases under Regulations (EC) Nos 44/2001 and 2201/2003 or even under the Brussels Convention.
<table>
<thead>
<tr>
<th>Country</th>
<th>France</th>
<th>Germany</th>
<th>Greece</th>
<th>Hungary</th>
<th>Italy</th>
<th>Latvia</th>
<th>Lithuania</th>
<th>Luxem-Bourg</th>
<th>The Netherlands</th>
<th>Northern Ireland</th>
<th>Poland</th>
<th>Portugal</th>
<th>Republic of Ireland</th>
<th>Scotland</th>
<th>Slovenia</th>
<th>Spain</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>22 since 2002</td>
<td>5</td>
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<tr>
<td>Germany</td>
<td>2843</td>
<td>34</td>
<td>56</td>
<td>2</td>
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<tr>
<td>Greece</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
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<tr>
<td>Hungary</td>
<td>Approx. 100 per year</td>
<td>No statistics available</td>
<td>1</td>
<td>1</td>
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<tr>
<td>Italy</td>
<td>There are about 27 cases per year before the court of Milan</td>
<td>0 before the court of Milan</td>
<td>No information available</td>
<td>No information available</td>
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<tr>
<td>Latvia</td>
<td>Approx. 40 per year</td>
<td>0</td>
<td>No</td>
<td>0</td>
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<tr>
<td>Lithuania</td>
<td>Approx. 50 per year</td>
<td>0</td>
<td>1</td>
<td>0</td>
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<tr>
<td>Luxem-Bourg</td>
<td>No information available</td>
<td>No information available</td>
<td>7 since the year 2000</td>
<td>0</td>
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<tr>
<td>The Netherlands</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>11&lt;sup&gt;170&lt;/sup&gt;</td>
<td>1</td>
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<tr>
<td>Northern Ireland</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No information available</td>
<td>No information available</td>
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<tr>
<td>Poland</td>
<td>50</td>
<td>No statistics available</td>
<td>11</td>
<td>0</td>
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<td>Portugal</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
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<tr>
<td>Republic of Ireland</td>
<td>No information available yet</td>
<td>No information available yet</td>
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<td>No information available yet</td>
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<td>Scotland</td>
<td>No statistics available</td>
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<tr>
<td>Slovenia</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>8</td>
<td>3</td>
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<tr>
<td>Spain</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>20</td>
<td>1</td>
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<tr>
<td>Sweden</td>
<td>158 (since the second half of 2002)</td>
<td>12 (since the second half of 2002)</td>
<td>5 (since the second half of 2002)</td>
<td>0 (but in 4 cases Article 169)</td>
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</tbody>
</table>

<sup>169</sup> This is a very tentative number, see note 3.

<sup>170</sup> No statistics available; result based on thorough examination of databases.
### 3.2.2. Content of the public policy exception

(a) Is the public policy defence in the respective State according to point (1) of Article 34 of the Regulation exclusively or mainly raised and examined with regard to the infringement of procedural guarantees, or is its substantive meaning taken into account as well?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratio of substantive and procedural public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>(a) Procedural public policy</td>
</tr>
<tr>
<td></td>
<td>OGH 22.02.2007 3Ob233/06w regarding the alleged refusal of the court in the state of origin (the Netherlands) to examine international jurisdiction and the arbitrary withholding of the legally competent judge</td>
</tr>
<tr>
<td></td>
<td>OGH 30.05.2006 3Ob49/06m regarding an Italian decreto ingiuntivo; on this topic see also OGH 03.05.2000 4Ob99/00p (regarding the Lugano Convention).</td>
</tr>
<tr>
<td></td>
<td>OGH 15.02.2006 3Ob242/95t regarding a German default judgment against an Austrian company which was rendered after an application of the company for legal aid in the form of a lawyer was not admitted under Section 116(1) sentence 2 ZPO (old version)</td>
</tr>
<tr>
<td></td>
<td>OGH 23.10.2002 3Ob251/02m regarding the application of point (1) of Article 27 of the Brussels Convention on the enforcement of a German judgment rendered in an “Urkundenprozess”</td>
</tr>
<tr>
<td></td>
<td>OGH 28.01.2004 3Ob104/03w regarding the declaration of enforceability under the Brussels Convention if the foreign decision does not meet the clarity requirements set for domestic judgments.</td>
</tr>
</tbody>
</table>
However, there is no explicit recourse to the public policy exception. In legal literature, a violation of public policy is envisaged in case of the lack of service of documents which modify or extend the claim in a current proceeding\textsuperscript{171}.

(b) Substantive public policy

OGH 22.02.2007 3Ob233/06w regarding the alleged violation of community competition law by a prohibition to resell goods on the Yugoslav market if this prohibition was made by abusing market dominance.

OGH 06.04.2006 6Ob64/06i (obiter) regarding the recognition of a Swedish judgment which accepts that acts of a Swedish liquidator take effect with respect to assets in Austria, because – prior to the entry into force of the Insolvency Regulation – the Austrian legal system did not allow such effects if there is no treaty on this matter.

BGH 10.11.2010 XII ZR 37/09 examined whether Austrian public policy would be violated by the enforcement of a German judgment awarding maintenance payments according to Section 1615(1) of the German BGB. This examination was carried out to determine whether the claimant has a legitimate interest to achieve a German judgment based on this provision. The court held that Austrian law itself provides for similar maintenance obligations in Section 168 AGBG. The simple fact that German law awards such payments to a greater extent cannot justify an application of public policy.

In legal literature, a violation of the protection of consumers, employees, renters is envisaged to entail an application of public policy\textsuperscript{172}.

Belgium

The reported cases suggest that arguments based on substantive public policy are commonly made. Out of the 10 reported cases since 1984, the argument was made in four cases. But the number of cases where it was argued that the foreign judgment violated procedural public policy was still higher: 6 out of 10 cases.

Finland

In the two cases in which the public policy defence was invoked by the party opposing enforcement, the first case invoked in relation to alleged misapplication of substantive law\textsuperscript{173} and the second case invoked as a general final point, but apparently more in relation to procedural guarantees since all other arguments related to procedural issues\textsuperscript{174}.

In the four cases where the court examined public policy ex officio it is

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\textsuperscript{171} Burgstaller/Neumayr, 2010, Art. 34 EuGVVO para 21.
\textsuperscript{172} Burgstaller/Neumayr, 2010, Art. 34 EuGVVO para 10.
\textsuperscript{173} Helsinki Court of Appeal judgment 2967 of 3.11.2009 in case S 09/2352.
\textsuperscript{174} Helsinki Court of Appeal, judgment 3292 of 25.11.2008 in case S 08/765.
\textsuperscript{175} Turku Court of Appeal, decision 2802 of 28.11.2005 in case S 05/1574.
not explicit what the remit of examination was, but the national reporter assumed that it was all encompassing. Specifically in one case, the court notes in its decision that procedural issues may have relevance under Article 34 point (1)\(^\text{175}\).

**France**

In almost all cases where the public policy exception was raised, the argument was that the foreign judgment violates procedural public policy. In each single case, it was argued that the foreign judgment violated procedural public policy. A violation of substantive public policy was argued in only two cases. Together with a violation of procedural public policy\(^\text{176}\) the Court d’Appel Amiens refused the recognition of an English judgment on the liability of an employee in a case of malpractice of a veterinary surgeon.\(^\text{177}\) The English Court had ordered the employee to pay around 85% of the damage whereas the employer should bear only 25%.\(^\text{178}\) As the veterinary surgeon was an uninsured employee of the clinic, the Court of Appeal held that the recognition would infringe Article 34 point (1) Regulation (EC) No 44/2001.

**Germany**

15 decisions dealing with substantive public policy mainly in maintenance cases with regard to the assessment of maintenance are faced with 40 decisions dealing with procedural public policy. Thus, the procedural component of the public policy exception prevails\(^\text{179}\).

**Greece**

The public policy defence is mainly examined with regard to the infringement of procedural guarantees. Article 34 point (1) has seldom been successful.

**Hungary**

In the single case which was found\(^\text{180}\) the public policy defence was raised and examined with regard to the procedural guarantee of the use of the native language. The Austrian plaintiff claimed damages from the Hungarian defendant at the District Court of Bad-Ischgl (Austria). An attempt was made to deliver the claim and the summons to the defendant in German, but the defendant refused to accept the document because of the lack of translation. Shortly thereafter, the claim and the summons were delivered to the defendant in Hungarian. According to the summons, the party was obliged to have a lawyer for his representation, and the personal appearance of the defendant at the trial was obligatory. The defendant, with the help of his German-speaking friend, confirmed his critical financial situation in writing, and requested to postpone the hearing. The Austrian Court sent him the form for the request of legal aid in German, and requested

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\(^{175}\) CA Amiens, 26 janvier 2010, No 07/02364 (successful); CA Paris, 15 avril 2010, No 09/16176 (unsuccessful).

\(^{176}\) The ill-treatment of a horse had caused its death and a damage of 350,000 GBP. The owner obtained a judgment against the clinic and the veterinary surgeon awarding 85% of the damage to the latter. As the veterinary surgeon was an uninsured employee of the clinic, the Court of Appeal held that the recognition would infringe Article 34 point (1) Regulation (EC) No 44/2001.

\(^{177}\) CA Amiens, 26 janvier 2010, No 07/02364, but note that this case was not challenged in the Cour de cassation and it seems to be unclear whether the Supreme Court would have had reversed the judgment.

\(^{178}\) A breakdown of these decisions which includes a short note regarding their main topics can be found in the annex Germany.

\(^{180}\) Pfv. XI.21.581/2008/11.
information about the need of a translation at the hearing, also in German. The defendant confirmed in German that he could not appear at the hearing and could not have a lawyer because of financial reasons. The Court interpreted this letter as an application for relief from charges, and dismissed it. On the same day, the Court passed a judgment by default in favour of the plaintiff. Shortly thereafter, the defendant sent, in German and in Hungarian, the form for the application for legal aid he had received earlier, and a letter in German and in Hungarian in which he requested the same. He also requested the translation of the papers into Hungarian, and sent the German language documents including the judgment back by default. The Court dismissed the application and called on the defendant to translate all the attached documents into German.

The Hungarian Supreme Court said – after citing the Krombach/Bamberski decision of the ECJ – that the right of the use of the native language is one of the basic principles of the Hungarian civil procedure. According to that, the foreign judgment resulting from a trial seriously infringing this principle cannot be recognised. Due to the lack of translation, the defendant did not have the chance to exercise his procedural rights and fulfill his procedural obligations. Therefore the foreign judgment violates not only the principle of the use of the native language, but also the principle of the information of the parties, which serves the equal opportunities of the parties in the civil proceedings.

Italy

In Italy, the public policy defence according to Article 27 point (1) of the Brussels Convention was mainly raised and examined with regard to the infringement of procedural guarantees. The public policy exception was taken into account in its substantive component only by the Corte d'appello Torino but the objection was rejected. More precisely, the Italian parties claimed that a French judgment was in breach of the economic public policy. The national Court stayed the proceedings and referred the interpretative question to the ECJ. The ECJ ruled that Article 27 point (1) must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy. Therefore, the Italian Corte

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181 See Article 6 of the Act III of 1952 on civil procedure.
182 See Article 7 of the Act III of 1952 on civil procedure.
183 Due to excessive length of the Italian proceedings, most of the case-law concerning public policy in recognition and enforcement of a judgment in civil matters is still regarding the 1968 Brussels Convention.
**d'appello has rejected the public policy objection and recognised the French judgment.**

**Lithuania**
In the single and very recent case where public policy was invoked, an applicant tried to prove that a judgment of a court in Poland is contrary to public policy of Lithuania because a defendant did not receive free legal aid during the proceedings. The public policy objection was not successful. The court decided that free legal aid is not awarded to everyone in proceedings and that it cannot be part of public policy.

**Luxembourg**
The public policy exception was raised more often with respect to substantive issues rather than procedural guarantees. In five cases out of seven, the argument was that the foreign judgment violated substantive public policy. In one case, procedural public policy was relied upon. In the last case, the party raising the objection failed to explain why it argued that the foreign judgment violated public policy.

**The Netherlands**
The public policy defence is mainly raised and examined with regard to the infringement of procedural guarantees. The following examples were found:
- party not serving counterparty with document opening proceedings
- violation of right to be heard
- lack of being notified of judgment
- lack of motivation in judgment
- writing error in judgment
- earlier performance of judgment by judgment debtor

Some examples were found of cases where one of the parties argued for a substantive public policy violation:
- unacceptably high court costs
- fraud
- unacceptably high child and partner alimony

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188 CA Luxembourg, 05 fevrier 2007, No 31257.
189 Haarlem, 25 April 2008, Nr. 141408/KG RK 07-1087.
190 Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306; Zutphen, 16 August 2006, Nr. 68792/HA ZA 05-332; Supreme Court, 27 June 2008, Nr. 07/10866; Supreme Court 5 April 2002, Nr. R01/111HR.
191 Supreme Court, 21 March 2008, Nr. C06/296HR.
193 Middelburg, 28 June 2006, Nr. 51494/HA ZA 06-84.
<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>In theory, public policy is applied in its substantive meaning. The Supreme Court of Justice ruled that a “refusal of the declaration of enforceability is only possible if the foreign judgment clearly violates public policy, which may be procedural in nature (severe lesion of the adversarial system, the judge’s impartiality, lack of reasoning) or substantive (serious contradiction of rules of competition)” (^{198}).</td>
</tr>
<tr>
<td>Slovenia</td>
<td>All reported cases related to procedural public policy.</td>
</tr>
<tr>
<td>Spain</td>
<td>According to the Article 45 of Regulation (EC) No 44/2001, Spanish courts maintain that they cannot examine substantive questions (^{199}), thus controlling only possible infringements of procedural guarantees (^{200}).</td>
</tr>
<tr>
<td>Sweden</td>
<td>In the 5 cases in which the public policy defence was invoked by the party opposing enforcement it was invoked both in its substantive meaning (level of damages (^{201}); entitlement to maintenance of grown-up child (^{202}); entitlement to maintenance as spouse (^{203})) and in relation to procedural guarantees (not properly called to hearing, no opportunity to present case (^{204}); judgment without instructions for appeal (^{205})). In the aforementioned cases where the court apparently made a schematic examination of public policy <em>ex officio</em> it is not explicit what the remit of examination has been but the regional reporter, Eva Storskrubb, assumes that both substantive and procedural elements were taken into account. With regard to substantive public policy, it is notable that in first instance cases dealing with judgments on maintenance obligations Svea Hovrätt systematically notes that even if the Regulation is applicable, the requirements of conventions on particular matters applicable in force in Sweden must also be taken into account, e.g. the Hague Convention on enforcement of maintenance obligations. Hence, enforcement is only valid if a child is under 21 years old and...</td>
</tr>
</tbody>
</table>

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194 Supreme Court, 12 March 2010, Nr. 08/04424.
195 Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306.
197 Supreme Court, 3 March 2006, Nr. C05/060HR.
201 Case Ö 2479-09.
202 Case Ö 1952-10.
203 Case Ö 4821-09.
204 Case Ö 6916-06.
205 Case Ö 615-10.
unmarried.

According to justice Mona Wildig of Svea Hovrätt, since Sweden is a party to the relevant Hague Convention, the limitation of enforceability in this manner has been considered possible under Article 71 of the Regulation even when the Regulation's procedure for recognition and enforcement is applied. However, if such an interpretation was not available, the principle that only children (i.e. persons under 21 years and unmarried) are entitled to maintenance could be considered to be a fundamental principle of Swedish law. Hence, any foreign judgment with broader obligations might in any event be refused enforcement, based on *ordre public*. Justice Hildig noted that that the enforcement cases related to maintenance are the only ones in relation to which the issue of *ordre public* in the context of the Regulation has generally arisen and been discussed in Sweden.

An older case from the Supreme Court[^206] predating the Regulation context demonstrates that same discussion. The case concerned a German (Federal Republic of Germany) maintenance judgment in favour of a brain damaged child unable to maintain itself as an adult. The Supreme Court found no grounds for referring to public policy and refusing enforcement based on the particular circumstances in the case, notably that the grown-up child and non-Swedish parent did not have recourse to state-based monetary assistance in their home country.

| United Kingdom & Republic of Ireland | Courts mainly had to deal with the alleged infringement of procedural guarantees[^207] or the procedural conduct of the parties[^208]. On occasion, arguments concerning the content or effect of the judgment have been addressed[^209], either independently or in conjunction with procedural arguments. |

With regard to this question, no relevant information could be gathered from Cyprus, Estonia and Latvia.

**(b) If the public policy exception was successful, was it more often due to its substantive or its procedural component?**

[^206]: T 198/90, reported NJA 1993:79.


<table>
<thead>
<tr>
<th>Member State</th>
<th>Reasons for the success of the objection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>The only reported case where the public policy exception was successfully raised concerned procedural public policy.</td>
</tr>
<tr>
<td>France</td>
<td>4 out of 5 cases where the public policy exception was successfully raised concerned procedural public policy. In the fifth case, an English judgment was found to violate French substantive public policy.</td>
</tr>
<tr>
<td>Germany</td>
<td>In the two cases where the public policy objection was successful, the foreign decisions did not meet procedural minimum standards.</td>
</tr>
<tr>
<td>Hungary</td>
<td>In the only case dealing with public policy the objection was successful due to its procedural component.</td>
</tr>
<tr>
<td>Italy</td>
<td>In Italy, the public policy objection has been successful only with regard to its procedural component. Conversely: a) Italian Courts have never refused to recognise Member State judgments given in breach of an arbitration agreement on the ground of procedural public policy; b) In <em>Gambazzi v Daimler Chrysler Canada Inc.</em>, the Corte d’appello of Milan held that, in the light of all the circumstance, it appears that the English order of debarmment does not constitute a manifest and disproportionate infringement of Mr Gambazzi’s right to be heard, although such kind of order is unknown in Italian civil litigation. Particularly, the Court had participated actively during the first stages of the English proceedings. Consequently, the Court has rejected the procedural public policy objection and has enforced the English default judgment rendered against Mr Gambazzi.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>There is report of only one case in which the public policy defence was successful. This case concerned a procedural public policy violation, i.e. a lack of motivation of a judgment.</td>
</tr>
</tbody>
</table>

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211 CA Colmar 25 mars 2004, No 02/04952: no reasons given by the foreign court; CA Versailles, 5 juillet 2006, No 05/04718: irregular service of documents instituting the proceedings; CA Versailles, 21 décembre 2006, No 06/03801: irregular service of documents instituting the proceedings; CA Reims, 7 mai 2007, No 06/01161: no service of documents instituting the proceedings.

212 CA Amiens, 26 janvier 2010, No 07/02364.


Portugal

The most common cases concern procedural issues. See the decision of the court of appeal of Lisbon: "A judgment given by an English court is not enforceable if the principle of adversarial procedure, the principle of substantial equality of the parties and the right to appeal have been infringed, since in England the appellant’s right to present a response to what the other party, at that time A., has stated against him, and thus the right to appeal, has been restrained" 218.

Spain

In the only case where public policy was admitted it was due to its procedural component 219: a German judgment included an order to remand the convicted in custody in a civil procedure, so that the Spanish court understood that this measure was contrary to Spanish public policy. Above all, the title was finally executed because Spanish courts understood that that measure was subsidiary.

United Kingdom & Republic of Ireland

There appear to be only two published decisions of United Kingdom courts since 2000 in which a public policy challenge to a declaration of enforceability under Regulation (EC) No 44/2001 or the Brussels Convention has succeeded. In one case 220, the objection was procedural in nature (proceedings re-started without notice to the defendant). In the other 221, the objection was partly procedural and partly “substantive” in nature (judgment superseded by later judgment; defendant automatically in breach by spending any money, including in challenging or seeking to vary order).

With regard to this question, no relevant information could be gathered from Austria, Cyprus, Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Sweden.

(c) If a foreign judgment was considered contrary to procedural public policy, was this mainly due to an incorrect application of law by the judge in the State of origin or was the foreign procedural law considered contrary to public policy itself?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Application by the foreign judge or foreign law considered contrary to public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>The only reported case where the public policy exception was successfully raised insisted that the foreign judgment had not only violated the rights of the defence, but also that it had incorrectly applied foreign procedural law (in this case, German law).</td>
</tr>
<tr>
<td>France</td>
<td>There is no indication in any case where the procedural public policy exception was successfully raised that the foreign court would not have applied its procedural law properly. It seems, therefore, that it is</td>
</tr>
</tbody>
</table>


in effect foreign procedural law which was found to be contrary to public policy.

<table>
<thead>
<tr>
<th>Germany</th>
<th>a) Incorrect application of law in the state of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In both cases where the public policy objection was successful, it was due to an incorrect application of law in the state of origin:</td>
</tr>
<tr>
<td></td>
<td>The decision of the Federal Court of Justice(^{222}) was based on the assumption of a violation of the right to be heard by the Polish court of origin: it disregarded the right of one party to produce evidence and affirmed paternity on the ground of hearsay.</td>
</tr>
<tr>
<td></td>
<td>In the case which gave rise to the decision of the OLG Zweibrücken(^{223}), the foreign court violated Article 19(2) of Regulation (EC) No 1348/2000.</td>
</tr>
<tr>
<td></td>
<td>The OLG Düsseldorf(^{224}) explicitly states that a violation of at least procedural public policy is mainly caused by an incorrect application of law by the foreign judge and not by the foreign procedural law.</td>
</tr>
<tr>
<td>b) Incompatibility of foreign law and domestic public policy</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The OLG Celle(^{225}) and the OLG Zweibrücken(^{226}), which did not finally assess whether public policy was violated, expressed concerns regarding the foreign law itself.</td>
</tr>
</tbody>
</table>

| Hungary | The rules of foreign procedural law do not appear in the only relevant decision, however the Hungarian court did not say anything about the incorrect application of law by the judge in the State of origin. |

| Italy | In principle, if a judgment given in another Member State is not recognised or enforced in Italy on the grounds of public policy, this is because the foreign procedural law is considered contrary to the public policy itself. No case was detected where the the application by the judge was the ground for refusal. The Corte d'appello of Milan held that the time limit allowed for an Italian company to prepare its defence was not sufficient, although corresponding to the provisions of the Belgian procedural law applying to an action against a defendant not domiciled in Belgium\(^{227}\). Similarly, the Corte d'appello of Naples\(^{228}\) has considered inadequate the time limits for service of a claim form. |

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\(^{222}\) BGH 26.8.2009, XII ZB 169/07.

\(^{223}\) 10.05.2005, 3 W 165/04.

\(^{224}\) 29.09.2006, I-3 W 156/06.

\(^{225}\) 08.09.2009, 8 U 46/09.

\(^{226}\) 22.09.2005, 3 W 175/05.


**The Netherlands**

In the previously mentioned case, the judgment violated Dutch procedural public policy due to the foreign judge’s wrongful application of his domestic procedural law\(^ {229}\).

**Portugal**

Both categories exist. The most common cases relate to deadlines, procedures and translations into Portuguese; see the decision of the Supreme Court\(^ {230}\) which held that the jurisdiction did not violate public policy. See also a decision of the Court of appeal of Oporto\(^ {231}\) concerning a default judgment and a decision concerning the lack of personal service or valid notification by substituted service\(^ {232}\). In particular:

Ac STJ 0834898: “According to the ECJ, reference to the public policy clause is only possible if the recognition or the enforcement of the decision rendered in another State violates the domestic legal system in an unacceptable manner by infringing a fundamental principle while it is not possible to invoke public policy if there are other grounds to refuse recognition. The court (of the state of origin) may condemn the defendant by default even if one cannot present any certification that proves that the defendant was notified of the act that instituted the proceedings, provided that for that effect all efforts have been made before the competent authorities of the State in whose territory the residence of the defendant is located in order to contact that defendant in due time”.

Ac RL 3876/2006: “That being stated, it is unknown when and under which terms the process in course in Germany has been served on the current appellant. These elements are essential to the granting of exequatur and to prove that is a burden of the plaintiff company, since only by presenting this proof it will be possible to determine the existence of an act which initiated the litigation. The current appellant has not managed to prove this element, wherefore one must conclude that the act that initiated the litigation has not even been communicated to the appellant. DECISION: All being examined, it is agreed to grant the appeal and, consequently, annul the appealed judgment, thus not to grant enforceability to the decision rendered on 28/01/2003 by the first instance court of Halle, Germany.”

**Slovenia**

Two cases related to insufficient and misleading information of the defendant in the context of an Italian decreto ingiuntivo. Due to the misleading information the party filed an appeal at the “wrong” court. The third case related to procedural fraud (substituted service).

**Spain**

In the only relevant case, the violation of public policy was due to a contradiction between German and Spanish procedural law.

**United Kingdom**

In both cases referred to above, the court's focus was on the content

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\(^{229}\) Rotterdam, 30 December 2009, 339640/HA RK 09-191.


\(^{231}\) 09.10.2008, Ac STJ 0834898.

\(^{232}\) Ac RL 08.02.2007, Ac RL 3876/2006.
Republic of Ireland of the foreign procedure, and not the correctness of its application by the foreign judge. English judges take a cautious approach in refraining from the appearance of reviewing the substance of the judgment. In *Maronier v Larmer*, the Court of Appeal emphasised that English courts should not “second guess” compliance by the Dutch courts with their own obligations under the ECHR.

With regard to this question, no relevant information could be gathered from Austria, Cyprus, Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Poland and Sweden.

**(d) Do national courts derive the content of public policy from sources of law such as Article 6 ECHR or the CFR?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Sources such as the ECHR or the CFR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Yes, cf. a decision of the OGH: Article 6 ECHR and the ban on discrimination provided for by community law are envisaged as sources of the content of public policy, but due to the circumstances of the case these provisions have not been further examined or applied.</td>
</tr>
<tr>
<td>Belgium</td>
<td>None of the reported cases mentioned any of these sources.</td>
</tr>
<tr>
<td>Finland</td>
<td>The courts did not explicitly state the source from where the content and remit of public policy was derived.</td>
</tr>
<tr>
<td>France</td>
<td>Although none of the reported cases which denied enforcement to foreign judgments on the ground of public policy referred to any of these sources, the French Cour de Cassation has repeatedly held that French courts can derive the content of public policy from provisions of the ECHR, and particularly Article 6 ECHR.</td>
</tr>
</tbody>
</table>
| Germany      | National courts derive the content of public policy from sources of law as Article 6 ECHR or the CFR, as the following decisions prove:  
1. OLG Frankfurt 21.06.2005, 20 W 463/04 regarding Article 12 of the EC Treaty  
2. OLG Karlsruhe 13.07.2005, 9 W 8/0 regarding the parties’ choice of law according to the Rome Convention  
3. OLG Hamburg 18.11.2008, 6 W 50/08 regarding Article 6 ECHR  
4. OLG Zweibrücken 10.05.2005, 3 W 165/04 regarding Article 6 ECHR  
5. OLG Zweibrücken 22.09.2005, 3 W 175/05 regarding Article 6 ECHR |

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235 15.02.2006 3 Ob242/95t.

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<table>
<thead>
<tr>
<th>Country</th>
<th>Public Policy Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Both, especially Article 6 ECHR.</td>
</tr>
<tr>
<td>Italy</td>
<td>The Italian Corte di cassazione derives the content of international public policy from:</td>
</tr>
<tr>
<td></td>
<td>International rules aimed at protecting the fundamental Rights (however, without explicitly referring to the ECHR)</td>
</tr>
<tr>
<td></td>
<td>EU rules (including Article 6(3) TFEU)</td>
</tr>
<tr>
<td></td>
<td>ECJ case law(^{237}).</td>
</tr>
<tr>
<td></td>
<td>Indeed, in <em>Pellegrini v Italy</em>(^{238}), the European Court of Human Rights held that Italy is entitled to deny enforcement of foreign judgments obtained in proceedings which do not comply with Article 6 ECHR on the ground of procedural public policy.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>One judgment ruled that, after the Krombach case, Article 6 ECHR could be used for the purpose of defining public policy(^{239}).</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The principles behind Article 6 ECHR are often used as public policy defences, for example:</td>
</tr>
<tr>
<td></td>
<td>- violation of right to be heard(^{240})</td>
</tr>
<tr>
<td></td>
<td>- lack of being notified of judgment(^{241})</td>
</tr>
<tr>
<td></td>
<td>- lack of motivation(^{242})</td>
</tr>
<tr>
<td></td>
<td>Only once has Article 6 ECHR been explicitly mentioned(^{243}).</td>
</tr>
</tbody>
</table>


\(^{238}\) European Court of Human Rights, 20 July 2001, 35 EHRR 44.

\(^{239}\) CA Luxembourg, 05 février 2007, No 31257.
<table>
<thead>
<tr>
<th>Location</th>
<th>Source Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>Such sources are taken into account, see cf. Court of Appeal of Coimbra\textsuperscript{244}: &quot;It is settled law that fundamental rights are effectively part of the general principles of law (see Opinion 2 / 94 of March 28, 1996, ECR. ECR I-1759, paragraph 33). To this end, the Court draws inspiration from the constitutional traditions common to the Member States as well as the guidelines supplied by international instruments for the protection of human rights which Member States have collaborated or acceded to. The European Convention on Human Rights and Fundamental Freedoms (‘ECHR’) is, in this context, of particular significance (see, inter alia, the judgments of 15 May 1986, Johnston, 222/84 ECR., p. 1651, paragraph 18, and March 28, 2000, Krombach, C-7/98, ECR. ECR I-1935, paragraph 25). It results from the ECHR, as interpreted by the European Court of Human Rights, that the right to a defence, arising from the right to a fair trial enshrined in Article 6 of that convention, requires a practical and effective protection to ensure the adequate and effective exercise of the rights of the defendant (see ECHR judgments Arctic and Italy on 13 May 1980, Series A, paragraph 37, § 33, and T. and Italy on 12 October 1992, Series A, n. ° C 245, § 28)”.</td>
</tr>
<tr>
<td>Spain</td>
<td>No references to these articles were found, but Spanish courts have developed the concept of public policy in an international sense from Article 24 of the Spanish Constitution, the content of which is very similar to Article 6 ECHR\textsuperscript{245}. Article 24 of the Spanish Constitution recognised as fundamental rights the main procedural guarantees which assure the right to a defence and the right to a fair trial.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The courts did not explicitly state the source from where the content and remit of public policy was derived.</td>
</tr>
<tr>
<td>United Kingdom &amp;</td>
<td>Under section 6 of the Human Rights Act 1998, judges in the United Kingdom are obliged to act in accordance with the provisions of the ECHR to which that act gives effect, insofar as it is possible for them to do so. The ECHR, in particular Article 6, is frequently relied on in cases of this type\textsuperscript{246} and was the focus of the decision upholding a challenge on public policy grounds in Maronier v Larmer\textsuperscript{247}. Article 1,</td>
</tr>
<tr>
<td>Republic of Ireland</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{240} Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306; Zutphen, 16 August 2006, Nr. 68792/HA ZA 05-332; Supreme Court, 27 June 2008, Nr. 07/10866; Supreme Court 5 April 2002, Nr. R01/111HR.

\textsuperscript{241} Supreme Court, 21 March 2008, Nr. C06/296HR.

\textsuperscript{242} Rotterdam, 30 December 2009, 339640/HA RK 09-191.

\textsuperscript{243} Supreme Court, 21 March 2008, Nr. C06/296HR.

\textsuperscript{244} 20.01.2009, RC 545/07.1TBOBT.C1, in www.dgsi.pt.

\textsuperscript{245} See, for all, Judgment TS 14/7/2007.


Protocol 1 of the ECHR has also been invoked, unsuccessfully, on more than one occasion. There is no evidence that the CFR has been relied on in United Kingdom courts as a source of public policy in cases of this type. It seems probable, however, that such arguments will be raised in the future, particularly in cases where the Charter accords with the ECHR, notwithstanding the limited legal effect which the Charter has under UK law (see the Protocol to the TEU on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom).

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovenia.

(e) Can you detect any recurring categories in the national case-law where enforceability is usually refused?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Categories courts frequently have to deal with</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>The service of the claim or of the judgment did not comport with applicable rules (in 16 cases out of 22 where the public policy)</td>
</tr>
<tr>
<td></td>
<td>The foreign judgment did not give reasons (in 7 cases out of 22)</td>
</tr>
<tr>
<td>Germany</td>
<td>Procedural fraud (at least 6 decisions); Italian “decreto ingiuntivo” (at least 7 decisions); Legal bases and calculation methods of maintenance obligations (7 decisions); Right to be heard (at least 6 decisions)</td>
</tr>
<tr>
<td>Greece</td>
<td>There are no recurring categories in the national case-law where enforceability is usually refused. Generally speaking, it can be argued that extremely high costs, exorbitant punitive damages and the full protection of the right to be heard (fundamental procedural defects in the process) impose a residual control of the title.</td>
</tr>
<tr>
<td>Italy</td>
<td>The defendant has not had enough time to prepare for his defence</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The following examples were found:</td>
</tr>
</tbody>
</table>


249 Since recognition and enforcement are so rarely refused, most of the Member States could not detect any categories of refusal but only categories courts frequently have to deal with.

250 A compilation of the decisions which deal with the categories mentioned in this section can be found in the annex GERMANY.


252 Haarlem, 25 April 2008, Nr. 141408/KG RK 07-1087.

253 Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306; Zutphen, 16 August 2006, Nr. 68792/HA ZA 05-332; Supreme Court, 27 June 2008, Nr. 07/10866; Supreme Court 5 April 2002, Nr. R01/111HR.
<table>
<thead>
<tr>
<th>Country</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>Declaration of enforceability of documents which have been formally</td>
</tr>
<tr>
<td></td>
<td>drawn up or registered as an authentic instrument (Article 57 of</td>
</tr>
<tr>
<td></td>
<td>Regulation (EC) No 44/2001); Judgments by default.</td>
</tr>
<tr>
<td>Spain</td>
<td>Since only one case dealt with public policy, no categories could be</td>
</tr>
<tr>
<td></td>
<td>detected.</td>
</tr>
<tr>
<td>Sweden</td>
<td>Due to the fairly limited amount of refusals it is difficult to state</td>
</tr>
<tr>
<td></td>
<td>for certain that there are recurring categories. However, one issue</td>
</tr>
<tr>
<td></td>
<td>that has arisen several times and that the Supreme Court has,</td>
</tr>
<tr>
<td></td>
<td>subsequent to a further appeal, also rendered its judgment on is</td>
</tr>
<tr>
<td></td>
<td>the temporal scope of the Regulation in relation to judgments from</td>
</tr>
<tr>
<td></td>
<td>“new” Member States. However, this “category” does not concern public</td>
</tr>
<tr>
<td></td>
<td>policy. Justice Mona Wildig of Svea Hovrätt confirmed that refusal</td>
</tr>
<tr>
<td></td>
<td>of enforcement is very rare and that to her knowledge, enforcement</td>
</tr>
<tr>
<td></td>
<td>has not been refused by Svea Hovrätt based on ordre public. As types</td>
</tr>
<tr>
<td></td>
<td>of cases where enforcement has been refused, she mentioned inter alia</td>
</tr>
<tr>
<td></td>
<td>documents not received within time limit, unclear original judgment,</td>
</tr>
<tr>
<td></td>
<td>party seeking enforcement did not have standing, party against whom</td>
</tr>
<tr>
<td></td>
<td>enforcement sought not party to original judgment.</td>
</tr>
<tr>
<td></td>
<td>From a research perspective, it is unfortunate that the Supreme</td>
</tr>
<tr>
<td></td>
<td>Court found that the Regulation was not temporally applicable because</td>
</tr>
<tr>
<td></td>
<td>that entailed that the Court did not have to deal with the second</td>
</tr>
<tr>
<td></td>
<td>question relating to substantive ordre public. Namely, the question</td>
</tr>
<tr>
<td></td>
<td>of whether damages for a traffic accident awarded by the Romanian</td>
</tr>
<tr>
<td></td>
<td>court that were 9 times higher than could be awarded in Sweden,</td>
</tr>
<tr>
<td></td>
<td>constituted grounds for refusal of enforcement. The appeal court,</td>
</tr>
<tr>
<td></td>
<td>Svea Hovrätt, notably did not find the level of damages in the case</td>
</tr>
<tr>
<td></td>
<td>an obstacle to enforcement.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of</td>
<td>It seems clear that enforceability will be refused if there is a</td>
</tr>
<tr>
<td>Ireland</td>
<td>manifest breach of the right of access to justice in Article 6 ECHR.</td>
</tr>
</tbody>
</table>

---

252 Supreme Court, 21 March 2008, Nr. C06/296HR.
254 Middelburg, 28 June 2006, Nr. 51494/HA ZA 06-84.
255 Supreme Court, 12 March 2010, Nr. 08/04424.
256 Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306.
258 Supreme Court, 3 March 2006, Nr. C05/060HR.
260 Case Ö 5591-09.
261 Case Ö 2479-09.
Formerly, it seemed clear that a Member State judgment obtained in knowing breach of an anti-suit injunction would be denied recognition on public policy grounds. That category of situation is now largely of theoretical significance following the ECJ’s decisions in *Turner v Grovit* and *Allianz Spa v West Tankers*, where the argument was rejected although the anti-suit injunction, granted before Cyprus acceded to the EU, was maintained.

There was, however, also judicial and academic support for the view that the public policy exception could also be relied on to challenge recognition or enforcement of a Member State judgment allegedly obtained in breach of an arbitration or (possibly) choice of court agreement, including in a situation where the court of origin had made a preliminary ruling denying the validity or effectiveness of that agreement. That argument, however, no longer appears viable following the West Tankers ruling and the subsequent decision of the English Court of Appeal in *National Navigation v Endesa*. It seems clear that enforceability will be refused if there is a manifest breach of the right of access to justice in Article 6 ECHR.

Formerly, it seemed clear that a Member State judgment obtained in knowing breach of an anti-suit injunction would be denied recognition on public policy grounds. That category of situation is now largely of theoretical significance following the ECJ’s decisions in *Turner v Grovit* and *Allianz Spa v West Tankers*, where the argument was rejected although the anti-suit injunction, granted before Cyprus acceded to the EU, was maintained.

There was, however, also judicial and academic support for the view that the public policy exception could the validity or effectiveness of that agreement. That argument, however, no longer appears viable following the *West Tankers* ruling and the subsequent decision of the English Court of Appeal in *National Navigation v Endesa*. It seems clear that enforceability will be refused if there is a manifest breach of the right of access to justice in Article 6 ECHR.

---

264 *Phillip Alexander Securities v Bamberger* [1997] ILPr 73 (QBD and CA).

265 ECJ, 27 April 2004, C-159/02.

266 ECJ, 10 February 2009, C-185/07.

267 See also *Advent Capital Plc v GN Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm)


270 *Phillip Alexander Securities v Bamberger* [1997] ILPr 73 (QBD and CA).

271 ECJ, 27 April 2004, C-159/02.

272 ECJ, 10 February 2009, C-185/07.

273 See also *Advent Capital Plc v GN Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm)


With regard to this question, no relevant information could be gathered from Austria, Cyprus, Belgium, Estonia, Finland, Latvia, Lithuania, Luxembourg, Poland, and Slovenia.

(f) **Is there any practical experience with the recognition and enforcement of judgments handed down in defamation proceedings?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Judgments in defamation proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>There are two decisions enforcing English judgments(^{276}).</td>
</tr>
<tr>
<td>Germany</td>
<td>No.</td>
</tr>
<tr>
<td>Greece</td>
<td>No.</td>
</tr>
<tr>
<td>Italy</td>
<td>No.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>No.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No.</td>
</tr>
<tr>
<td>Spain</td>
<td>No.</td>
</tr>
<tr>
<td>Sweden</td>
<td>No. However, in this context, a case was found which falls outside the scope of Regulation (EC) No 44/2001(^ {277}). The case concerned a Norwegian judgment by which the defendant had been found to have vilified the claimants in a TV broadcast and was therefore ordered to pay damages. The relevant convention as basis for enforcement was due to the temporal rules of the Nordic Convention. The Swedish Supreme Court first reviewed whether enforcement would be contrary to Article 10 ECHR, which it held would not be breached. Thereafter, the Court turned to public policy. The Court noted that in general, refusal of enforcement on <em>ordre public</em> grounds can only take place in exceptional cases and that this is the case particularly if the judgment has been rendered in another Nordic country. The Court noted that it is a fundamental and constitutional principle of the legal order that a party who assists by providing information for publication is free from criminal and civil liability and that it is the party who publishes or broadcasts that bears the responsibility. Hence the Court stated that enforcement must be refused on public policy grounds if a judgment on liability appears to be a circumvention of the Swedish constitutional protection. However, the matter must always be reviewed on a case-by-case basis. In the case at hand, the Court finally found that the judgment did not breach public policy and could be enforced in Sweden.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>No.</td>
</tr>
</tbody>
</table>

\(^{276}\) CA Paris, 29 juin 2006, no. 04/22985 ; CA Paris, 22 janvier 2009 no 07/17080.

\(^{277}\) Case Ö 2121-97, reported in NJA 1998:122.
Study on the Interpretation of the Public Policy Exception

With regard to this question, no relevant information could be gathered from Austria, Cyprus, Estonia, Belgium, Finland, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovenia.

(g) Did the non-recognition of a judgment due to incompatibility with public policy entail any amendment of law of the Member State of origin?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Amendments of law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Section 542(7) of the Austrian GEO provides for the possibility to apply for a motivated version of a default judgment if it is to be enforced in a State where the giving of reasons to a judgment is considered to form part of public policy.</td>
</tr>
<tr>
<td>Belgium</td>
<td>No.</td>
</tr>
<tr>
<td>Finland</td>
<td>No.</td>
</tr>
<tr>
<td>France</td>
<td>English courts have changed their practice after French courts denied enforcement of English default judgments on the ground that they lacked reasons and were therefore contrary to French public policy.</td>
</tr>
<tr>
<td>Germany</td>
<td>The obligation to give reasons for a judgment according to Section 30 of the German AVAG is based on the practice of French courts to refuse recognition and enforcement of foreign decisions which lack reasons or equivalent documents. The legal situation in insolvency law is equal, Article 102 § 2 EGInsO.</td>
</tr>
<tr>
<td>Greece</td>
<td>No.</td>
</tr>
</tbody>
</table>
| Italy        | Italian courts do not generally review the legal correctness of any finding of fact or law concerning the merit of the case. Indeed, they investigate the fairness of the foreign proceedings if the claim is based on Article 34 point (2) of Regulation (EC) No 44/2001 or if it is alleged that, in the foreign proceeding, there was a breach of the defendant’s right to a fair trial. Furthermore, it must be mentioned that the non-recognition of a judgment due to the incompatibility with Italian (procedural) public policy seems not to entail any amendment of the law of the Member State of origin. Moreover, with regard to Article 27 point (2) of the 1968 Brussels Convention and Article 34 point (2) of Regulation (EC) No 44/2001, Italian courts state that the enforcing tribunal should evaluate the possible grounds for non-recognition by taking into


280 Introductory Act to the German Insolvency Act, see Paulus, 2008, Art. 26 para 12.

account the concrete circumstances of the dispute. Conversely, it should not evaluate either the content of foreign procedural rules nor their concrete application by the foreign Court281.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Luxembourg</td>
<td>No.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>No.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No.</td>
</tr>
<tr>
<td>Spain</td>
<td>No.</td>
</tr>
<tr>
<td>Sweden</td>
<td>No.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>No.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Sweden.

(h) Is case-law relating to other EU instruments, in particular those listed in this questionnaire, considered relevant for the application of the public policy exception according to point (1) of Article 34 of the Regulation?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>The Kuovola Court of Appeal282 referred to case-law of the ECJ concerning the Service Regulation. There is, generally speaking, no reason why case-law on public policy – if available in the EU context and in relation to the other Regulations on private international law and procedural cooperation – would not be considered relevant, in particular case-law from the ECJ or the Swedish Supreme Court.</td>
</tr>
<tr>
<td>Germany</td>
<td>There is no such case-law but legal literature advocates the transferability of the interpretation of the public policy exception as referred to in European primary law regarding the fundamental freedoms283. It is case-law regarding Regulation (EC) No 44/2001 which is considered relevant for the other instruments under scrutiny and, as recently stated by the Bundesfinanzhof284, even for other European instruments, as Directive 76/308/EEC (regarding the service of an untranslated payment order including untranslated information on legal remedies).</td>
</tr>
<tr>
<td>Lithuania</td>
<td>There are no cases which directly answer the question. However, the</td>
</tr>
</tbody>
</table>

284 03.11.2010, VII R 21/10.
The case-law of the Constitutional Court may be important. For example, in its ruling of 16 January 2006, it acknowledged that it is necessary to have legal provisions which provide for the possibility to challenge every judgment of a first instance court. The Constitutional Court held that the appeal is a mandatory instance and cannot be limited. This could be interesting if a judgment of another Member State which cannot be appealed there is contrary to Lithuanian public policy.

In a ruling of 21 September 2006 the court held that every judgment must be well motivated and that the introductory and resolution parts of the judgment cannot be adopted and announced earlier than the reasoning. Thus the lack of reasoning can be contrary to Lithuanian public policy.

Furthermore, it could be important that there are cases regarding recognition of judgments from third countries where recognition was refused on the ground of public policy because maintenance payments were awarded to a person older than 21 years.

<table>
<thead>
<tr>
<th>Country</th>
<th>Case-law relating to other EU instruments usually refers to</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>No, on the contrary, case-law relating to other EU instruments usually refers to Regulation (EC) No 44/2001.</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>Case-law was not referred to in relation to public policy in any of the cases reviewed. However, there is in general no reason why case-law on public policy – if available in the EU context and in relation to the other Regulations on private international law and procedural cooperation – would not be considered relevant, in particular case-law from the ECJ or the Swedish Supreme Court.</td>
<td></td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>No, on the contrary, case-law relating to other EU instruments usually refers to Regulation (EC) No 44/2001.</td>
<td></td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, and Slovenia.

### 3.2.3. Scope of the public policy exception

According to the case-law of the ECJ, the public policy exception is an obstacle to the free movement of judgments in the Internal Market. Thus, it has to be handled in a restrictive way: it only applies if recognition and enforcement are “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle”.

(a) Against this background, is point (1) of Article 34 of the Regulation applied broadly or narrowly?

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285 Case number 7/03-41/03-40/04-46/04-5/05-7/05-17/05.
286 Case number 35/03-11/06.
Austria
Narrowly. Courts stressed that the public policy clause only applies in "exceptional cases"288 and that it is not possible to review foreign law as such because a violation of public policy can only be derived from the concrete result of the application of foreign law289.

Belgium
It was reported that courts have expressly stated that the exception ought to be interpreted narrowly290 and that the low number of cases where the public policy exception was successfully raised clearly reflects this.

Finland
From the very brief judgments in the fairly small number of reviewed cases, it is difficult to gauge in a definite manner whether Article 34 point (1) is applied broadly or narrowly. However, literature in Finland suggests that to refuse recognition on *ordre public* grounds remains a measure of final resort291. Hence, the assumption would be a narrow application.

France
It was reported that the low number of cases where the public policy exception was successfully raised clearly suggests that Article 34 point (1) is applied narrowly.

Germany
In general, the public policy exception is narrowly applied as can be seen from the German guidelines for its application (see below: e.g. the obligation of the defendant to lodge appeals against the decision in the state of origin; the burden of proof, the requirements concerning the substantiation of submissions, etc.).

However, the Federal Court of Justice (BGH) applied the exception generously in a decision of 26 August 2009292: the court affirmed a violation of the right to be heard because the court of origin disregarded an offer to furnish evidence, although it remained unclear whether the offered evidence would have influenced the findings in the state of origin and, consequently, whether the violation of the right to be heard was causal for the judgment. In the same decision, the BGH also made an exception from the debtor’s obligation to appeal the judgment in its state of origin.

Greece
Article 34 point (1) is applied narrowly, in accordance with the case-law of the ECJ.

Hungary
The only application of the public policy clause in Article 34 point (1) was made by the Supreme Court293, where it reviewed the decisions of the two lower courts concerning the enforceability of an Austrian judgment by default in Hungary. All three courts denied the

288 Cf. OGH 22.02.2007 3Ob233/06w; OGH 30.05.2006 3 Ob49/06m.
289 OGH 15.02.2006 3 Ob242/95t.
290 E.g. Tribunal Civil de Liège (24/03/93) Jurisprudence de Liège, Mons et Bruxelles, 1994, p. 929, which also ruled that application of the exception ought to be "rare" and "reserved for exceptional cases".
292 XII ZB 169/07.
recognition of the Austrian judgment by default with reference to public policy. However, only the Supreme Court recognised that, in this case, Article 34 point (1) shall apply. The interpretation of the provision by the Supreme Court did not go beyond the limits of the interpretation in *Krombach v Bamberski* (narrow), whereas the Supreme Court, taking into account the numerous infringements committed by the Austrian court (language usage, lack of a hearing by the court, etc.), held that there was a violation of fundamental procedural guarantees. In this regard, the Supreme Court classified the Austrian judgment – with reference to the wording of the *Krombach* case - as infringing the legal system of Hungary to such an extent that it could be seen as a violation of the fundamental principle of a fair trial.

### Italy

In Italy, the public policy objection has never been successful with regard to its substantive component. Besides, Article 34 point (1) is applied strictly concerning its procedural component.

For example, abuse of process has never been considered an infringement of public policy. Moreover:

a) the Corte di Cassazione holds that Italian procedural public policy may be infringed only with regard to the principles which establish the inviolable right to a defence. However, these principles do not obligate the court to give reasons for the decision. Even if the obligation to provide a reasoning for a decision is stipulated in a constitutional provision (Article 111(8) of the Italian Constitution), the provision is still closely connected to the organisation of the internal legal system. For this reason, no principle of public policy is derived from this rule.\(^{294}\)

b) the right to file for a review of the court of appeal's decision before a court of third instance is not considered as being part of the "right to a fair trial" as stated in Article 6 ECHR as well as in Article 111(1) of the Italian Constitution. Consequently, the right to file for a review of the court of appeal's decision before a court of third instance does not fall within the concept of Italian procedural public policy.\(^{295}\)

### Luxembourg

It was reported that the low number of cases where the public policy exception was successfully raised clearly suggests that Article 34 point (1) is applied narrowly.\(^{296}\)

### The Netherlands

Dutch courts construe Article 34 point (1) narrowly.

### Portugal

The public policy exception is applied narrowly. Almost all decisions state that "With Regulation (EC) No 44/2001 on jurisdiction and on the recognition and enforcement of judgments in civil and commercial

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\(^{294}\) Corte di cassazione, I Section, May 18, 1995, No 5451, Jure id: 757 available at http://ec.europa.eu/civiljustice/jure/consultation_det_en, which has recognised an English judgment lacking in statement of reasons. See also Corte di cassazione, I Section, March 22, 2000, No 3365, Giurisprudenza italiana, 2000, 1786 although relating to the autonomous Italian law on recognition of foreign judgments.


\(^{296}\) CA Luxembourg, 05 February 2007, No 31257.
matters, the Council created a normative instrument of community law which provides for the unification of rules of conflict of jurisdiction in civil and commercial matters, as well as the simplification of formalities striving after a quick and simple recognition and enforcement of decisions regarding these matters\textsuperscript{297}.

Spain

It was reported that the public policy exception was applied narrowly, only in a procedural sense and in very specific cases.

Sweden

From the very brief judgments it is difficult to gauge in a definite manner whether Article 34 point (1) is applied broadly or narrowly. However, the competent Swedish court (Svea Hovrätt) has for example noted that for ordre public to arise, the conflict between the foreign and the Swedish legal order must relate to a “fundamental legal rule”. In addition, Svea Hovrätt notes that, taking into account the prohibition to retry the matter in substance, the foreign decision must clearly negate a fundamental rule in the legal order\textsuperscript{298}. Based on these statements, it is more likely that Svea Hovrätt applies Article 34 point (1) narrowly than broadly.

United Kingdom & Republic of Ireland

Article 34 point (1) of the Regulation has been applied narrowly, consistently with the ECJ’s case-law on this subject\textsuperscript{299}. English courts have required “exceptional” or “extraordinary” circumstances to justify invoking the exception.

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Latvia, Lithuania, Poland and Slovenia.

(b) In cases where Article 34 point (1) of the Regulation was applied broadly, what reasons have been given for this?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reasons for a broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Belgium</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Finland</td>
<td>There is no evidence of a broad application.</td>
</tr>
<tr>
<td>France</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Germany</td>
<td>In the aforementioned judgment of 26 August 2009\textsuperscript{300}, the BGH gave the following reasons:</td>
</tr>
<tr>
<td></td>
<td>(a) Reasons for the affirmation of a violation of public policy despite</td>
</tr>
</tbody>
</table>


\textsuperscript{298} See case Ö 6916-09.


\textsuperscript{300} XII ZB 169/07.
the lack of proof of causality:

Instead of examining the causality of the violation of the right to be heard for the obligation to pay alimony, the court held that it was sufficient that the violation was causal for the concrete course of the procedure: if the defendant’s offer to provide for evidence had been taken into account, the maintenance obligation would not have been based only on the mother’s declaration and thus the judgment would not have violated the defendant’s right to be heard.

b) Reasons for the exception of the obligation to lodge an appeal in the state of origin:

According to the BGH, the defendant was not obliged to appeal in the state of origin because neither did he know about the decision rendered against him nor ought he to have known about it: he could expect that a decision was not rendered before the evidence which he offered was taken.

<table>
<thead>
<tr>
<th>Country</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Hungary</td>
<td>There were no reasons listed.</td>
</tr>
<tr>
<td>Italy</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Portugal</td>
<td>It was reported that denials are rare and isolated, unless it comes to the violation of guarantees of the principle of adversary proceedings. Reference was made to a decision of the Supreme Court 301, unfortunately without further specifications.</td>
</tr>
<tr>
<td>Spain</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
<tr>
<td>Sweden</td>
<td>There is no evidence of a broad application.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>There is no evidence of a broad interpretation.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Latvia, Poland and Slovenia.

(c) Did national authorities develop specific criteria to implement point (1) of Article 34 of the Regulation or the ECJ’s guidelines, e.g. criteria to clarify the terms of the “fundamental nature” of the infringed provision, the “unacceptable degree” to which the foreign judgment has to be at variance with the domestic legal order, the “manifest” breach, etc.?

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301 Ac. STJ in www.dgsi.pt.
<table>
<thead>
<tr>
<th>Member State</th>
<th>Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>See above: question 1.</td>
</tr>
<tr>
<td>Belgium</td>
<td>Public policy was defined using the following terms: “incompatibilité inacceptable”\textsuperscript{302}, “violation manifeste”\textsuperscript{303} or “d’un principe considéré comme essentiel à l’ordre moral, politique et économique”\textsuperscript{304}.</td>
</tr>
<tr>
<td>Finland</td>
<td>The foreign judgment has to be “contrary to the fundaments of the Finnish legal order”. No further specification was identified.</td>
</tr>
<tr>
<td>France</td>
<td>There is no particular definition of public policy. Reported cases systematically used the language of the regulation itself (“manifestement contraire à l’ordre public”).</td>
</tr>
<tr>
<td>Germany</td>
<td>(1) regarding procedural public policy German courts substantiate the “unacceptable degree” of the divergence between the foreign judgment and the domestic legal system as follows: “A violation of public policy cannot be assumed only because the foreign judgment was rendered in a proceeding which does not comply with mandatory provisions of German procedural law. The foreign proceeding must rather deviate from fundamental principles of German procedural law to such an extent that the decision cannot be considered as rendered in a constitutional procedure anymore.” “Breaches of elementary procedural guarantees are necessary. Only fundamental and manifest violations of procedural guarantees can entail the refusal of recognition and enforcement.”\textsuperscript{305} (2) Regarding substantive public policy, German courts describe the requirement of the “unacceptable degree” of discrepancy as follows: “A foreign decision does not violate German substantive public policy only because a German judge would have decided differently, if he had had jurisdiction, due to German mandatory provisions. The public policy exception only applies if the result of the foreign judgment contradicts fundamental ideas of German law to such an extent that it has to be considered unsustainable to give any effect to it in Germany.”\textsuperscript{306}</td>
</tr>
</tbody>
</table>

\textsuperscript{305} BGH 26.08.2009, XII ZB 169/07; OLG Frankfurt 30.06.2005, 20 W 485/04; OLG Stuttgart 20.04.2009, 5 W 68/08; OLG Köln 28.06.2006, 16 W 15/06. 
\textsuperscript{306} OLG Hamburg 18.11.2008, 6 W 50/08; OLG Frankfurt 30.03.2005, 1 W 93/04; OLG Celle 08.09.2009, 8 U 46/09; BGH NJW 1992, 3096, 3101.
With regard to the “fundamental nature” of the infringed right, German courts described this criterion in the following manner:

At least the disregard of constitutional rights triggers the application of the public policy exception. This includes human dignity and the right to a fair trial, in particular the prohibition of arbitrariness and the right to be heard. However, the protection of these rights does not guarantee a certain conduct of proceedings. Especially the right to be heard can be restricted if this is necessary in favour of the peculiarities of some proceedings, e.g. warrants or enforcement measures. Nevertheless, it was stressed by OLG Saarbrücken that public policy provides protection against a violation of fundamental human rights. The “ordre public universel” guarantees a minimum of righteousness in a sense of natural law.

According to the OLG Hamm the violation of the clarity requirements of German enforcement law can lead to the application of the public policy exception.

The Federal Labour Court envisaged an application of the public policy exception because the state of origin violated German sovereign rights. Apparently, sovereign rights can be a principle of “fundamental nature” in German law.

In examining whether a provision is of fundamental importance, the judicial practice considers foreseeable legal developments and reform projects.

Greece
A manifest breach only occurs if there is an unacceptable degree of violation of the fundamental right to be heard. The procedural defects must be of a fundamental nature. Mere procedural and/or substantive discrepancies between legal orders do not constitute per se a manifest breach.

Hungary
The reported feasible answer is no.

Italy
The Italian Corte di cassazione held that the “fundamental nature” of a provision derives from its attitude to protect fundamental rights: it takes into account not only the rights established by constitutional

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307 BGH 29.06.2000, IX ZB 23/97 (regarding the Brussels Convention); BGH 20.05.2010 IX ZB 212/07 (regarding the Lugano Convention).
308 BGH 26.08.2009, XII ZB 169/07.
310 OLG Hamm 19.08.2003, 29 W 29/03 – this statement was incorrect as the recognition proceedings shall adapt the foreign judgment to the requirements of the enforcement law of the requested Member State.
311 OLG Köln 17.03.2004, 16 W 2/04, but, OLG Köln 15.09.2004, 16 W 27/04, according to which the lack of the possibility to put a foreign interest claim in concrete terms cannot be considered as a ground for refusal pursuant to Articles 34 and 35 of Regulation (EC) No 44/2001.
312 BAG 30.10.2007, 3 AZB 17/07.
313 See BGH 25.01.2005, IX ZR 78/04 and BGH 10.06.2009, XII ZB 182/08 regarding the Rome Convention (in its German implementation) and Regulation (EC) No 2201/2003.
provisions but also rights provided in international rules and in EU rules, without expressly referring to the ECHR. The Corte di cassazione has also declared that "only the right to a fair trial shall be considered as a component of procedural public policy."

| The Netherlands | The following phrases have been used in Dutch case-law to clarify or explain the standard applied in Article 34 point (1) of the Regulation:
- "This provision needs to be interpreted restrictively and should be applied with caution. In case of a violation of fundamental principles of due process, the enforcement of a foreign judgment can be manifestly contrary to public policy."³¹⁶
- "What is required is a manifest, eye-catching, violation of public policy."³¹⁷
- "The question whether the recognition is contrary to public policy must be ascertained by having regard only to the fact whether the public policy violation existed at the time recognition was sought, not the moment in time the judgment was rendered."³¹⁸

| Portugal | It was reported that there is no particular implementation.

| Spain | Although the Spanish Supreme Court maintains that there is no autonomous and uniform concept of public policy in Spain, it has stated that its content in an international and procedural context could be "identified with the rights and guarantees of Article 24 of the Spanish Constitution (for example, with the right to an effective judicial protection)."

| Sweden | The conflict between the foreign and the Swedish legal order "must relate to a fundamental legal rule"; the foreign decision must "clearly negate a fundamental rule in the legal order."³²⁰

| United Kingdom & Republic of Ireland | The approach of the United Kingdom Courts generally follows that of the ECJ (see, in particular, the decisions of the English Court of

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³¹⁸ Opinion of AG Strikwerda in: Supreme Court, 27 June 2008, Nr. 07/10866.
³²⁰ See case Ö 6916-09.
Study on the Interpretation of the Public Policy Exception

Appeal in *Apostolides v Orams*[^321^], *National Navigation v Endesa*[^322^] and *Maronier v Larmer*[^323^], where the ECJ’s decisions in Case 7-98, *Krombach v Bamberski* and Case C-420/07, *Apostolides v Orams* were considered and applied.

In its decision in *Apostolides v Orams* (following that of the ECJ) the Court of Appeal emphasised that the content of English public policy was a matter for the courts and not the executive.

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Sweden.

**(d) Do courts apply or did they even develop limits to the application of public policy, e.g. the duty for the debtor to make use of available (maybe even extraordinary) remedies in the State of origin?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Limits</th>
</tr>
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<tbody>
<tr>
<td>Austria</td>
<td>In legal literature it is stressed that remedies in the state of origin must be exhausted and that, furthermore, public policy cannot be used to correct a negligent conduct of proceedings in the state where the judgment was rendered[^324^].</td>
</tr>
<tr>
<td>Belgium</td>
<td>None of the detectable cases suggested so.</td>
</tr>
<tr>
<td>Finland</td>
<td>No.</td>
</tr>
<tr>
<td>France</td>
<td>None of the detectable cases suggested so.</td>
</tr>
<tr>
<td>Germany</td>
<td>German jurisprudence and literature have developed the following limits to the application of the public policy exception:</td>
</tr>
<tr>
<td></td>
<td>(a) Obligation to file an appeal in the state of origin and autonomous conduct of the proceedings.[^325^] Systematically, this obligation is based on an analogous application of Article 34 point (2) of Regulation (EC) No 44/2001[^326^]. In the legal literature it is disputed whether even extraordinary remedies have to be exhausted in the state of origin[^327^]. Courts regularly approve an exception of the obligation to file an appeal in the state of origin where the judgment was obtained by means of procedural fraud: if the judgment was</td>
</tr>
</tbody>
</table>


given in absence of the defendant, he can still claim the procedural fraud in the stage of recognition and enforcement. The literature criticises this practice by referring to the system of jurisdiction which underlies Regulation (EC) No 44/2001: it forces the defendant to litigate in the courts having jurisdiction under the Regulation. According to a decision of the OLG Köln, the public policy objection on the ground of procedural fraud can at least no longer be raised in an action against the enforcement as provided by German law (Section 767 ZPO) or in an action for cessation of enforcement (Section 826 BGB). In the aforementioned recent decision of the Federal Court of Justice, which did not deal with procedural fraud but with the violation of the right to be heard in the state of origin, the court negated a preclusion of the public policy exception again, although the defendant failed to lodge an appeal against the decision in the state of origin (supra III 2). The reason was, as already noted, that the defendant neither knew about the foreign decision nor ought he to have known about it. This reflects that the obligation to exhaust remedies in the state of origin is restricted by the criterion of reasonableness for the defendant. The obligation to exhaust remedies in the state of origin is an expression of a superior basic principle, namely the principle of procedural personal responsibility. This principle restrains the application of the public policy exception in the following decisions:

OLG Köln 19.03.2004, 16 W 39/03: no breach of public policy where the judgment was served without translation if the defendant was represented by a lawyer in the state of origin and had to expect a judgment

OLG Karlsruhe 24.04.2007, 9 W 74/06: no breach of public policy in the event of service by filing the document away after the defendant


330 17.11.2008, 16 W 27/08.


332 Cf. Schlosser, 2009, Art. 34-36 para 4; Geimer in Geimer/Schütze, 2010, Art. 34 para 30; Schack, 2010, para 957, holds that, furthermore, such an obligation overcharges the defendant at least in the case of violation of procedural fraud.

333 BGH 26.08.2009, XII ZB 169/07.

334 Kreuzer/Wagner in Dauses, 2010, para Q.671; Geimer in Geimer/Schütze, 2010, Art. 34 paras 40-41, making an exception for “absolutely immoral law”: when it comes to such law, recognition must be refused.

335 IX ZB 2/98, the so-called “Bürgschaftsentscheidung”.

336 Geimer in Geimer/Schütze, 2010, Art. 34 para 19 et seq.

337 Geimer in Geimer/Schütze, 2010, Art. 34 para 39; Leible in Rauscher, 2011, Art. 34 Brüssel I-VO, para 8; regarding the Brussels Convention OLG Köln 06.10.1994, 7 W 34/94.

338 Geimer in Geimer/Schütze, 2010, Art. 34 para 39; incidentally, the decisiveness of this date seems to be more in line with the principle of automatic extension of effects of the foreign judgment to the other member states.

failed to nominate a domestic address for service

OLG Zweibrücken 25.08.2005, 3 W 96/05: no breach of public policy if the defendant was not personally served with the judgment although he withdrew his lawyer’s mandate

BGH 23.06.2005 IX ZB 64/04 for a similar situation

OLG Frankfurt 16.12.2004, 20 W 507/04: no breach of public policy if the debtor was not served with the decree which declared a request for payment enforceable in the state of origin

BGH 06.10.2005, IX ZB 360/02 (Brussels Convention): no breach of public policy where a party was not summoned to appear at an additional hearing if it did not appear at the first hearing: it was given the possibility to be heard but violated its obligation to cooperate.

BGH 18.09.2001 IX ZB 104/00 (Brussels Convention): no breach of public policy if a default judgment was rendered after the defendant was summoned to appear on a nonexistent date indicated in the translated summons: the defendant should have inquired about the correct date at the court. The right to be heard (Article 103(1) of the German Constitution) only guarantees the reasonable opportunity to take part in the proceedings; the parties have to avail themselves of it.

(b) Specific link to the domestic legal system (exceeding the simple fact that enforcement is sought in Germany)

According to German legal literature, the application of the public policy exception in its substantive as well as in its procedural meaning is restricted by the unwritten requirement of a sufficient connection of the case to the domestic legal system. The Federal Court of Justice made reference to this requirement in its judgment of 24 February 1999.

(c) Effet atténué

At the stage of recognition and enforcement the exception is interpreted more generously than in conflicts of law. Recognition is not mandatorily refused only because the German judge would have avoided applying the foreign provision which underlies the foreign judgment, if he had had jurisdiction. This can be seen from the German implementation of the guidelines of the ECJ.

(d) Relevant date

The relevant date for assessing whether the foreign decision violates German public policy is the date when the German court is concerned with the declaration of enforceability and not the date when the foreign decision was rendered. Thus, reductions of the German standards can be considered which lead to a more generous practice of recognition. However, if German standards intensified in the meantime, the relevant date should be the date when the judgment was rendered in the state of origin.

(e) Partial recognition
Furthermore, it is a recognised fact that the recognition of a judgment cannot be refused *in toto*, if its content can be separated and only one part contradicts German public policy. A partial recognition shall apply in particular if judgments awarding exorbitant damages are at stake\(^\text{339}\).

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Greece</td>
<td>The debtor must make use of available remedies in the State of origin. Courts must only consider procedural defects when the Member state of origin does not provide for a full effective remedy and/or in order to protect the fundamental right to be heard.</td>
</tr>
<tr>
<td>Hungary</td>
<td>The reported feasible answer is no.</td>
</tr>
</tbody>
</table>
| Italy        | Italian Courts and Italian Scholars have developed the following limits to the application of the procedural public policy exception in recognition of foreign judgments:  

(a) Duty for the debtor to make use of available (ordinary) remedies in the State of origin  

The Italian Corte di cassazione has confirmed that the defendant shall exhaust the remedies of the judgment in the State of origin in a dispute concerning the recognition of a foreign judgment in accordance with Italian national law (Article 64(b) of the Italian Statute on Private International Law and International Civil Procedure of 31 May 1995, No 218), without further explanations\(^\text{340}\). However, most Italian authors link the obligation as mentioned above to the principle of procedural personal responsibility\(^\text{341}\).  

(b) Relevant date: The relevant date for assessing whether the foreign judgment is contrary to Italian procedural public policy is the date when the domestic court is concerned with the declaration of enforceability and not the date in which the decision was pronounced\(^\text{342}\). |
| Luxembourg   | None of the detectable cases suggested so. |
| The Netherlands | The following phrases have been used to limit the application of public policy exceptions in bilateral and multilateral judgment recognition treaties and EU instruments in general, but not limited to Article 34 point (1) of Regulation (EC) No 44/2001:  

- “With regard to the recognition and execution of foreign judgments, the public policy exception affects both the outcome (in the meaning of result) of the foreign decision, but also in the manner in which it has been produced (in the meaning of fundamental demands of due process). Since judgment recognition treaties serve the purpose of facilitating the mutual recognition and enforcement of judicial decisions as much as possible, the public policy-exception should be applied with caution and should at the  

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\(^{342}\) D’Alessandro, 2007, p. 183.
very least not be used to investigate the correctness/appropriateness of the judgment; it does not allow a révision au fond.343

- “If the foreign court’s procedural law violations – e.g. a court’s violation of its obligation to motivate its decision or hear one of the parties to the dispute – could have been repaired by the injured party’s right of appeal to the foreign judgment and this party was not hindered from filing such an appeal, the foreign judgment cannot be refused recognition on the basis of having violated this country’s public policy.”344

<table>
<thead>
<tr>
<th>Country</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>It was reported that limits are applied.</td>
</tr>
<tr>
<td>Spain</td>
<td>Courts usually refuse public policy statements based on Article 45 of the Regulation, according to which it is prohibited to control the substantive aspects of the case345, and in Article 35(3), according to which it is forbidden to examine questions of judicial competence346.</td>
</tr>
<tr>
<td>Sweden</td>
<td>No.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>United Kingdom courts have taken into account the existence and/or exercise of a right of appeal in the State of origin in considering whether a judgment violates public policy for the purposes of Regulation (EC) No 44/2001 or the Brussels Convention. In particular, this approach has been taken where the judgment is alleged to have been procured by fraud347 and where there is alleged bias in the first instance tribunal348.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Latvia, Lithuania, Poland and Slovenia.

**(e) How do procedural aspects influence the application of Article 34 point (1) of the Regulation? In particular:**

(aa) Do courts apply the public policy exception and do they determine the facts ex officio or only on submission of the parties?

(bb) Is there any particular impact of the burden of proof?

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343 Opinion of AG Strikwerda in: Supreme Court 5 April 2002, Nr. R01/111HR.
344 Supreme Court 5 April 2002, Nr. R01/111HR.
(cc) May courts consider facts not considered or not acknowledged by the court in the state of origin?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects</th>
</tr>
</thead>
</table>
| Austria      | (aa) The OGH\(^{349}\) held with regard to the Lugano Convention that courts have to apply the public policy exception on their own motion. This position is also taken by legal literature\(^{350}\).

(bb) The burden of proof lies with the party which challenges recognition and enforcement and can lead to the non-admission of the public policy exception\(^{351}\).

(cc) It can be derived from the case-law of the OGH\(^{352}\) that, in principle, additional facts can be taken into account: the court held that it – unlike the courts of precedent instances (!)– cannot consider facts beside the judgment in question. This position is also taken in legal literature\(^{353}\).

Belgium       | None of these issues have been addressed in the relevant case-law. |

Finland       | (aa) Courts do review public policy ex officio based on the facts included in the case documentation. |

(bb) The application for enforcement follows the procedure and procedural rules for application matters that vary to some extent from general civil proceedings. However, the general burden of proof principles apply.

(cc) In principle yes. There is no specific prohibition of particular types of facts that cannot be considered as long as the facts are included in the case documentation. However, the general rule in Article 45(2) of the Regulation may naturally affect whether certain facts may be considered.

France        | None of these issues have been addressed in the relevant case-law. |

Germany       | (aa) Several judgments\(^{354}\) held that the appellant failed to invoke the public policy exception. Nevertheless, the courts examined a violation of public policy because the possibility of a breach follows from the facts submitted by the party. |

This approach leads to the conclusion that the public policy

\(^{349}\) 22.10.2009 3Ob155/09d.

\(^{350}\) Burgstaller/Neumayr, 2010, Art. 34 EuGVVO para 11.

\(^{351}\) Cf. OGH 22.02.2007 3Ob233/06w; OGH 30.05.2006 3 Ob49/06m and OGH 30.09.2009 3Ob161/09m (regarding autonomous law but with explicit reference to Article 34 BR).

\(^{352}\) 22.02.2007 3Ob233/06w.

\(^{353}\) Burgstaller/Neumayr, 2010, Art. 34 EuGVVO para 11.

\(^{354}\) OLG Oldenburg 22.07.2003, 8 W 64/03, OLG Köln 19.03.2004, 16 W 39/03, OLG Zweibrücken 25.01.2006, 3 W 239/05 and, regarding the Brussels Convention, OLG Köln 12.01.2004, 16 W 20/03.
exception is scrutinised ex officio but that the facts have to be submitted by the parties\(^{355}\). This also applies to the judgments of the OLG Köln regarding the Brussels Convention\(^{356}\) and of the OLG Karlsruhe\(^{357}\), according to which the grounds for refusal listed in Article 27 of the Brussels Convention are “Einwendungsnormen”. Additionally, the Federal Court of Justice explicitly addresses the question\(^{358}\) in the context of Article 34 point (2) of Regulation (EC) No 44/2001 and answers it in the aforementioned manner. It argues that the fact-finding cannot take place ex officio because the procedural law of the concerned court applies (principle of the *lex fori*) and therewith the German “Beibringungsgrundsatz”. These findings seem to apply to Article 34 point (1) as well, the more so as the mentioned solution was applied under the Brussels Convention. If the legislator had wanted a change, he would have expressed it in the wording of Article 34 of Regulation (EC) No 44/2001\(^{359}\).

Legal literature correctly stresses that courts must not examine the public policy exception ex officio by referring to the principles of acceleration and simplification which underlie Regulation (EC) No 44/2001\(^{360}\). An exception is only considered in cases where public interests would be affected by the enforcement of the foreign decision\(^{361}\).

(bb) The burden of proof lies with the party which contests the enforceability of the foreign decision\(^{362}\). A reversal of the burden of

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\(^{355}\) Tschauner in Geimer/Schütze (ed.), 2010, vol. 1, p. 532 also affirms this solution.

\(^{356}\) OLG Köln 28.06.2004, 16 W 32/03.

\(^{357}\) OLG Karlsruhe 08.08.2006, 9 W 16/06.

\(^{358}\) BGH 12.12.2007, XII ZB 240/05.

\(^{359}\) BGH 12.12.2007, XII ZB 240/05.


\(^{361}\) Leible in Rauscher, 2011, Art. 34 Brüssel I-VO para 3; Geimer in Geimer/Schütze, 2010, Art. 34 para 62 et seq.


\(^{363}\) BGH 26.8.2009, XII ZB 169/07; no final decision was made by the OLG Saarbrücken 03.03.2004, 5 W 212/03 (regarding the Lugano Convention); Geimer in Geimer/Schütze, 2010, Art. 34 para 67.

\(^{364}\) E.g. in the following decisions: BGH 10.12.2009, IX ZB 103/06; OLG Frankfurt 07.12.2004, 20 W 369/04; OLG Köln, 19.3.2004 16 W 39/03; regarding the Brussels Convention OLG Köln 28.06.2004, 16 W 32/03 and BGH 06.05.2004, IX ZB 43/03; regarding the Lugano Convention BGH 05.03.2009, IX ZB 123/06; but see also BGH 06.05.2004, IX ZB 43/03 regarding the Brussels Convention.


\(^{366}\) BGH 10.12.2009, IX ZB 103/06; regarding the Brussels Convention BGH 06.05.2004, IX ZB 43/03.

\(^{367}\) Geimer in Geimer/Schütze, 2010, Art. 34 paras 34 and 66.
proof is envisaged in cases where the foreign judgment lacks reasons because it would be very difficult for the appellant to prove a violation of public policy. German courts require substantiated submissions of the parties. The burden of proof and the requirement of making substantiated allegations often entail the rejection of the public policy exception.

(cc) According to the prevailing opinion in Germany, the German judge is principally bound by the fact-finding as it took place in the state of origin. In contrast, the judicial practice which permits the defendant to refer to procedural fraud in the stage of recognition and enforcement for the first time seems to admit a submission of new facts in the state where recognition is sought. Some authors object to any kind of restriction of the German judge as soon as a violation of public interests is at stake.

Greece
National courts apply the public policy exception on submission of the parties. There is no particular impact on the burden of proof. Courts must only (re) consider procedural defects (facts relating to the procedure) when the Member state of origin does not provide for a full effective remedy and/or in order to protect the fundamental right to be heard.

Hungary
(aa) In the mentioned case of the Supreme Court, the Court applied the public policy exception on the submission of the parties. In general there is not enough experience to answer this question.
(bb) There is not enough experience to answer this question.
(cc) There is not enough experience to answer this question.

Italy
(aa) In disputes concerning recognition of foreign judgments in accordance with Article 64 of the Italian Statute on Private International Law and International Civil Procedure, courts shall deny the recognition on the ground of procedural public policy independently. Conversely, in proceedings under Article 43 et seq. of Regulation (EC) No 44/2001, Italian Courts shall not apply ex officio the above mentioned ground for non recognition;
(bb) Pursuant to Article 2697 of the Italian Civil Code, the burden of proof goes with the burden of pleading. In other words, it lies with the party alleging procedural irregularity to prove facts supporting its claim.
(cc) Italian Courts review foreign proceedings concerning the

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371 De Cristofaro, 2004, p. 143 and Lopes Pegna, 2001, p. 629 et seq. both referring to the principle of simplification as stated in Article 41 of the Brussels I Regulation. Accordingly Salerno, Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001, Padova, 2006, 365-366 referring to Article 45 of the Brussels I Regulation by which stated that the court shall give its decision without delay; dissenting D'Alessandro, 2007 p. 373 et seq.
observance of procedural rules. To this effect, with the important exception of Article 34 point (2) of Regulation (EC) No 44/2001, they take into account facts not evaluated or not acknowledged by the court in the State of origin.

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
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<tbody>
<tr>
<td>Luxembourg</td>
<td>None of these issues have been addressed in the relevant case-law.</td>
</tr>
</tbody>
</table>
| The Netherlands | (aa) Dutch courts have raised and applied the public policy defence ex officio in one case only.\textsuperscript{372}.
(bb) No information regarding the burden of proof has been specifically discussed in the cases researched.
(cc) In its decision of 12 March 2010, the Supreme Court asked the ECJ for guidance on the question “whether Article 45 of Regulation (EC) No 44/2001 prohibits a court from enforcing a foreign judgment according to Articles 43 and 44 of the Regulation on other grounds than those mentioned in Articles 34 and 35 of the Regulation, such as the grounds based on facts dating from after the rendering of the foreign judgment. An example of such grounds could be that the foreign judgment has already been executed by the judgment debtor after it was rendered”\textsuperscript{373}. |
| Portugal    | In Portugal, the court depends on the information and the evidence furnished by the claimant. Initially, scrutiny by the court is purely formal. After this stage, the defendant is served with the claim and he may object to it. At this stage, he must plead and prove the facts of the exceptions. |
| Spain       | (aa) Courts can consider the public policy exception ex officio. However, there have been submissions of the parties in every relevant case which was found.
(bb) There is no specific rule about the burden of proof in relation to public policy, so that it must be proved by the person who alleges its violation. The Tribunal supremo\textsuperscript{374} noted that the party asserting that it was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence shall prove the facts on which this assertion is based.
(cc) No, they may not and they have refused to control if the proof was sufficient because they could not review the foreign decision as to its substance\textsuperscript{375}. |
| Sweden      | (aa) Courts appear to at least schematically review grounds of public policy ex officio based on the facts included in the case documentation. This approach was explicitly confirmed by Justice Mona Wildig of Svea Hovrätt. In the literature it has also been held |

\textsuperscript{372} Rotterdam, 30 December 2009, 339640/HA RK 09-191.
\textsuperscript{373} Supreme Court, 12 March 2010, Nr. 08/04424.
that due to the nature of ordre public it must be applied by the
courts *ex officio* even if neither party specifically refers to it.\(^{376}\)
Similarly it has been held in the literature that in the context of an
appeal of enforceability under the Regulation, the court must in
principle review the grounds of refusal *ex officio*. However, the
Regulation does not require that the court actively seeks facts other
than those presented by the parties.\(^{377}\)

(bb) Based on the case-law it appears that the general burden of
proof principles apply.

(cc) There is no specific prohibition on considering particular types of
facts as long as these facts are included in the case documentation.
However, the general rule in Article 45(2) of the Regulation may
naturally affect whether certain facts may be considered.

United Kingdom &
Republic of Ireland

(aa) Due to the adversarial system which is applied in United
Kingdom courts, the public policy exception is, in practice,
determined by reference to submissions of the parties.

(bb) In practice, the burden of establishing that the recognition or
enforcement of the judgment would be manifestly contrary to
English public policy lies with the challenging party.

(cc) Courts may consider facts not considered or acknowledged by
the court in the State of origin, for example the conduct of the
parties (although objections based solely on the conduct of the
parties have rarely succeeded).

With regard to this question, no relevant information could be gathered from Cyprus,
Estonia, Latvia, Lithuania, Poland and Slovenia.

**(f) Are there any differences between**

(aa) the application of the public policy exception of Article 34 point (1) of Regulation (EC)
No 44/2001 on the one hand and autonomous national law on the other?

(bb) the application of the public policy exception of Regulation (EC) No 44/2001 and
Regulations (EC) Nos 593/2008 and 864/2007 on the other?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Differences between the public policy clauses</th>
</tr>
</thead>
</table>
| Austria      | (aa) No, the OGH\(^{378}\) explicitly states that it is possible to fall back on
jurisdiction regarding Section 81 point (3) EO, and *vice versa*\(^{379}\). Differences might occur regarding the question whether courts can
consider public policy on their own motion, because autonomous law
explicitly provides for the rule that an appeal must be based on the

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\(^{376}\) See Bogdan, 1999, p. 71.


\(^{378}\) OGH 30.05.2006 3 Ob49/06m.

\(^{379}\) OGH 30.09.2009 3Ob161/09m.
allegations of the parties (Section 84(2) point (2) EO):
(bb) No information reported.

Belgium
(aa) No information reported.
(bb) No reported case-law on the Rome I and II Regulations could be found, so no comparison could be made.

France
(aa) No difference could be noted. Indeed, the French autonomous law of foreign judgments equally uses the ECHR for the purpose of defining public policy, in particular in the context of Islamic repudiations. By contrast, the use of the public policy exception in France in the context of arbitration is dramatically different.
(bb) No reported case-law on the Rome I and II Regulations could be found, so no comparison could be made.

Germany
(aa) The comparability of the application of Article 34 point (1) of Regulation (EC) No 44/2001 on the one hand and Sections 328, 722, 723 ZPO on the other hand results from the fact that legal literature concerning Article 34 point (1) of the Regulation makes reference to the principles which have been developed for the application of Section 328(1) point (4) ZPO. This is considered methodologically defensible despite the necessarily autonomous interpretation of EU instruments, since Article 34 point (1) of the Regulation is said to refer to principles of the domestic legal system, even if community law which is directly applicable in the member states and international sources of law shall determine its content as well.
(bb) In the absence of relevant case-law regarding the public policy exception as referred to in Regulations (EC) Nos 593/2008 and 864/2007, until now, the main difference seems to be the differentiation between the public policy exception in the stage of recognition on the one hand and in the stage of conflicts of law on the other hand (effet atténué).

Greece
(aa) No.
(bb) No.

Hungary
The reported feasible answer is no.

Italy
(aa) There are no significant differences between the two applications. The Courts employ the case-law related to Regulation (EC) No 44/2001 to explain the meaning of the public policy exception provided by the autonomous national law and vice versa.
(bb) Data are not available. There are no published cases regarding Regulations (EC) Nos 593/2008 and 864/2007.

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<table>
<thead>
<tr>
<th>Country</th>
<th>(aa)</th>
<th>(bb)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Luxembourg</td>
<td>No information reported.</td>
<td>No reported case-law on Regulations (EC) Nos 593/2008 and 864/2007 was found, so no comparison was possible.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>(aa) The following case denies any differences between the content of the public policy exceptions mentioned in bilateral judgment enforcement treaties on the one hand, and the exception mentioned in EU instruments on the other hand: “Since judgment recognition treaties serve the purpose of facilitating the mutual recognition and enforcement of judicial decisions as much as possible, the public policy exception should be applied with caution.”³⁸³</td>
<td>(bb) No such indications were made clear in the researched case-law.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No differences were found.</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>(aa) Yes, there are differences. When neither EU Regulations nor Conventions nor “reciprocity” are applicable, Spanish Courts may refuse recognition/enforcement if the foreign judgment deals with &quot;an obligation which is not lawful in Spain&quot; (Article 954(3) of the Civil Procedure Act 1881, which is still in force). The Supreme Court has interpreted this provision as equivalent to a public policy exception. However, unlike Regulation (EC) No 44/2001, the public policy exception in Spanish national law is said to comprehend two aspects: a procedural aspect and a substantive aspect. This means that, under Spanish law, recognition/enforcement will be denied not only when the foreign judgment breaches fundamental procedural guarantees but also when the foreign decision violates essential principles of Spanish substantive law³⁸⁴.</td>
<td>(bb) Yes, there are differences. When dealing with the public policy exception under Regulation (EC) No 44/2001, Spanish Courts refuse to examine substantive questions. Therefore, the public policy exception under Regulation (EC) No 44/2001 applies only if the respect of fundamental procedural guarantees is at risk. Conversely, under Regulations (EC) Nos 593/2008 and 864/2007, the public policy exception allows Spanish courts to dismiss foreign substantive provisions which clearly conflict with the basic principles of Spanish substantive law.</td>
</tr>
<tr>
<td>Sweden</td>
<td>(aa) Due to the fairly limited case-law, it is not possible to give a justified response to the question. Examples of application of public policy by the courts outside the context of the EU regulations are the following cases: – a Polish judgment on maintenance obligations, based on a marriage that was apparently a sham and that had been dissolved</td>
<td></td>
</tr>
</tbody>
</table>

³⁸³ Opinion of AG Strikwerda in: Supreme Court 5 April 2002, Nr. R01/111HR.

by decision of a Swedish court 16 years ago, was refused enforcement;\(^{385}\)

– a judgment from the former Yugoslavia on dissolution of marriage was refused enforcement due to the circumstances in which the judgment had been obtained, i.e. the fact that the signature of the defendant had been forged, that he had not been served with the claim or been notified of the hearing\(^{386}\).

As a general point it should be noted that the traditional Swedish attitude is that the *ordre public* exception should be used in very rare and exceptional circumstances\(^{387}\).

(bb) Based on the limited case-law and lack of access to cases where Regulations (EC) Nos 593/2008 and 864/2007 have been applied it is not possible to answer the question.

| United Kingdom & Republic of Ireland | (aa) Under English common law, a court may refuse to recognise or enforce a foreign judgment if that would be contrary to public policy. As the leading English commentary notes, "[t]here have been very few reported cases in which foreign judgments in personam have been denied enforcement or recognition for reasons of public policy at common law"\(^{388}\), and the majority of cases arise in a family law context\(^{389}\). Separately from the public policy exception, a court may refuse to recognise or enforce a judgment on the grounds that (a) it was obtained by fraud by a party to the foreign proceedings or the foreign court\(^{390}\), and (b) the proceedings in which it was obtained were opposed to natural justice\(^{391}\). These grounds of objection are all narrow (a foreign judgment cannot be impeached on the merits), but their combined effect is, in certain respects, wider than the public policy exception under Regulation (EC) No 44/2001. For example, and in contrast to the position taken with respect to the Brussels Convention, a foreign judgment may be impeached at common law on the ground of fraud even if the fraud might have been, or was, raised before the foreign court (subject to the possibility of res judicata or abuse of process arguments arising from the foreign proceedings with respect to the fraud issue)\(^{392}\). The "natural justice" exception may also cover a wider category of cases in which there has been a breach of the English court's view of substantial justice, not limited to cases where the defendant has been given sufficient notice of proceedings\(^{393}\). Finally, in *Israel* |

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\(^{385}\) Svea Hovrätt case Ö 9218-02.

\(^{386}\) Supreme Court case Ö 332-88, reported NJA 1988:95.

\(^{387}\) See Bogdan, 2006, p. 605. See also Bogdan, 2010, p.35.

\(^{388}\) Dicey, Morris & Collins, 2006, para 14-142.

\(^{389}\) See ibid, paras 14-143 to 14-147.

\(^{390}\) Ibid, paras 14-R127 to 14-137.

\(^{391}\) Ibid, paras 14R-151 to 14-158.

\(^{392}\) See *Owens Bank v Etoile Commerciale* [1995] 1 WLR 44 (Privy Council).

\(^{393}\) See Adams v Cape Industries [1990] Ch. 433.
Discount Bank of New York v Hadjipateras\(^{394}\), it was suggested that it might be contrary to public policy to enforce a judgment based on a contract executed as a result of undue influence, although the judgment has been strongly criticised on the ground that it fails sufficiently to distinguish between the judgment itself and the underlying cause of action\(^{395}\). More generally, the approach taken by English (and other United Kingdom) courts to questions of public policy in private international law has been strongly influenced by the classical statement of Cardozo J in *Loucks v Standard Oil Co of New York*\(^{396}\) that a court will exclude a foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal". In *Kuwait Airways Corporation v Iraqi Airways*\(^{397}\) (a tort case arising out of the Iraqi invasion of Kuwait in the early 1990s), Lord Nicholls summarised the position as follows (at [15-18]): "Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no 'conflict' of laws. This, overwhelmingly, is the normal position. But, as noted by Scarman J in *In the Estate of Fuld*\(^{398}\), blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances. This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo [his Lordship here quotes the passage from *Loucks v*

\(^{394}\) [1984] 1 WLR 137.

\(^{395}\) See Dicey, Morris & Collins, 2006, para 14-144.

\(^{396}\) (1918) 120 NE 198, 202.


\(^{398}\) [1968] P 675, 698.

\(^{399}\) [1976] AC 249, 277-278.

\(^{400}\) [2010] EWCA Civ 810.
Standard Oil Co of New York extracted above]. Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: Oppenheimer v Cattermole. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations.

Although flexible, the application of public policy is not a matter of discretion. In Golubovich v Golubovich, concerning recognition of a Russian divorce under UK legislation, Thorpe LJ stated (at [68-69]): "[T]he judge's true task is to conclude whether "recognition of the divorce.. .would be manifestly contrary to public policy." In reaching that conclusion, the judge is not exercising a discretion but forming a proportionate judgment, by which I mean a judgment which gives proper weight to all relevant factors and circumstances. If a judge reaches the positive conclusion that recognition would be manifestly contrary to public policy, refusal of recognition must follow. It would be quite unrealistic to suggest that the positive conclusion only leads him into a second stage discretionary judgment as to whether or not to refuse recognition."

(bb) United Kingdom case-law concerning Regulations (EC) Nos 593/2008 and 864/2007 is not sufficiently developed to permit this comparison. It seems clear, however, that any public policy exception in an EU private international law instrument is likely to be narrowly applied by UK courts.

With regard to this question, no relevant information could be gathered from Cyprus, Estonia, Latvia, Lithuania, Poland and Slovenia.
3.3. **Synopsis 2 – Point (a) of Article 22 of Regulation (EC) No 2201/2003**

3.3.1. **Statistical Data**

According to Article 21 paras (2) and (4) of Regulation (EC) No 2201/2003, recognition in matrimonial affairs can be subject of judicial review, although a judgment is principally recognised without any special procedure being required. According to point (a) of Article 22 of the Regulation, a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised if “such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought”. Against this background, the following statistics could be drawn up:

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of cases where recognition was subject of judicial review</th>
<th>Number of refusals of recognition</th>
<th>Number of refusals on the ground of Public Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>1[^401]</td>
<td>No statistics available, but no case was found.</td>
<td>No statistics available, but no case was found.</td>
</tr>
<tr>
<td>Belgium</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Estonia</td>
<td>“Only few cases”</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>France</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Greece</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>No statistics available</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Italy</td>
<td>No statistics available</td>
<td>No statistics available; at least the Court of Milan never refused recognition</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Latvia</td>
<td>“Only few cases”</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lithuania</td>
<td>“Only few cases”</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

[^401] The automatic recognition of an Austrian divorce decree according to Article 21(1) of the Regulation was explicitly stated by the OGH (24.03.2009, 4Ob20/09h) which examined such recognition as a preliminary question asked by Article 18(4) of the German EGBGB.
### Content of the public policy exception

As substantive law in matrimonial matters has not yet been harmonised, public policy under point (a) of Article 22 of Regulation (EC) No 2201/2003 is of particular interest.

**(a) According to Article 25 of Regulation (EC) No 2201/2003, recognition may not be refused “because the law of the Member State in which recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts”. Is this provision understood as an exclusion of substantive public policy in matrimonial matters?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Is Article 25 understood as an exclusion of substantive public policy?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>No relevant case-law was found.</td>
</tr>
<tr>
<td></td>
<td>Based on the literature an affirmative answer cannot necessarily be</td>
</tr>
<tr>
<td></td>
<td>made to the question. One commentator has referred to equality, the</td>
</tr>
<tr>
<td></td>
<td>interest of the child, certain procedural principles (such as audiatur</td>
</tr>
<tr>
<td></td>
<td>et altera pars) and fundamental rights as matters that the principle of</td>
</tr>
<tr>
<td></td>
<td>public policy is intended to protect.</td>
</tr>
<tr>
<td></td>
<td>Hence, regardless of the specific limitation in Article 25 there might,</td>
</tr>
<tr>
<td></td>
<td>in a particular case, arise other issues that can be characterised as</td>
</tr>
<tr>
<td></td>
<td>substantive public policy.</td>
</tr>
<tr>
<td>Germany</td>
<td>According to prevailing opinion in Germany, Article 25 of Regulation</td>
</tr>
<tr>
<td></td>
<td>(EC) No 2201/2003 does not exclude a violation of public policy but</td>
</tr>
<tr>
<td></td>
<td>states that the simple fact that other provisions would have applied to</td>
</tr>
</tbody>
</table>

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402 See Mikkola, 2009, p. 228.
the case according to German private international law or substantive law does not justify the refusal of recognition, even if German courts would not have divorced the couple. In contrast to Article 24 of the Regulation, the wording of Article 25 does not exclude the examination of the public policy exception but only prevents its excessive use.

Thus, Article 25 is understood as a provision which restrains the standard by which the foreign decision is measured: neither national differences in periods of separation and in reasons for the divorce, nor a divorce which takes place just because the spouses agree to it are suitable reasons for the refusal of recognition. Nevertheless, the public policy exception can still be applied if fundamental principles of German law, such as human or constitutional rights, would be affected by the recognition of the foreign judgment.

Against this background, the role of Article 25 of Regulation (EC) No 2201/2003 remains unclear: the general prohibition to review the foreign decision as to its substance is already provided by Article 26 of the Regulation. Furthermore, it was not necessary to clarify that the simple fact that the domestic court would have applied other provisions according to its own private international law cannot justify a refusal of recognition. This is already shown by the lack of a corresponding reason for refusal in Article 22 of Regulation (EC) No 2201/2003.

Italy
This provision is interpreted by the Italian Courts as an exclusion of substantive public policy. It is also to underline that the same position is taken with regard to the national provisions. In both cases, the courts held that recognition may not be refused on the basis of the public policy objection because the law of the state in which the judgment was rendered would not allow divorce, legal separation or marriage annulment on the same grounds as the lex fori.

Portugal
Article 25 of the Regulation is understood as an exclusion of the consideration of substantive public policy. However, it was reported that divorce is widespread in Portugal anyway, depending only on separation for more than a year in the absence of willingness of both spouses to resume the marriage.

405 Helms, 2001, p. 263.
Spain

Taking Article 25 of the Regulation into consideration, Spanish courts consider it very difficult to declare differences between the Member States’ substantive laws contrary to public policy. In particular, courts understand that they could not examine the equivalence of the causes of divorce or legal separation between the different countries, so that they may only refuse the recognition of a judgment because of other substantive reasons.

United Kingdom & Republic of Ireland

This provision does not appear to have been discussed in any published decision. It is understood to cut down the public policy exception in point (a) of Article 22, although it would not appear to exclude entirely the possibility of a public policy challenge based on the content or legal consequences of a judgment409.

In DT v FL410, in addressing the potential application of point (1) of Article 34 of Regulation (EC) No 44/2001 to an order for spousal maintenance, the Irish Supreme court observed (at [63]) that “it could scarcely be suggested that public policy could any longer be invoked in this State to refuse recognition of a foreign divorce, where such recognition is so extensively provided by law”.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

(b) Is the application of the public policy clause mainly discussed with regard to its substantive component, or do procedural infringements prevail?411

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratio of substantive and procedural public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>There is no relevant case-law. In legal literature the substantive component of public policy is considered to be unimportant due to the liberality of the German divorce law412. This is strengthened by the fact that problematic constellations, such as divorces because of an unilateral declaration of intent, already do not fall within the scope of the Regulation413. As regards procedural public policy, German law is relatively generous, too, inasmuch as it neither requires a formalisation of the separation, nor any attempts to reconcile the spouses as mandatory</td>
</tr>
</tbody>
</table>

409 See Cheshire, North & Fawcett, 2008, pp. 990-992 giving the possible example of a challenge to judgments concerning "same sex" marriages, to the extent that they fall within the scope of the Regulation.


411 This table also covers question B I 2, 2.2 regarding the principle ground (substantive or procedural) for success of the public policy objection.


413 Rauscher in Rauscher (ed.), 2010a, Brüssel II a-VO Art. 22 para 9.
measures to save the marriage.

Nevertheless, the right to a fair trial is important in proceedings concerning matrimonial matters as well, so that many of the categories discussed under Regulation (EC) No 44/2001 should also be considered with regard to Article 22 point (a) of Regulation (EC) No 2201/2003 (e.g. procedural fraud, the right to be heard, the impartiality of the court, etc.). Thus, procedural public policy is likely to prevail under Regulation (EC) No 2201/2003 as it does under Regulation (EC) No 44/2001.

<table>
<thead>
<tr>
<th>Country</th>
<th>Case-Law Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>No case-law was found but it was stated that, according to Portuguese opinion, international public policy shall be defined by each State as it is an evaluative and historical criterion which functions in each case to ward off the shocking results of foreign law on the basis of economic, social and political violations that society cannot ignore.</td>
</tr>
<tr>
<td>Spain</td>
<td>As it is difficult to find substantive reasons for a refusal of recognition due to Article 25 of the Regulation, procedural public policy prevails (in particular, problems with the recognition of judgments by default).</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>As Article 25 of Regulation (EC) No 2201/2003 significantly restrains the application of substantive public policy, procedural public policy is supposed to prevail, although there is not enough case-law yet.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

(c) Can you detect different categories in the national case-law where recognition is usually refused?

No categories have been reported from any Member State. The German report made reference to categories which developed in earlier jurisdiction and in legal literature:

(1) Substantive public policy

Concerning substantive public policy, especially judgments rendered in a Member State which applied the law of a third state and has a less strict public policy control are considered problematic\(^ {414} \). For example, a refusal of recognition is envisaged with regard to divorces which exclusively took place because of political or governmental pressure\(^ {415} \).

Furthermore, concerns are expressed regarding divorces based on the request of one party, e.g. the divorce according to Swedish law, if the foreign substantive law renounces reasons for divorce and significant periods of separation and thus makes the divorce resemble a declaration of termination\(^ {416} \).

\(^ {414} \) Rauscher in Rauscher (ed.), 2010a, Brüssel II a-VO Art. 22 para 7.


\(^ {416} \) Helms, 2001, p. 263; Dornblüth, 2003, p. 118 et seq.
Additionally, the pivotal importance of Articles 8 and 14 ECHR is emphasised. A violation of these principals is supposed to justify the refusal of recognition on the ground of public policy\textsuperscript{417}.

(2) Procedural public policy

As regards procedural public policy, especially a violation of the right to a fair trial is regarded as a ground for the refusal of recognition and enforcement\textsuperscript{418}.

(d) Is case-law relating to other EU instruments, in particular those listed in this questionnaire, considered relevant for the application of the public policy exception according to point (a) of Article 22 of Regulation (EC) No 2201/2003?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The case-law of the ECJ concerning Regulation (EC) No 44/2001 and the Brussels Convention is taken into account in order to interpret point (a) of Article 22 of Regulation (EC) No 2201/2003\textsuperscript{419}.</td>
</tr>
<tr>
<td>Italy</td>
<td>Point (a) of Article 22 does not appear to have been discussed in any published decision. However, the case-law relating to points (1) and (2) of Article 34 of Regulation (EC) No 44/2001 is taken into account by some Authors in order to outline the character of the public policy exception in family matters\textsuperscript{420}.</td>
</tr>
<tr>
<td>Spain</td>
<td>Case-law about Article 34 of Regulation (EC) No 44/2001 is considered relevant.</td>
</tr>
<tr>
<td>Sweden</td>
<td>See respective answer with regard to point (1) of Article 34 of Regulation (EC) No 44/2001.</td>
</tr>
</tbody>
</table>
| United Kingdom & Republic of Ireland | Although there is no case-law directly in point, it is clear that UK courts would consider the ECJ's case-law with respect to point (1) of Article 34 of the regime of Regulation (EC) No 44/2001 to be relevant, as indicating the narrow character of the public policy exception. In Golubovich v Golubovich\textsuperscript{421}, a case concerning recognition of a Russian divorce decree under English legislation, Thorpe LJ (in the English Court of Appeal) referred to the ECJ's decision in Case C-7/98 Krombach v Bamberski as supporting the statement (at [79]): "Public policy hardly runs as a bar to recognition within the Member States of the European Union". In the previous paragraph, his Lordship had stated (at [78]) that: "By way of generality to refuse recognition of a


\textsuperscript{418} Dornblüth, 2003, p. 117, who refers to the judgment of the ECHR in the case Pellegrini/Italy, no 30882/96, where the court emphasised the importance of the right to be supported by a lawyer and to examine the files in an ecclesiastical proceeding regarding the invalidity of a marriage.


\textsuperscript{420} See e.g. Cafari Panico, 2007, p. 29 et seq., particularly pp. 39-40.

\textsuperscript{421} [2010] EWCA Civ 810.
divorce decree pronounced by the court in another jurisdiction within the Council of Europe, absent breach of natural justice, must be regarded as truly exceptional.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

3.3.3. Scope of the public policy exception according to point (a) of Article 22 of Regulation (EC) No 2201/2003

(a) Is the public policy exception in matrimonial matters applied broadly or narrowly?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>Although the public policy exception was raised in two cases, courts did not discuss it, as the first one (wrongly) decided that it could deny recognition on a jurisdictional point(^{422}), and the other noticed that the party raising the public policy exception had not explained why the foreign judgment would violate public policy(^{423}).</td>
</tr>
<tr>
<td>Germany</td>
<td>Point (a) of Article 22 of Regulation (EC) No 2201/2003 is interpreted narrowly(^ {424}). This is due to the liberal German law and the limits of the application of the public policy exception which have been developed.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No case could be detected where the Regulation was applied in matrimonial matters because cases are brought before a court of first instance whose decisions are usually not published.</td>
</tr>
<tr>
<td>Spain</td>
<td>The provision is applied narrowly. Nevertheless, the Tribunal Supremo(^ {425}) has stated that the recognition of a decision concerning the invalidity of a marriage taken under the Treaty with the Holy See can be refused in case of abuse of process, vexatious action or, generally speaking, if the judgment is contrary to the public policy. In other words, the Spanish Court has considered the abuse of process as a part of the public policy.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>Although there is no case-law directly in point, it is to be expected that United Kingdom courts will apply the public policy exception in</td>
</tr>
</tbody>
</table>

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\(^{423}\) CA Paris CH. 01 C 3 juillet 2008 No 05/22715.


matrimonial matters narrowly, in line with the approach of Thorpe LJ in Golubovich v Golubovich426.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

(b) In cases where point (a) of Article 22 of Regulation (EC) No 2201/2003 has been applied broadly, which reasons have been given for this?

There was no evidence of a broad application in any Member State.

(c) Do courts apply or did they even develop limits to the application of public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>In the absence of relevant case-law, reference has to be made to legal literature:</td>
</tr>
<tr>
<td></td>
<td>a) Obligation to file an appeal in the state of origin</td>
</tr>
<tr>
<td></td>
<td>In German legal literature, some authors negate an obligation of the appellant to exhaust the remedies in the state of origin427. This opinion is based on the fact that, under point (1) of Article 34 of Regulation (EC) No 44/2001, the aforementioned obligation is methodologically based on an analogous application of point (1) of Article 34 of Regulation (EC) No 44/2001 in fine, whereas no corresponding provision exists in Article 22 of Regulation (EC) No 2201/2003. The European Commission explicitly refused to amend point (b) of Article 22 of Regulation (EC) No 2201/2003, although the European Parliament proposed to match point (b) of Article 22 with point (2) of Article 34 of Regulation (EC) No 44/2001428.</td>
</tr>
<tr>
<td></td>
<td>Others advocate the appellant’s obligation to lodge an appeal in the state of origin in the context of point (a) of Article 22 of Regulation (EC) No 2201/2003 as well. As it is in any case necessary to consider all specific circumstances of the case while examining whether public policy is violated, the failure to appeal against the decision can be taken into account429.</td>
</tr>
</tbody>
</table>

b) Special Link to the German legal system

The extent of the connection of the facts which underlie the legal controversy to the German legal system influences the application of point (a) of Article 22 of Regulation (EC) No 2201/2003 as it does with regard to point (1) of Article 34 of Regulation (EC) No 44/2001.430.

Spain

In most cases, courts are required to control the compatibility of judgments of the Catholic Church Courts with the Spanish Civil Code. They refuse to control the substantive aspects because they do not consider it necessary to establish a total equivalence between the causes of the annulment of marriages in both systems.431.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Sweden and the United Kingdom.

(d) How do procedural aspects influence the application of point (a) of Article 22 of Regulation (EC) No 2201/2003 (as application or fact-finding ex officio or only on submission of the parties, consideration of facts not considered or not acknowledged by the court in the state of origin, burden of proof)?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>See the response to the same question regarding point (1) of Article 34 of Regulation (EC) No 44/2001.</td>
</tr>
</tbody>
</table>
| Germany      | a) According to the prevailing opinion in Germany, the public policy exception is examined ex officio but the facts have to be submitted by the parties.432.  
b) The burden of proof lies with the party which contests the recognition of the foreign judgment.433. Some authors negate a general rule for the burden of proof but ask whether the specific circumstances of the case suggest the granting or the refusal of recognition and enforcement.434.  
c) Consideration of additional facts: At least before Regulation (EC) No 2201/2003 entered into force, German courts were considered bound by the fact-finding of the court of origin.435. |


433 Andrae in Anwaltkommentar BGB, 2007, vol. 1, Art. 22 EheVO para 1, who refers to mutual trust as the basic tendency of the Regulation.

434 Spellenberg in Staudinger, 2005, Art. 22 EheGVO para 104 et seq., who, furthermore, is of the opinion that the distribution of the burden of proof is more important in cases where a violation of procedural public policy is at
Italy  See the response to the same question regarding Article 34 point (1) of Regulation (EC) No 44/2001.

Sweden  See the response to the same question regarding Article 34 point (1) of Regulation (EC) No 44/2001.

United Kingdom & Republic of Ireland  See the response to the same question regarding Article 34 point (1) of Regulation (EC) No 44/2001. In view of the nature of matrimonial proceedings, courts may be expected to take a more pro-active approach. It remains to be seen whether this will be borne out in future case-law.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain and Slovenia.

3.4.  Synopsis 3 – Point (a) of Article 23 of Regulation (EC) No 2201/2003

3.4.1.  Statistical Data

According to Article 28(1) and Article 31 of Regulation (EC) No 2201/2003, judgments on parental responsibility must be declared enforceable, unless one of the reasons specified in Article 22 and seq. of Regulation (EC) No 2201/2003 applies. The grounds for non-recognition are verified by the court of the first instance. Furthermore, Article 33(1) of Regulation (EC) No 2201/2003 provides for an appeal against the declaration of enforceability, which can be based on the same grounds. According to point (a) of Article 23 of Regulation (EC) No 2201/2003, recognition and enforcement shall be refused if the foreign decision is "manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child".

Against this background, the following statistics could be drawn up:

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of cases where enforceability was sought</th>
<th>Number of refusals of enforceability in first instance</th>
<th>Refusals on the ground of public policy in first</th>
<th>Number of refusals on appeal</th>
<th>Number of appeals based on public policy</th>
<th>Number of refusals on appeal on the ground of public policy</th>
</tr>
</thead>
</table>

stake because, for the assessment of a breach of substantive public policy, the German court can detect all relevant information from the reasons of the foreign judgment and the report of the underlying facts.

435 BayObLG 03.10.1978, BReg 1 Z 67/78.
<table>
<thead>
<tr>
<th>Country</th>
<th>instance</th>
<th>policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>0436</td>
<td>0437</td>
</tr>
<tr>
<td>Belgium</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>12 (since 2007)</td>
<td>0</td>
</tr>
<tr>
<td>Estonia</td>
<td>“Only few cases”</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>France</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Greece</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Italy</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Latvia</td>
<td>“Only few”</td>
<td>0</td>
</tr>
</tbody>
</table>

436 OGH 28.10.2009 7Ob171/09m (see the application of the mother; the judgment itself only deals with recognition under Article 21 of the Regulation) and OGH 03.08.2006 8Ob73/06b regarding recognition and enforcement of a contact order under Regulation (EC) No 1347/2000.

437 But see the precedent instances to OGH 03.08.2006 8Ob73/06b regarding Regulation (EC) No 1347/2000 (decisions reproduced by the considerations of the OGH) where enforcement was refused according to Section 110(3) AußStrG: the enforcement of a contact order was refused due to a violation of the best interests of the child. It has to be mentioned that the decision on recognition and enforceability according to Regulation (EC) No 1347/2000 had already become final and the judgments thus did not deal with the grounds for non-recognition laid down in the Regulation. Instead, they applied Section 110(3) AußStrG according to which enforcement measures can be stopped if they lead to a violation of the child’s best interests. The OGH revised the prior decisions due to insufficient determination of facts.

438 But see note 261.

439 But see note 261.

440 Three more decisions addressing the public policy exception in Regulation (EC) No 1347/2000 were found.
3.4.2. Content of the public policy exception

(a) Is public policy mainly applied as a substantive or a procedural objection?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratio of substantive and procedural public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lithuania</td>
<td>“only few cases”</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>No information available</td>
</tr>
<tr>
<td>Poland</td>
<td>“There were such cases but no exact statistics are available”</td>
</tr>
<tr>
<td>Portugal</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Republic of Ireland</td>
<td>No information available</td>
</tr>
<tr>
<td>Scotland</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Slovenia</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
</tr>
<tr>
<td>Sweden</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Country</td>
<td>Case Description</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------</td>
</tr>
<tr>
<td>Austria</td>
<td>The only case (incidentally) addressing point (1) of Article 23 of the Regulation concerned the possibility of reviewing foreign jurisdiction.</td>
</tr>
<tr>
<td>Finland</td>
<td>In the one case in which the public policy defence was invoked by the party opposing enforcement, it was invoked with reference to the judgment being discriminatory and against the right to divorce, i.e. mainly as a substantive matter. However, the appellant also stated that the children had not been heard in a proper manner. In its brief judgment, the court mainly focussed on the issue of whether the children had been given an opportunity to be heard and noted that no other grounds for refusal had been proven. According to the literature, public policy is also in the family law field considered to include both a substantive and a procedural element.</td>
</tr>
<tr>
<td>Germany</td>
<td>The Federal Court of Justice, examined a breach of both substantive and procedural public policy. As regards procedural public policy, it scrutinised a breach of fundamental principles when the judgment was exclusively based on the submission of the applicant because the defendant did not appear in person although he had been summoned. Concerning substantive public policy, it was examined whether the joint custody of unmarried parents infringed German public policy (this was not the case). The OLG Celle refused recognition and enforcement in a proceeding according to Articles 40 et seq. of Regulation (EC) No 2201/2003 (although Article 42 of the Regulation principally obliges the courts to enforce a judgment if the certificate was issued according to Article 42(2)) on the ground of a violation of the right of the child to be heard and thus on the ground of procedural public policy. Legal literature discusses a breach of public policy if the non-discrimination principle of Article 14 ECHR was violated by the foreign decision, e.g. if it awarded sole custody for a child because of the sex, the religion, the sexual orientation or the nationality of the other parent. Furthermore, strong justification is considered necessary with regard to Article 8 ECHR, if foreign courts award sole custody without giving the other parent a right of access to the child.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>It was reported that in one relevant case a violation of procedural public policy was invoked. This case concerned the ECJ’s decision Inga Rinau.</td>
</tr>
</tbody>
</table>

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441 OGH 28.10.2009 7Ob171/09m.
442 Helsinki Court of Appeal judgment 1210 of 13.5.2009 in case S 09/357.
443 See T Mikkola, Kansainvälinen avioliittoja jäämistöoikeus (WSOYpro, 2009) p. 228.
444 BGH 10.06.2009, XII ZB 182/08.
446 Dornblüth, 2003, p. 120.
447 Dornblüth, 2003, p.120.
The Netherlands

The only case examined concerned an objection to the enforcement of a foreign judgment due to a substantive public policy violation: Fraudulent agreement on parental responsibility between divorcees.\footnote{S Gravenhage, 23 December 2008, Nr. FA RK 08-9154.}

Portugal

It was reported that, in this context, the substantive component of the public policy exception prevails.

Spain

It was reported that point (a) of Article 23 of the Regulation was mainly invoked as an objection against alleged violations of procedural rights.

United Kingdom & Republic of Ireland

The most common public policy objection is that the order is not in the best interests of the child(ren).\footnote{See Re Jacob and Dawid Northern Ireland [2009] NIFam 23; S v S [2008] 2 FLR 1358; W v W [2005] EWHC 1811 (Fam); Re S [2003] EWHC 2974 (Fam); Re S [2003] EWHC 2115 (Fam).} On occasion, procedural objections have also been raised.\footnote{Re Jacob and Dawid Northern Ireland [2009] NIFam 23; Re S [2003] EWHC 2115 (Fam).}

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Luxembourg, Poland, Slovenia and Sweden.

(b) Does the reference to the "best interest of the child" entail an increased relevance of substantive public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Increased relevance of substantive public policy due to the reference to the &quot;best interest of the child&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Taking into account the case-law of the OGH regarding Regulation (EC) No 1347/2000, the best interest of the child entails an additional control of the judgment according to Section 110(3) AußStrG. In this case, the best interest of the child was determined with regard to its mental development.</td>
</tr>
<tr>
<td>Finland</td>
<td>Neither the reviewed case-law nor the legal literature permit any affirmative response. Public policy is considered to include both a substantive and a procedural element. However, the addition of the interest of the child would appear to highlight one of the substantive aspects of public policy in family law matters.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The only case examined referred to the best interest of the child in the following way but did not elaborate on its relevance for its decision on the dispute. It stated that: &quot;If the agreement contains a false signature, then the recognition of the decision of the Portuguese judge...&quot;</td>
</tr>
</tbody>
</table>

\footnote{OGH 03.08.2006 8Ob73/06b.}

\footnote{Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen of 13 December 2003, BGBl. I Nr. 111/2003.}
would violate Dutch public policy, especially when taking into account the interest of the child.  

Portugal  

There is an increased relevance of substantive public policy. In this context, the national report cites a decision of the court of appeal of Lisbon:\footnote{455} “The decisive factor to take into account is the effective bond of the minor and his parents to Portugal, which is the country of nationality for all of them, given that this has been the situation for the last five years, while at the time of the action, the plaintiff has been living for the past year with the child in France, leading to a clear detachment from the new country. 

An action to regulate the parenthood in course before a French court would present the serious risk that the best interest of the minor would not be safeguarded in a similar manner. However, the father, although residing in France, has clearly decided to retain the connection to Portugal due to the fact that his living conditions and those of the mother can be better identified here. These factors contribute to a decision which conforms to the family’s reality and the social and economic environment of the child and its parents, therefore the situation reflects the last part of Article 12 of the Regulation.

The defendant, residing in Portugal, was summoned to present a response to the appeal and remained silent, considering herself satisfied with the declaration signed by herself unequivocally and expressly consenting to the jurisdiction of Portuguese courts to regulate the son’s custody – a requirement that corresponds with the last part of the cited Article 12.”

United Kingdom & Republic of Ireland  
The objection of the violation of the best interest of the child has been raised, in one form or another, in every one of the published decisions and has been identified as being relevant. Accordingly, “substantive public policy” would appear to have an increased profile in this area.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Slovenia, Spain and Sweden.

(c) If the public policy objection was successful, was it mainly due to a violation of substantive or of procedural public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reason for the success of the objection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The only decision where recognition and enforcement have been refused was the decision of the OLG Celle\footnote{456} which concerns a</td>
</tr>
</tbody>
</table>

\footnote{454} S Gravenhage, 23 December 2008, Nr. FA RK 08-9154.

\footnote{455} 20.01.2009, RP 10097/2008-7, N.4-6.

\footnote{456} 30.09.2010, 18 UF 67/10.
<table>
<thead>
<tr>
<th>Study on the Interpretation of the Public Policy Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>proceeding according to Articles 40 et seq. of Regulation (EC) No 2201/2003. Recognition and enforcement have been refused (although Article 42 of the Regulation principally obliges the courts to enforce a judgment if the certificate was issued according to Article 42(2)) on the ground of a violation of the right of the child to be heard and thus on the ground of procedural public policy. This judgment was strongly criticised by the ECJ, see infra 2.3. of Chapter VI.</td>
</tr>
<tr>
<td>Portugal</td>
</tr>
<tr>
<td>Spain</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

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(d) To what extent have sources such as Article 8 ECHR and Articles 7 and 24 CFR been taken into account?

Article 8 ECHR reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 7 CFR provides that “[e]veryone has the right to respect for his or her private and family life, home and communications.”

Article 24 stipulates:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Consideration of sources such as Article 8 ECHR and Articles 7 and 24 CFR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The OGH (03.08.2006 8Ob73/06b regarding Regulation 1347/2000) determined the “best interests of the child” by referring to the child’s and the father’s right to personal contact as guaranteed by Article 8 ECHR. However, it has to be mentioned that this interpretation concerned the “best interests of the child” as referred to in Section 110(3) AußStrG because grounds for non-recognition according to the Regulation could not be examined anymore due to a final judgment on their absence. Nevertheless, it is not evident why such interpretation would not apply to European legal acts as well. On the contrary, the application of Section 110(3) AußStrG amounted to a circumvention of the (limited) grounds for non-recognition of the Regulation.</td>
</tr>
<tr>
<td>Finland</td>
<td>The mentioned sources have not been referred to either by the parties or the courts.</td>
</tr>
<tr>
<td>Germany</td>
<td>Both the German Federal Constitutional Court (Bundesverfassungsgericht) and the ECHR derived procedural guarantees from Articles 6 and 8 ECHR. In particular, they have set minimum standards concerning the fact-finding of the court in order to</td>
</tr>
</tbody>
</table>

468 See for the duty of the court to involve the parents ECHR 13.7.2000 Elsholz v Deutschland, DAVorm 2000, 679; and BVerfG FamRZ 1994, 223, 225 for the need of the use of any source of information in a summary proceeding and for the requirement of the examination into whether the measure taken by the summary
ensure the protection of fundamental rights\textsuperscript{460}. A breach of these
principles is considered justification for the refusal of recognition and
enforcement\textsuperscript{461}. In legal literature, Articles 6, 8 and 14 of the ECHR
and the CFR are considered very important\textsuperscript{462}.

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>It was reported that the above mentioned provisions have been taken into account extensively and on multiple occasions\textsuperscript{463}.</td>
</tr>
<tr>
<td>Spain</td>
<td>It was reported that there was no reference to the cited provisions in the relevant decisions.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>Under section 6 of the Human Rights Act 1998, judges in the United Kingdom are obliged to act in accordance with the provisions of the ECHR to which that act gives effect, insofar as it is possible for them to do so. Art. 8 ECHR has been specifically referred to only occasionally in cases under Regulation (EC) No 2201/2003\textsuperscript{464}, but it is frequently relied on by in other international family law proceedings\textsuperscript{465}. There is no evidence that the CFR has been relied on in United Kingdom courts as a source of public policy in cases of this type. It seems probable, however, that such arguments will be raised in the future, particularly in cases where the Charter accords with the ECHR, notwithstanding the limited legal effect which the Charter has under UK law\textsuperscript{466}.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

(e) Can you detect different categories in the national case-law, where recognition is usually refused?

No categories have been reported from any Member State due to the absence of relevant case-law.

(f) Is case-law relating to other EU instruments, in particular those listed in this questionnaire, considered relevant for the application of the public policy exception according to point (a) of Article 23 of Regulation (EC) No 2201/2003?

\textsuperscript{460} Helms, 2001, p. 264; Andrae in Anwaltkommentar BGB, 2007, vol. 1, Art. 22 EheVO para 3.


\textsuperscript{462} See Supreme Court 20.01.2009, STJ 08B2777, in www.dgsi.pt.

\textsuperscript{463} See, e.g., Re S [2008] 2 FLR1358, [52].

\textsuperscript{464} See, e.g., Re J [2005] UKHL 40; [2006] 1 AC 80.

\textsuperscript{465} See the Protocol to the TEU on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>No.</td>
</tr>
<tr>
<td>Germany</td>
<td>Reference is often made to the Hague Convention on the civil aspects of international child abduction of 1980(^{467}). Furthermore, the case-law of the ECJ regarding Regulation (EC) No 44/2001 and the Brussels Convention is considered relevant(^{468}). In this context, it is of interest that the BGH(^{469}) made reference to the ECJ for a preliminary ruling, which shall clarify whether the jurisdiction of the ECJ on the case Denilaule(^{470}) can be transferred to Regulation (EC) No 2201/2003.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>There has been no case-law indicating the contrary.</td>
</tr>
<tr>
<td>Spain</td>
<td>Case-law regarding point (1) of Article 34 of Regulation 44/2001 is considered transferable.</td>
</tr>
<tr>
<td>Sweden</td>
<td>No, but generally speaking, there is no reason why case-law in relation to the other Regulations would not be considered relevant, in particular case-law from the ECJ or the Swedish Supreme Court.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In Re S(^{471}) the English High Court judge (Holman J) referred (at [32]) to the ECJ's decision in Case 7/98 Krombach v Bamberski which regarded the Brussels Convention in emphasising that the requirement that the judgment be manifestly contrary to English public policy under Article 15(2)(a) of Regulation (EC) No 1347/2000 constituted a “high hurdle”. That approach has been approved in later cases(^{472}).</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal and Slovenia.

3.4.3. Scope of the public policy exception according to point (a) of Article 23 of Regulation (EC) No 2201/2003

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\(^{467}\) Paraschas in Geimer/Schütze (ed.), 2010, vol. 2, p. 351; Dornblüth, 2003, p. 121 et seq., the more so as judicial practice regarding this convention takes the best interest of the child into account as well, although this criterion is not explicitly mentioned. However, the scope of the public policy exception of this Convention is broader because no specific rules such as point (b) of Article 23 of Regulation (EC) No 2201/2003 exist.


\(^{469}\) 10.06.2009, XII ZB 182/08.

\(^{470}\) ECJ 21.5.1980 Rs. 125/79.

\(^{471}\) [2003] EWHC 2115.

\(^{472}\) See Re Jacob and Dawid Nothern Ireland [2009] NIFam 23; S v S [2008] 2 FLR 1358; W v W [2005] EWHC 1811 (Fam); Re S [2003] EWHC 2974 (Fam).
(a) Is point (a) of Article 23 of Regulation (EC) No 2201/2003 applied narrowly or rather broadly?  

In particular, are the “best interests of the child” considered a cumulative requirement for refusing recognition and enforceability, independent from the “regular” public policy test? Or are they applied as the decisive criterion within the public policy test?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>In this context, the decisions of the OGH of 20 April 2010 and 13 July 2010 should be mentioned: the court was unsure whether Austrian courts which were requested to enforce an Italian order of return on the basis of a certificate according to Article 42(2) of the Regulation are entitled to refuse such enforcement on the grounds of the best interests of the child. Thus, the court envisaged extending public policy considerations to the procedure according to Article 42 et seq.</td>
</tr>
<tr>
<td>Finland</td>
<td>The question cannot be answered exhaustively due to limited case-law and literature, but it appears that it is considered more a cumulative requirement, albeit a very important criterion.</td>
</tr>
</tbody>
</table>
| Germany      | (a) Ratio of the “best interest of the child” and the public policy exception: Some authors advocate that recognition could only be refused if, in addition to a violation of public policy, it is not compatible with the best interest of the child. By this approach, very strict requirements for the application of the ground for refusal according to point (a) of Article 23 of the Regulation are set, thus favouring a very narrow interpretation. By contrast, the prevailing opinion in legal literature considers the “best interest of the child” the decisive criterion within the examination of a breach of public policy.

(b) Regarding the handling of the “best interest of the child” as the decisive criterion, some authors advocate a very restrictive interpretation. In their opinion, even in matters of paternal responsibility, the grounds for refusal of recognition and enforcement were not allowed to lead to a review as to the substance of the foreign decision. Instead, the application of the public policy clause should be narrowed down to evident violations of German fundamental

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473 E.g. by refusing the assumption of an effet atténué of the ordre public in the stage of recognition.

474 Both regarding the case 4Ob58/10y.

475 See also the intervening decision of the ECJ of 1 July 2010, C-211/10 PPU Povse.


480 Rauscher in Rauscher (ed.), 2010a, Brüssel II a-VO Art. 23 para 6; Helms, 2001, p. 263.

481 As far as the former legal position is concerned, cf. BGH 28.05.1986, IVb ZB 36/84.
principles. Others differentiate between a suboptimal realisation of the best interest of the child with regard to its procedural and to its substantive component: recognition could not be refused automatically where the foreign decision does not comply with the best interest of the child in only a procedural respect, whereas any judgment which affects the best interest of the child in its substantive respect had to be repelled. Thus, this approach favours a more generous application.

Some authors consider the grounds for refusal according to Article 23 of the Regulation unimportant because the German court could usually amend the foreign decision anyway. Occasionally, this approach is taken by judicial practice as well.

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>It seems that the “best interest of the child” is considered a component of public policy in family matters. For instance, the Corte d'appello Milan has stated that the recognition of a judgment relating to parental responsibility was not contrary to the public policy because there was a relevant interest of the child in enforcing the judgment in Italy.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The public policy defence is always applied narrowly. The aforementioned Dutch judgment did not, however, elaborate on the extent to which it found the interests of the child adding something to the already restrictive public policy defence.</td>
</tr>
<tr>
<td>Portugal</td>
<td>The provision is applied rather broadly. The criterion of the best interests of the child is applied independently of the public policy test, as shown by a decision of the court of appeal of Lisbon: &quot;Article 23 states that a decision on parental responsibility will not be recognised in another Member State &quot;if such recognition is manifestly contrary to public policy of the requested Member State, taking into account the best interests of the child (point (a)) or where it is irreconcilable with a posterior judgment given in matters of parental responsibility in the Member State addressed (point (b)). This implies that, in principle, against the request of surrender and enforcement of a decision by the Italian court, an opposition can be filed under the abovementioned terms, given the primacy of the interests of the child”.</td>
</tr>
<tr>
<td>Spain</td>
<td>The provision is applied narrowly. No reference to the “best interest of the child” was found in Spanish case-law related to Regulation (EC) No 2201/2003, but the Spanish Supreme Court has defended that the interest of the child must prevail over their progenitors.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>Article 23 point (a) of Regulation (EC) No 2201/2003 has typically been applied narrowly, including in cases where the best interests of the child are at issue. In Re S, Holman J (who made clear that he...</td>
</tr>
</tbody>
</table>

---

would not have made the same order as that made by the Belgian court in the case in question) concluded: “[I]t is possible to contemplate a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our state. But, in my judgment, this order in relation to M falls far short of that. I have frankly said that in my view it is not an order which was in his best interests, but I am quite unable to conclude that it is so contrary to his best interests that it would be actually contrary, let alone manifestly contrary, to some English principle of public policy to enforce it. Accordingly, in my view, no defence or exception to recognition and registration of this judgment has been established and I am bound by the mandatory terms of Article 14(1) to recognise it.” In *W v W*[^486], Singer J stated (at [40]): “A high onus rests upon a parent who seeks to reopen welfare issues which, normally, would have been relatively recently the subject of investigation and decision in the courts of the country where the order was made, and to avoid that outcome as a matter of policy ‘under no circumstances may a judgment be reviewed as to its substance’. The importation of these Regulations into English domestic law has the effect, as it seems to me, that our own public policy must enshrine and give credit to the concept that the child’s interests (as the judge in the court of recognition and enforcement may perceive them) are but an element in the equation, and thus that the policy must be save in the most exceptional of circumstances not to allow the foreign judgment to be subverted.” The welfare of the child remains, however, the paramount consideration for English judges in parental responsibility cases[^487], and will likely remain so in cases under Regulation (EC) No 2201/2003. In the one case in which enforcement of a Member State order has been refused on public policy grounds under Regulation (EC) No 2201/2203[^488], it may be that the judge (who accepted the public policy test to be “a very high one”) could be criticised for being too ready to substitute his own assessment of what was in the child’s best interests for that of the Polish court. This, however, was an unusual case in which the order to be enforced was a consent order, the child had stated clearly that she considered the order to be unworkable, and the judge had found that the mother, who was the respondent to the application, had misled the Polish court.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Sweden.

[^486]: [2005] EWHC 1811 (Fam).
[^487]: Children Act 1989, s. 1.
[^488]: *Re S* [2008] 2 FLR 1358.
(b) In cases where point (a) of Article 23 of Regulation (EC) No 2201/2003 was applied rather broadly, which reasons have been given for this?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reasons for a broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The aforementioned opinion, which favours a refusal of the foreign decision whenever it affects the best interest of the child in a substantive respect[^489], is substantiated as follows: Otherwise, children whose matters have been subject to a foreign decision would be treated unequally with regard to children whose matters are subject to a German proceeding[^490]. Furthermore, the best interest of the child would be a very important principle and it would be contradictory to consider a high standard of its respect as a main target of the European Charta of Fundamental Rights on the one hand but to give precedence to the free movement of decisions on the other hand[^491].</td>
</tr>
<tr>
<td>Portugal</td>
<td>Only the best interest of the child has been put forward as a reason to justify a rather broad application.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In general, the provision is narrowly applied. The one case in which enforcement of a Member State order has been refused on public policy grounds under Regulation (EC) No 2201/2203[^492], was an unusual case in which the order to be enforced was a consent order, the child had stated clearly that she considered the order to be unworkable, and the judge had found that the mother, who was the respondent to the application, had misled the Polish court.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.

(c) Do courts apply or did they even develop limits to the application of public policy in matters of paternal responsibility?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>In legal literature, the following limits to the application of point (a) of Article 23 of Regulation (EC) No 2201/2003 have been developed: (a) Obligation to file an appeal in the state of origin As mentioned with regard to point (a) of Article 23 of Regulation (EC)</td>
</tr>
</tbody>
</table>

[^489]: Cf. supra 3.4.3.a.
[^491]: Rauscher in Rauscher (ed.), 2010a, Brüssel II a-VO Art. 23 para 5.
[^492]: Re S [2008] 2 FLR 1358.
No 2201/2003, some authors gather from the fact that a provision which corresponds to point (2) of Article 34 of Regulation (EC) No 44/2001 *in fine* does not exist in point (a) of Article 23 of Regulation (EC) No 2201/2003, that no such obligation exists. The OLG Celle recognises the obligation to lodge an appeal in general but advocates an exception of this rule in cases where a very serious breach of fundamental rights is assumed (as will normally be the case, if a violation of public policy is at stake).

(b) The relevant date for assessing whether a foreign judgment contradicts German public policy is the date where recognition and enforcement are sought, so that changes, especially regarding the compliance with the interest of the child, e.g. an improvement of the child’s relationship to a parent, can be considered.

<table>
<thead>
<tr>
<th>Country</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>No.</td>
</tr>
<tr>
<td>Spain</td>
<td>No.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In <em>Re S</em>[^496], it was stated that an order might not be in the best interest of the child but, however, this did not automatically mean that it was “so contrary to his best interests that it would be actually contrary, let alone manifestly contrary, to some English principle of public policy to enforce it.” In <em>W v W</em>[^497], it was stated that “A high onus rests upon a parent who seeks to reopen welfare issues which, normally, would have been relatively recently the subject of investigation and decision in the courts of the country where the order was made, and to avoid that outcome as a matter of policy ‘under no circumstances may a judgment be reviewed as to its substance’. The importation of these Regulations into English domestic law has the effect, ..., that our own public policy must enshrine and give credit to the concept that the child's interests (as the judge in the court of recognition and enforcement may perceive them) are but an element in the equation, and thus that the policy must be save in the most exceptional of circumstances not to allow the foreign judgment to be subverted.”</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

(d) How do procedural aspects influence the application of point (a) of Article 23 of the Regulation (as application or fact-finding ex officio or only on submission of

[^495]: Dornblüth, 2003, p. 121.
[^497]: [2005] EWHC 1811 (Fam).
the parties, consideration of facts not considered or not acknowledged by the court in the state of origin, burden of proof)?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects on Article 23 point (a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>Germany</td>
<td>Public policy is examined <em>ex officio</em>[^498^]. This result is given by the fact that, at least in the first instance, courts have to examine the existence of grounds for refusal of enforceability according to Article 31 of the Regulation, although the defendant is not heard at this stage, Article 31(2) of the Regulation.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>In Lithuania, the court has a right to collect evidence on its own initiative in every case of family affairs. Such legal regulation should not prevent the courts from collecting evidence if the case is concerned with non-recognition of a judgment relating to parental responsibility. Still the burden of proof should lie with the party, who wishes not to recognise the judgment.</td>
</tr>
<tr>
<td>Portugal</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>Spain</td>
<td>Courts control whether the procedure has developed according to the rules which guide these kind of cases related with minors (<em>fact-finding ex officio</em>, etc.). Article 748 et seq. of the Spanish procedural code states special rules in relation to the intervention of the public prosecutor in these kind of procedures, special dispositions on evidence, on fact-finding that could be done <em>ex officio</em>, or on the defining of the subject of the procedure.</td>
</tr>
<tr>
<td>Sweden</td>
<td>See the response to the same question regarding point (1) of Article 34 of Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001. In view of the sensitive nature of parental proceedings, and the importance of the child's welfare, courts may be expected to take a more pro-active approach in considering questions of recognition and enforcement under Regulation (EC) No 2201/2003. For example, <em>Re S</em>[^499^], as in other cases of this kind, the judge had the assistance of a court-appointed officer in ascertaining the views of the child as to the likely effect of the order upon her. Having refused to enforce the Polish contact order on the application of the father (for reasons that included the mother's conduct in the Polish proceedings), the judge proceeded to exercise his own inherent and wardship jurisdiction to make a new contact order (the child being at that point in time habitually resident in England).</td>
</tr>
</tbody>
</table>


[^499^]: [2008] 2 FLR 1358.
With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Poland, and Slovenia.


#### 3.5.1. Statistical Data

According to Article 26 of Regulation (EC) No 1346/2000, the requested State “may” refuse recognition and enforcement "where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”.

According to Article 25(3) of Regulation 1346/2000, the Member States are not obliged to recognise or enforce a judgment “which might result in a limitation of personal freedom or postal secrecy”. The statistical data regarding these provisions are compiled in the following table:

<table>
<thead>
<tr>
<th>Member State</th>
<th>Refusals of recognition or enforcement according to Article 26 of the Regulation</th>
<th>Refusals of recognition or enforcement according to Article 25(3) of the Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Belgium</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Estonia</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>France</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Greece</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Italy</td>
<td>No statistics available</td>
<td>No statistics available</td>
</tr>
<tr>
<td>Latvia</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lithuania</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>
3.5.2. Content of the public policy exception

(a) Is Article 26 of Regulation (EC) No 1346/2000 exclusively or mainly applied on the ground of procedural or substantive public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratio of substantive and procedural public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Procedural public policy:</td>
</tr>
<tr>
<td></td>
<td>OLG Innsbruck, 8. 7. 2008 - 1 R 176/08d regarding the right to be heard and the lack of reasons regarding international jurisdiction</td>
</tr>
<tr>
<td></td>
<td>OGH 17.03.2005 8Ob135/04t regarding incorrect claim of jurisdiction in the opening state (prior instance: OLG Wien 09.11.2004, 28R225/04w)</td>
</tr>
<tr>
<td>France</td>
<td>So far, the public policy has been raised by parties in five French cases, but never applied by the relevant court. In three cases, it concerned substantive public policy, in one case procedural public policy, and in one case both.</td>
</tr>
<tr>
<td></td>
<td>Under French autonomous law, parties have submitted that a number of French rules of insolvency law define French public policy: period during which detrimental acts may be challenged(^{500}), availability of insolvency for non-commercial people(^{501}), effect of the failure to inform the liquidator about the existence of a debt(^{502}). Such arguments have always been rejected.</td>
</tr>
<tr>
<td>Germany</td>
<td>As shown by the following compilation of judgments dealing with public policy according to Article 26 of the Regulation, its substantive component is taken into account but the procedural component prevails in judicial practice:</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>There is no available case-law at the moment, but if Article 26 was to be applied, it would be applied both on the ground of procedural and substantive public policy.</td>
</tr>
<tr>
<td>Italy</td>
<td>In Italy, Article 26 of Regulation 1346/2000 has been applied only on the ground of a violation of procedural public policy.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>There are no cases to answer this question. Nevertheless, it can be said that in Lithuania, until now, there is no law on personal bankruptcy. It was reported that there were discussions during events for lawyers about whether a case concerning personal insolvency could be recognised in Lithuania. It was always strongly emphasised that the lack of legal regulation cannot be ground not to recognise insolvency proceedings opened in another Member State.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Only one case has been found and it dealt with Article 26 of the Regulation due to a complaint regarding a procedural public policy violation: Violation of insolvent debtor’s right to be heard due to lack of a right to appeal against insolvency judgment.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Country</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Poland</strong></td>
<td>The District Court Katowice applied Article 26 of the Regulation narrowly with regard to the recognition of French insolvency proceedings. The Court held that Article 26 was an exception and only applicable in the case of a manifest violation of fundamental principles of Polish law.</td>
</tr>
<tr>
<td><strong>Portugal</strong></td>
<td>Both components are applied. Reference was made to a decision of the Court of appeal of Lisbon⁵⁰⁶: “The fact that, by force of the decision rendered by English courts, the plaintiff’s rights to invoke the Portuguese courts in order to obtain the recognition of rights sought had been restrained, is not inconsistent with the constitutional guarantee of access to law and effective judicial protection, since it is always possible to exercise it in compliance with the State’s legal system regarding the initiation of the insolvency procedure, not constituting a greater difficulty or burden that it may result, per se, in grounds that might shake or rupture the foundations of the Portuguese legal system and cause the application of public policy”⁵⁰⁶.</td>
</tr>
<tr>
<td><strong>Sweden</strong></td>
<td>Article 26 was referred to in one case⁵⁰⁷, in which the first instance court had apparently refused enforcement of a German court decision to open insolvency proceedings but the appeal court stated that there were no reasons to refuse enforcement due to <em>ordre public</em>. It is not clear whether Article 26 was applied as a procedural or substantive ground. In another case⁵⁰⁸, in which the court had in the first instance refused recognition of a Spanish court decision on an interim attachment order concerning the officers of a company in Spanish insolvency proceedings, the appeal court granted enforcement under Articles 25 and 26 of the Regulation. The court noted in relation to <em>ordre public</em> that the wording of Article 26 makes it clear that the remit for applying public policy is very narrow. The court further noted that the right to a fair trial in accordance with Article 6 ECHR that includes the right to defend oneself is of a fundamental nature. Hence, if it is breached in the Member State of origin, enforcement may be refused. The court thereafter found that it had not emerged that the Spanish procedure would not fulfil the requirements of the ECHR. The Spanish decision was hence enforceable but the enforcement claimant was ordered to post security in accordance with Article 46(3) of Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td><strong>United Kingdom &amp;</strong></td>
<td>In the case <em>Eurofood IFSC Ltd</em>⁵⁰⁹, the public policy ground relied on was procedural in nature, relating to the failure by the applicant in the Italian insolvency proceedings to provide the Irish provisional</td>
</tr>
</tbody>
</table>

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⁵⁰⁵ Haarlem, 7 September 2010, Nr. F. 172470.
⁵⁰⁷ Göta Hovrätt case Ö 3222-07.
⁵⁰⁸ Svea Hovrätt case Ö 4988-08.
liquidator with the application documents. See also *Re Stojevic v Official Receiver*[^510], where the judge commented noted the approach to public policy taken by the Higher Regional Court in Vienna in proceedings concerning the same debtor and responded to criticisms by academic commentators of English bankruptcy procedures.

“Substantive public policy” would not, however, appear to have been excluded as a possibility. In *Re MG Rover Enterprises*[^511], albeit not a case of recognition or enforcement of insolvency proceedings in another Member State, the High Court judge acknowledged that treatment of preferential claims might justify non-recognition of insolvency proceedings under Regulation (EC) No 1346/2000 if the rule underlying the claim in question was equated with a fundamental right or a fundamental principle of a Member State.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, Hungary, Latvia, Luxembourg, Slovenia and Spain.

(b) According to the Virgós/Schmit Report, the main issues under Article 26 of Regulation (EC) No 1346/2000 are the creditors’ and the debtor’s right of participation (procedural public policy), and the principles of non-discrimination and private property (substantive public policy). Is there any case-law dealing with these categories? Are there other significant topics?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The decision of the OLG Innsbruck of 8 July 2008[^512] regarded the right to be heard.</td>
</tr>
<tr>
<td>France</td>
<td>In two cases out of five, the argument made before the courts was that the lack of information and/or participation of employees in decisions made in the context of insolvency was a violation of French (substantive) public policy. In both cases, the argument was rejected[^513]. Other arguments have included the low amount received by creditors, the fact that the foreign judgment opening the insolvency proceedings had been made public late; and the fact that creditors were not entitled to challenge the foreign decision abroad[^514].</td>
</tr>
</tbody>
</table>
| Germany      | (a) Cases dealing with the categories listed in the Virgós/Schmit-Report  
(1) Non-discrimination and rights of private property. BGH |

[^511]: [2005] EWHC 3426 (Ch).  
[^512]: 1 R 176/08d.  
18.09.2001, IX ZB 51/00 ; OLG Stuttgart 15.01.2007, 5 U 98/06 (regarding autonomous international insolvency law)

(2) Right to be heard: AG Düsseldorf 07.04.2004, 502 IN 124/03; AG Düsseldorf 12.03.2004, 502 IN 126/03

(b) Other categories:
AG Nürnberg 15.08.2006, 8004 IN 1326 regarding the lack of scrutiny of jurisdiction by a court in the state of origin when the English out-of-court appointment takes place, the independency of the insolvency administrator, the lack of reasons and procedural fraud

Some authors consider a violation of public policy, if domestic provisions concerning the exemption from seizure contradict the enforcement of the foreign judgment. According to a prevailing opinion the application of the public policy exception is undesirable if the debtor is not actually insolvent.

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>See the decision of the Consiglio di Stato which emphasises the ECJ’s case C-341/04 Eurofood and, consequently, the debtor’s right of participation in the proceedings (procedural public policy).</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>The only relevant case considers the debtor’s right of participation.</td>
</tr>
<tr>
<td>Portugal</td>
<td>It was reported that there is case-law dealing with the abovementioned categories.</td>
</tr>
<tr>
<td></td>
<td>Furthermore, conflicts of jurisdiction with Spain are a main issue with regard to the application of Article 26 of the Regulation.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The only case where the reason for the objection of public policy became clear dealt with the right to a defence (Article 6 ECHR).</td>
</tr>
<tr>
<td>United Kingdom &amp;</td>
<td>In the Eurofood case, the public policy ground relied on was the failure by the applicant in the Italian insolvency proceedings to provide the Irish provisional liquidator with the application documents. In Re MG Rover Enterprises, albeit not a case of recognition or enforcement of insolvency proceedings in another Member State, the High Court judge acknowledged that treatment of preferential claims might justify non-recognition of insolvency proceedings under Regulation (EC) No 1346/2000 if the rule underlying the claim in question was equated with a fundamental right or a fundamental principle of a Member State.</td>
</tr>
<tr>
<td>Republic of Ireland</td>
<td></td>
</tr>
</tbody>
</table>
With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Spain.

(c) If public policy was considered infringed, was it mainly due to the violation of procedural or substantive public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratio of substantive and procedural public policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The public policy exception according to Article 26 of Regulation (EC) No 1346/2000 is considered to have been violated only once(^5). The non-recognition of the British opening of the proceedings (which took place by means of the relatively new British out-of-court appointment) was based on a violation of procedural public policy(^2). The mentioned judgment of the OLG Stuttgart(^2), which affirmed a violation of public policy according to autonomous international insolvency law, refused the recognition of a French judgment: as creditors who were secured in rem but who lived abroad were excluded from the insolvency proceeding because they did not register their claims in time, the French decision disregarded their right to be heard and their right to private property. Thus, both procedural and substantive public policy were considered violated.</td>
</tr>
<tr>
<td>Italy</td>
<td>Only procedural public policy has been relevant in Italy.</td>
</tr>
<tr>
<td>Portugal</td>
<td>The application of procedural public policy prevails.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In the case Eurofood IFSC Ltd(^2), the public policy ground relied on was procedural in nature, relating to the failure by the applicant in the Italian insolvency proceedings to provide the Irish provisional liquidator with the application documents.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.

(d) Is case-law relating to other instruments, in particular those listed in this questionnaire as well as instruments of substantive private international law, considered relevant for the application of the public policy exception in Article 26 of Regulation (EC) No 1346/2000?

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\(^5\) AG Nürnberg 15.08.2006, 8004 IN 1326.

\(^2\) Knof, 2007, p. 629 provides for a criticism of this judgment.

\(^2\) 15.01.2007, 5 U 98/06.

\(^2\) [2004] IESC 45.
<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Yes, reference was made to the <em>Eurofood/Maxicar</em> decision 525 regarding the relevance of a breach of community law within the public policy test. However, it has to be mentioned that the OGH has explicitly refused to take up on a decision of the Swiss Federal Court 526 regarding the public policy exception according to the Lugano Convention 527.</td>
</tr>
<tr>
<td>Finland</td>
<td>No relevant case-law was found. However, there is no reason why case-law on the scope of public policy in the EU context and in relation to the other Regulations on private international law and procedural cooperation would not be considered relevant as interpretative guidance, in particular case-law from the ECJ or the Finnish Supreme Court.</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes, at least case-law regarding Regulation (EC) No 44/2001 and the Brussels Convention can be taken into account 528, as the ECJ confirmed in the judgment on the <em>Eurofood</em> case 529. However, it should be considered that insolvency proceedings are not contradictory procedures between just two parties. On the contrary, many people are concerned. As a result, for example, it has to be determined in advance who among the affected persons shall have a right to be heard before the case-law which has been developed with regard to Article 34 of Regulation (EC) No 44/2001 can be transferred 530.</td>
</tr>
<tr>
<td>Italy</td>
<td>Not specifically.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>There has been no case-law indicating the contrary.</td>
</tr>
</tbody>
</table>

525 OGH 17.03.2005 8Ob135/04t.
526 BGE 127 III 186.
527 OGH 17.03.2005 8Ob135/04t.
529 ECJ, 2 May 2006, C-341/04 no. 64.
In the first relevant case the findings of the ECJ on the *Eurofood* case were referred to by the court.<br>

In the second relevant case both the first instance court and the appeal court analysed the application of the case Denilauler that related to the Brussels Convention and interim measures in the context of the Regulation.<br>

The references to ECJ case-law including case-law on Regulation (EC) No 44/2001 by the courts in the above mentioned cases demonstrate that where available and considered relevant for the question in the case at hand, the courts will apply case-law on the EU instruments on private international law from the ECJ and the Swedish Supreme Court.<br>

In its decision on the *Eurofood* case, the ECJ relied (para 62) on its decision on the *Krombach* case, concerning the Brussels Convention. The Irish Supreme Court and High Court, in their judgments on the public policy issue, also referred to *Krombach*. In view of this, and the close link between the instruments, the case-law concerning Regulation (EC) No 44/2001 will likely remain influential, although differences in wording between the two may be significant.<br>

No relevant information could be gathered from Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovenia and Spain.<br>

### 3.5.3. Scope of the public policy exception

#### (a) Is Article 26 of Regulation (EC) No 1346/2000 applied broadly or narrowly?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>For a narrow application see the judgments of the OLG Innsbruck and the OGH; the clause is to be applied “only in exceptional cases”; grounds for non-recognition shall be “reduced to the minimum necessary”. The criterion of the “manifest” contradiction to public policy “shall only be considered fulfilled if there is such an obvious infringement that it is directly revealed to a knowledgeable person”. “Greatest restraint” is required. The application of public policy is excluded with regard to a proceeding</td>
</tr>
</tbody>
</table>

---

531 Göta Hovrätt case Ö 3222-07.<br>532 Svea Hovrätt case Ö 4988-08.<br>533 See Moss, Fletcher and Isaacs, 2009, paras 8.326-8.329.<br>534 8.7.2008 - 1 R 176/08d.<br>535 17.03.2005 80b135/04t.
<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>French courts have insisted that the exception should be applied narrowly(^537), and have indeed always rejected arguments to the effect that a foreign judgment would violate public policy under the Regulation.</td>
</tr>
<tr>
<td>Germany</td>
<td>As shown by the limits which have been developed to the application of the public policy exception, Article 26 of Regulation (EC) No 1346/2000 is applied narrowly. This complies with the principle of mutual trust which underlies the Regulation(^538). The Federal Court of Justice(^539) reminded of the restraint necessary with regard to the application of public policy in the context of an examination of a French judgment which concerned a liquidation proceeding with discharging effect.</td>
</tr>
<tr>
<td>Italy</td>
<td>Article 26 shall be applied narrowly because the refusal of recognition is provided as merely optional and not mandatory(^540). For instance, an arrangement with a creditor shall be recognised in Italy even if it was approved by a number of creditors other than those provided by Italian Law(^541).</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Article 26 of the Regulation is applied narrowly according to the aforementioned case, which states: &quot;It is only in exceptional cases that the recognition of a foreign insolvency judgment will be refused.&quot;(^542)</td>
</tr>
<tr>
<td>Portugal</td>
<td>Narrowly.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>Although there is no case-law directly in point, it is to be expected that United Kingdom courts will apply the public policy exception in insolvency matters narrowly, in line with the ECJ's decision in the Eurofoods case. The decision of the Irish Supreme Court in that case also supports a narrow approach.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovenia, Spain and Sweden.

**\(^{536}\) Burgstaller/Neumayr, 2010, Art. 26 EuInsVO para 6.**

**\(^{537}\) CA Versailles 13e ch. 15 décembre 2005, Rover No 05-04273.**

**\(^{538}\) Cf. Recital (22).**

**\(^{539}\) BGH 18.09.2001, IX ZB 51/00.**

**\(^{540}\) Montella, in De Cesari/Montella, 2004, p. 228.**

**\(^{541}\) Montella, in De Cesari/Montella, 2004, p. 226.**

**\(^{542}\) Haarlem 7 September 2010, Nr. F. 172470.**
<table>
<thead>
<tr>
<th>Member State</th>
<th>Reasons for a broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The Local Court of Nuremberg\textsuperscript{543} referred to the fact that no English court had scrutinised whether English courts had jurisdiction. According to the judges in Nuremberg, this was a violation of a fundamental principle of German procedural law. Furthermore, they stated that the independency of an insolvency administrator was a fundamental principle of the German legal system, as well, which was affected because the insolvency administrator in question was chosen at request of the debtor's director: only an independent insolvency administrator could ensure that all actions of a corporation are scrutinised, that misfeasance is revealed and that the rights of the creditors are respected. These reasons have been considered insufficient and too abstract\textsuperscript{544}. A problematic consequence of the decision of the court of Nuremberg was that the court rendered a judgment opening insolvency proceedings itself\textsuperscript{545}. Since the English opening decision was not recognised, the conflict of the two proceedings could not be resolved by an application of the priority principle\textsuperscript{546} but only because the English courts revised the opening judgment afterwards\textsuperscript{547}.</td>
</tr>
<tr>
<td>Portugal</td>
<td>In the decision of the Court of appeal of Lisbon\textsuperscript{548} it was stated that the law chosen by the parties could not be invoked if one party is in a deficit economy or has serious difficulties in liquidating all its commitments, is being threatened with the cease of trading and the sale of assets in order to pay off its creditors as far as possible. In this matter there are interests of economic and social development, which, being of public policy, clearly fall outside the scope of a particular relationship with the insolvent.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>There is no evidence for a broad interpretation.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.

(c) Do courts apply or did they even develop limits for the application of the public policy exception? In particular, did they develop guidelines on how to handle the leeway given by the optional character of the refusal according to Article 26 of Regulation (EC) No 1346/2000 (“may refuse”)?

\textsuperscript{543} 15.08.2006, 8004 IN 1326.
\textsuperscript{544} Knof, 2007, p. 633.
\textsuperscript{545} AG Nürnberg 1.10.2006, NZI 2007, 187.
\textsuperscript{546} Cf. Article 3(3) of the Regulation.
\textsuperscript{548} 29.05.2008, 1351/2007-6.
Austria

(a) The OLG Innsbruck referred to *Eurofood* and held that the protection of the right to be heard must be proportionate to the urgency of the realisation of the interests of the creditors.

The OGH held that, as the incorrect claim of jurisdiction in the state of origin itself cannot justify the application of the public policy clause, this must also be true for the lack of reasons for the claim of jurisdiction.

With regard to the examination of procedural public policy, it is furthermore of note that it always has to be taken into account whether the procedural law of the state of origin would have provided for remedies against the violation of procedural rights.

Finally, Article 25(3) of the Regulation is mainly understood as *lex specialis* to Article 26 by excluding some very sensitive areas of fundamental rights from the principle of recognition according to Article 25 of the Regulation.

(b) The discretionary character of Article 26 has been addressed by the OGH once: the court derived from it that the lack of reasons for international jurisdiction cannot justify the application of public policy, even if this might be possible under the Lugano or Brussels Convention or under Regulation (EC) No 44/2001.

France

French courts have only quoted the *Eurofood* judgment and Recital (22) of the Regulation. They have not further elaborated on the limits of the application of the exception and have not mentioned the possibility that Article 26 might be optional.

Germany

(a) Limits to the application of the public policy exception

(1) The appellant must exhaust the remedies in the state of origin. If he fails to do so, he will not be allowed to object to recognition and enforcement by referring to a violation of public policy.

(2) Again, the application of the public policy exception is influenced by the link of the case to the German legal system. According to

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549 8.7.2008, 1 R 176/08d.
550 OGH 17.03.2005 8Ob135/04t; OLG Innsbruck, 8.7.2008, 1 R 176/08d.
551 OGH 17.03.2005 8Ob135/04t.
553 17.03.2005 8Ob135/04t.
555 CA Versailles 13 e ch. 15 décembre 2005, Rover No 05-04273.
556 Paulus, 2008, Art. 26 para 9; Knof, 2007, p. 634: for this reason alone, the decision of the Nuremberg Local Court (AG) of the 15 August 2006 (8004 IN 1326) was indefensible.
557 Pannen, 2007, Art. 26 para 16; Gruber in Geimer/Schütze (ed.), 2010, vol. 2, p. 217; Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 5; Virgós/Schmit 1997, para 204; regarding autonomous international insolvency law OLG Stuttgart 15.01.2007 5 U 98/06; according to Reinhart in MüKo-InsO, 2008, Art. 26 EuInsVO para 12,
some authors, a sufficient connection to the German system can be established by the German nationality or the domicile of a party in Germany\textsuperscript{558}. Pursuant to others, it is sufficient that assets are situated in Germany\textsuperscript{559} or even that recognition is sought in Germany\textsuperscript{560}.

(3) No review as to the substance of the judgment and no review of jurisdiction

In Regulation (EC) No 1346/2000, the prohibition to review the foreign judgment as to its substance is not explicitly mentioned as it is in other EU instruments (e.g. in Article 36 of Regulation (EC) No 44/2001). Nevertheless, it is expressed by the wording of art. 26 of the Regulation according to which “the effects of such recognition” have to contradict public policy\textsuperscript{561}.

(4) Article 16 (1) 2 of Regulation 1346/2000

This provision, according to which the fact that, on account of his capacity, insolvency proceedings cannot be brought against the debtor in the state where recognition is sought, does not influence the obligation to recognise a foreign judgment opening insolvency proceedings. It is understood as an explicit restraint of the public policy exception\textsuperscript{562}.

(5) Partial recognition

Recognition cannot be refused in toto, if the content of the judgment can be separated and only one part contradicts public policy\textsuperscript{563}.

(b) The handling of the leeway

The optional character of Article 26 of Regulation (EC) No 1346/2000 has not been subject to any judgment. According to legal literature, it could lead to an even rarer refusal of recognition\textsuperscript{564}.

| Italy | No case-law is available. However, the discretionary (and not mandatory) character of Article 26 has been noted by Corsini\textsuperscript{565} and Montella\textsuperscript{566} both emphasizing the fact that a judgment contrary to Italian public policy shall, nevertheless, be recognised. |

the application of procedural public policy clause does not depend on a special connection to the German legal system.


\textsuperscript{559} Reinhart in MüKo-InsO, 2008, Art. 26 EuInsVO para 12.

\textsuperscript{560} Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 5.

\textsuperscript{561} Gruber in Geimer/Schütze (ed.), 2010, vol. 2, p. 218; Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 12.. Additionally, it is prohibited to review whether the foreign court had jurisdiction (Recital (22) of the Regulation; ECJ 2.5.2006 C-341/04 para 38 et seq.; Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 11, who, however, wants to admit the objection of abuse of rights in the state where recognition is sought, para 20.

\textsuperscript{562} Pannen, 2007, Art. 26 para 17.

\textsuperscript{563} Pannen, 2007, Art. 26 para 15.

\textsuperscript{564} Pannen, 2007, Art. 26 paras 14 and 32.

\textsuperscript{565} Profili transnazionali dell’azione revocatoria fallimentare, Torino, 2010, 322.

\textsuperscript{566} In De Cesari/Montella, 2004, p. 228.
Portugal  
United Kingdom & Republic of Ireland

There is insufficient evidence to answer this question. The apparently discretionary character of Article 26 has been noted by commentators, although it may be doubted whether the difference in wording will have any significance in practice given that Article 26 (like point (1) of Article 34 of Regulation (EC) No 44/2001) requires that the court considers whether the effects of recognition and enforcement in the individual case would be contrary to public policy of the forum State, in particular its fundamental principles or the constitutional rights and liberties of the individual. Those principles, rights and liberties may be expected to be mandatory, not discretionary, in character.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.

(d) How do procedural aspects influence the application of Article 26 of Regulation (EC) No 1346/2000 (as application or fact-finding ex officio or only on submission of the parties, consideration of facts not considered or not acknowledged by the court in the state of origin, burden of proof)?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>No special influence</td>
</tr>
<tr>
<td>Estonia</td>
<td>In Estonia, a court hearing a bankruptcy matter can also, at its own initiative, take measures to ascertain the facts relevant to the bankruptcy proceedings and organise collection of the evidence necessary to ascertain the facts.</td>
</tr>
<tr>
<td>Finland</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>France</td>
<td>No special influence.</td>
</tr>
<tr>
<td>Germany</td>
<td>According to prevailing opinion in Germany, the public policy exception should be examined ex officio because normally, a large and sometimes unclear number of creditors is concerned, so that the requirement of an individual objection could not be maintained. Nevertheless, the facts have to be submitted to the court. This approach was also adopted in the following cases: OLG Düsseldorf 09.07.2004, I-3 W 53/04 stated that the existence of grounds for a refusal of recognition was “neither demonstrated nor</td>
</tr>
</tbody>
</table>

567 Moss, Fletcher and Isaacs, 2009, para 8.327.
569 BGH 18.09.2001, IX ZB 51/00; Reinhart in MüKo-InsO, 2008, Art. 26 EuInsVO para 13; Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 17.
evident.” AG Köln 23.1.2004 71, IN 1 /04; AG Köln 06.11.2008, 71 IN 487/07 which simply stated that there was no violation of public policy although there was no sign of a possible breach of public policy at all. OLG Hamburg 17.04.2008, 10 U 9/07. The burden of proof lies with the party which contests the recognition of the foreign judgment569.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Extension of the scope to the applicable law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Although no case-law is available, the rule is that the suggestion and proof of the public policy exception remains in the hands of the interested party.</td>
</tr>
<tr>
<td>Italy</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>Latvia</td>
<td>See the answer regarding Lithuania.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>In Lithuania the court has a right to collect evidence on its own initiative in insolvency cases. Such legal regulation should not prevent the courts from collecting evidence if the case is concerned with non-recognition of a judgment relating to insolvency.</td>
</tr>
<tr>
<td>Portugal</td>
<td>No special influence.</td>
</tr>
<tr>
<td>Sweden</td>
<td>See the response at the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Cyprus, Hungary, Luxembourg, the Netherlands, Poland, Slovenia and Spain.

\[(e) \text{ Is the scope of Article 26 of Regulation (EC) No 1346/2000 in your State extended to the applicable law designated by the Regulation (Articles 4 et seq.), although, pursuant to its wording, Articles 26 of Regulation (EC) No 1346/2000 only applies to the recognition and enforcement of judgments?} \]
\[\text{If so, is there any practical experience with the application of Article 26 of the Regulation as a rule for conflicts of law?}\]

<table>
<thead>
<tr>
<th>Member State</th>
<th>Extension of the scope to the applicable law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>No relevant case-law was found. However, it has been mentioned in legal literature with regard to general international insolvency law that the &quot;wrong&quot; choice of law might lead to application of public policy and that as an example, a derogation from the lex rei sitae principle could form grounds for public policy570.</td>
</tr>
<tr>
<td>Germany</td>
<td>No case-law was detected. According to German legal literature, the scope of the public policy exception is extended to the stage of conflicts of law. It is considered contradictory that a breach of public policy by foreign law could be taken into account in the stage of conflicts of law.</td>
</tr>
</tbody>
</table>

570 See Koulu, 2004, p. 252.
recognize in Germany but not already in the stage of the application of the foreign law by German courts\(^{571}\). The public policy exception should be interpreted narrowly, too, when it applies on conflicts of law. It is proposed to substantiate it with regard to the case-law concerning Article 6 EGBGB or Article 16 of the Rome Convention\(^{572}\) which have now been replaced by Article 21 of Regulation (EC) No 593/2008.

**Portugal**

Yes, see the decision mentioned above of the Court of appeal of Lisbon\(^{573}\).

**United Kingdom & Republic of Ireland**

This possibility was specifically contemplated in *Re MG Rover*\(^{574}\), although this was not a decision concerning recognition or enforcement of insolvency proceedings in another Member State under Regulation (EC) No 1346/2000. The judge acknowledged, however (at [11]), that "[i]t is difficult to envisage how the application of Articles 3 and 4 of the EU Regulation could contavene the ‘fundamental principles’ of another Member State or how the operation of a foreign insolvency regime could be contrary to ‘the constitutional rights and liberties of the individual’". In this connection, it is to be noted that Article 26 requires the court, in applying the public policy exception, to consider “the effects of such recognition and enforcement”, which may (apparently) include the law applicable under Articles 3 and 4.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.


#### 3.6.1. Statistical Data

Regulation (EC) No 1206/2001 does not contain a general public policy exception, but provides in Article 17(5)(c) of the Regulation that the requested State may refuse the direct taking of evidence by the requesting State if this is “contrary to fundamental principles of law”.

It was examined how often the Member States made use of this objection but no case-law was found in any Member State. The Greek reporter gave the following information on the practical application of the Regulation\(^{575}\):

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\(^{572}\) Mäsch in Rauscher, 2010b, Art. 26 EuInsVO para 23.

\(^{573}\) Court of Appeal of Lisboa, 11 February 2010, 586/08.1TCFUN.L1-6.

\(^{574}\) [2005] EWHC 3426 (Ch).

\(^{575}\) The statistical data concerning Regulation (EC) No 1206/2001 stem from the Athens Court of First Instance and regard requests transmitted directly to the Greek court from other courts of Member States, since the Greek central body/competent authority (i.e. Ministry for Justice) does not have a database to archive every request.

3.6.2. Content of the public policy exception

(a) Which situations are considered to be contrary to fundamental principles in the sense of Article 17(5)(c) of the Regulation?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Situations considered contrary to fundamental principles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>A violation of rights to refuse to give evidence due to professional secrets.</td>
</tr>
<tr>
<td>Germany</td>
<td>An application of Article 17(5)(c) of Regulation (EC) No 1206/2001 is discussed with regard to the following legal situations:</td>
</tr>
<tr>
<td></td>
<td>1. Situations where it is questionable whether a person contributes voluntarily to the taking of evidence.</td>
</tr>
<tr>
<td></td>
<td>2. German mandatory provisions prohibiting the taking of evidence as they protect not only the witness but third persons or specific securities.</td>
</tr>
<tr>
<td>Greece</td>
<td>The only situation that has been officially reported regarded two requests from the same court in Constanța (Romania) transmitted directly to the Athens Court of First Instance. The Romanian court requested information about possible bank accounts of the parties of a family law dispute in Athens. The Greek court refused to execute the requests applying Articles 1 and 3 of Law Decree 1059/1971, according to which the bank accounts of any kind are secret, and Greek banking institutions are only allowed to provide the authorities with personal and account information about their customers in case of a felony. However, the above mentioned refusal is not a case within the scope of Art. 17(5)(c) Regulation (EC) No 1206/2001, since it regarded a direct request of a foreign court transmitted to a Greek court and not a request for direct taking of evidence.</td>
</tr>
<tr>
<td>Italy</td>
<td>In Italy, there is only one situation which is considered to be contrary to fundamental principles in the sense of Article 17(5)(c) of the Regulation: the deposition of witnesses by telephone.</td>
</tr>
</tbody>
</table>

made from a foreign court and the respective response of the Greek competent court. According to the said Greek competent authority Greece has not made use of the objection of Article 17(5)(c) Regulation (EC) No 1206/2001.

576 Both requests refused were transmitted directly to the Athens Court of First Instance by a Romanian court in Constanța and regarded data of parties' possible bank accounts in Athens.

577 Burgstaller/Neumayr, 2010, Article 17 EuBewVO, para 14 et seq.


Moreover, legal literature has pointed out that the so-called “orders to produce evidence” are contrary to fundamental principles of Italian procedural law because, under the law of Italy, a party does not have the duty to contribute to the fact-finding.581

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>Violation of the principle of adversarial procedure, effective defence and rule of evidence. See the decision of the Supreme court582. “In case of expert evidence, its implementation is contained in Article 568. This right ... is a fundamental pillar of the right to legal protection by judicial means, which encompasses not only the right of the parties to dispose of the means of evidence on the stated facts in the course of the process, but also the right to the manner in which they take part in the discovery, under the terms of law, and also the right to take advantage of the evidence discovered in the course of process, even if brought by the opposing party, according to the principle of procedural acquisition, stated in Article 515 of the Civil Procedural Code”.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>No relevant case-law was found.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, France, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.

(b) Do these situations mainly concern the performance of the taking of evidence, e.g. cross-examinations, or substantive principles, as the right to refuse giving evidence?

No further information was reported from any Member State with regard to this question.

3.6.3. Scope of the public policy exception

(a) Is Article 17(5)(c) of the Regulation applied broadly or narrowly?

In particular: do courts make use of the possibility to set up conditions for the direct taking of evidence according to Article 17(4) of the Regulation in order to avoid conflicts with national public policy?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>It is stressed in legal literature that, although the wording of Article 17(5)(c) suggests a discretionary character of the provision, the</td>
</tr>
</tbody>
</table>

580 This information was obtained from the Ministero della Giustizia – Dipartimento affari di giustizia – Direzione generale della giustizia civile – ufficio 2.


request has to be refused if the mentioned conditions are fulfilled. However, the application of the provision is considered to be restrained by Article 17(2) which allows the direct taking of evidence only on a voluntary basis with the opportunity to determine conditions.583

<table>
<thead>
<tr>
<th>Germany</th>
<th>a) Narrow interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Legal literature proposes a restrictive application following the interpretation of point (1) of Article 34 of Regulation (EC) No 44/2001, so that only risks for security, sovereign rights and indispensable principles of a constitutional state can be relevant.584 Nevertheless, it should be considered that the cases discussed with regard to point (1) of Article 34 of Regulation (EC) No 44/2001 on the one hand and with regard to Article 17(5)(c) of Regulation (EC) No 1206/2001 on the other have different connections to the German legal system. Thus, a situation can violate public policy according to Article 17(5)(c) of Regulation (EC) No 1206/2001 while the taking of evidence abroad does not automatically entail a violation of procedural public policy according to point (1) of Article 34 of Regulation (EC) No 44/2001.585</td>
</tr>
</tbody>
</table>

| b) Role of conditions according to Article 17(4) of Regulation (EC) No 1206/2001 |
| To establish conditions and to supervise their respect by a court according to Article 17(4) of the Regulation are measures to help avoid the need for refusal of the taking of evidence on the ground of public policy.586 By these means, cross examinations and even the taking of evidence by private persons could be tolerated.587 |

| Greece | Considering the above mentioned, limited data from the Athens Court of First Instance and the lack of respective data at the Greek competent authority, it is safe to assume that – so far – Article 17(5)(c) of Regulation (EC) No 1206/2001 has not been handled at all by the Greek competent authority. |

| Italy | The provision is applied narrowly.588 |

| Portugal | The provision is narrowly applied. The possibility to set up conditions to avoid conflicts with public policy is used. Reference was made to a decision of the Court of appeal Coimbra: “The request for the provision of information by a Portuguese Court to a Spanish company |

583 Burgstaller/Neumayr, 2010, Article 17 EuBewVO, paras 11 and 14 et seq.
587 Ibid.
589 11.06.2010, RC 374/09.8TBCVL-B.C1, in www.dgsi.pt.
(in Spain), under article 535º of the Civil Procedure Code is a means of obtaining evidence, involving cooperation between two Member States. The direct applicability of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between courts of Member States in the taking of evidence in civil or commercial matters binds the Portuguese Court to the obtainment of such specific evidence, to the use of the forms of cooperation stated in this Regulation, whether through direct obtainment or via the competent court of another Member State.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, France, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.

### 3.7. Synopsis 6 – Regulation (EC) No 593/2008

#### 3.7.1. Statistical Data

According to Article 21 of Regulation (EC) No 593/2008, the application of a provision of the law of another country may be refused “if such application is manifestly incompatible with the public policy (ordre public) of the forum”.

It was examined how often courts made use of this possibility to dismiss foreign provisions. No case-law regarding Article 21 of Regulation (EC) No 593/2008 was found in any Member State but Greece: one decision was located, which examined the issue of whether Greek public policy was violated by a choice-of-law clause in a distributor agreement entered into between a Greek company and a German company, whereby the parties chose German law as the applicable law to the contract. The Court found that this choice of the governing law (made according to Article 3 of Regulation (EC) No 593/2008) did not offend Greek public policy merely due to the fact that German substantive law did not contain the same provisions as Greek law on the matter of remuneration of the distributor, in the event of default.

Furthermore, a decision where a provision from the Bahamas was dismissed on the ground of public policy according to the Rome Convention of 1980, the predecessor of the Regulation, was mentioned by the Spanish reporter.

The national report for England and Wales made reference to one more case where the court expressed a willingness to apply the public policy exception according to the Rome Convention, although it was not ultimately necessary for English public policy to be given an overriding effect in that case as the repugnant clause was also invalid under the law applicable to the contract.

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590 Decision No. 4467/2010 of the Court of Appeal of Athens.

591 He also referred to two other cases stating that, under the Rome Convention 1980, an English and a German provision were NOT incompatible with Spanish public policy. Sources: statistics of the Spanish Council of the Judiciary (http://195.55.151.26:8040/estad/inicio.htm) and official case-law database, so called “Fondos de Jurisprudencia del CENDOJ TS, AN, TSJ y APS” (http://www.poderjudicial.es/eversuite/GetRecords?Template=cpjp/cgpj/principal.htm); web pages last visited 27/NOV/2010.
3.7.2. Content of the public policy exception

(a) The violation of which substantive principles has triggered the application of Article 21 of Regulation (EC) No 593/2008 in the national jurisdictions under your review?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Principles the violation of which triggers the application of the public policy exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The only relevant decision concerned Article 16 of the Rome Convention 593. The case concerned the cross-border sale of an allegedly original “SS-Ehrenring” via internet. The ring turned out to be a fake and the buyer claimed damages because he would have drawn profits from the agreement if the ring had been genuine. The court left open whether the Rome Convention applied to the case because even if it did, the designated German law would be rejected due to a violation of public policy (whether German law would consider such agreement null and void itself was not examined): the Austrian prohibition to deal with badges or uniforms of forbidden organisations forms part of public policy.</td>
</tr>
<tr>
<td>Finland</td>
<td>In the conflicts of law literature, it has been noted that it cannot be predefined what the fundaments of the legal order are and that substantive public policy has to be applied contextually on a case-by-case basis. However, as general overarching principle, commentators note that the principle of gender equity would, in particular in the family law context, be considered fundamental to the legal order. In a contract law context, equality between the parties is also fundamental and fraud or compulsion against the will of a party are not accepted.</td>
</tr>
<tr>
<td>Germany</td>
<td>Legal literature discusses an application of the public policy exception with regard to the following legal situations: The foreign law does not provide for a possibility to contest a declaration of intent in the event of a “vice of consent”594. Exorbitant contractual penalties which, according to the foreign law, cannot be reduced595. The designated law of a Member State only exists because a directive has not been implemented596. However, it has to be borne in mind that community law provides sanctions against this behaviour and the self-help of another Member State by referring to the public policy exception can only be permitted in the exceptional cases where the result of the foreign decision would lead to a violation of public policy. It is not allowed to pass a sentence on the foreign provision as such597.</td>
</tr>
</tbody>
</table>

592 See Duarte v The Black and Decker Corporation [2007] EWHC 2720 (QB).
<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>No cases about Article 21 of Regulation (EC) No 593/2008 were found. Indeed, the following circumstances were considered contrary to Italian public policy in accordance with Article 16 of the 1980 Rome Convention: a) Wrongful discharge (<em>{598}); and b) Lack of compensation in case of skipped notice of dismissal (</em>{599}).</td>
</tr>
<tr>
<td>Lithuania</td>
<td>There are no cases to answer this question. According to legal doctrine (_{600}), in Lithuania too high interest rates and punitive damages should be regarded as public policy exceptions. There are cases regarding the recognition of judgments of third countries where too high interest rates were considered as violating public policy of Lithuania.</td>
</tr>
<tr>
<td>Spain</td>
<td>No cases about Regulation 593/08 were found. However, when applying the Rome Convention 1980, Spanish Courts said that respect to (a) fundamental rights proclaimed in the Spanish Constitution and (b) the fundamental principles of Spanish Law fall within the scope of “public policy” (<em>{601}). On the other hand, it was held that foreign provisions do not affect public policy when they lead to a violation of a domestic commercial prohibition (prohibition: “Collective Investment Institutions shall not pledge their bonds, shares or stocks as securities”) and Spanish law does not deem void the act of violating the prohibition (because that act only entails a monetary fine) (</em>{602}); and it was also held that foreign rules on time limits for judicial actions are not incompatible with Spanish public policy at all (_{603}).</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>This provision does not appear to have been discussed in any published decision. In \textit{Duarte v The Black and Decker Corporation} (_{604}), the court indicated a willingness to apply Article 16 of the Rome Convention to invalidate a restrictive covenant which was considered to be anti-competitive and to hinder trade. As that clause was also held invalid under the law applicable to the contract, it was not necessary for Article 16 to be used.</td>
</tr>
</tbody>
</table>

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601 Judgment of TSJ Galicia, Sala de lo Social, Sec. 1 (Sede A Coruña), 26 April 2004, recurso de suplicación no. 946-2004, refusing to apply a provision from Bahamas because it violated the right to non discrimination as established in Article 14 of the Constitution; also, “Auto” AP Barcelona, Sec. 15, 77/2004, 1 June 2004, recurso de apelación no. 20/2004-1.\(^*\).
603 “Auto” AP Barcelona, Sec. 15, 77/2004, 1 June 2004, recurso de apelación no. 20/2004-1.\(^*\).
With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Sweden.

**(b) Is case-law relating to European procedural instruments considered relevant for the application of Article 21 of Regulation (EC) No 593/2008?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Relevant case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The guideline of the ECJ, saying that it was up to the Member States to determine the content of public policy but that the ECJ had to watch over the limits, is considered transferable to the application of Article 21 of Regulation (EC) No 593/2008.</td>
</tr>
<tr>
<td>Spain</td>
<td>No cases about Regulation (EC) No 593/2008 were found. Regarding the Rome Convention 1980, a case was found where the court cited the ECJ interpretation of “public policy” under the Brussels Convention 1968 and Regulation (EC) No 44/2001, as an exception that applies only when there is an “unacceptable conflict with the law of the required State, damaging a fundamental principle”.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In view of the similarities in wording, and the close connections between the instruments, it is considered that the ECJ’s case-law with respect to Regulation (EC) No 44/2001 (and, perhaps, the Insolvency Regulation) may be influential in limiting the scope of the public policy exception in Regulation (EC) No 593/2008.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Sweden.

### 3.7.3. Scope of the public policy exception

**(a) Is the public policy exception applied broadly or narrowly?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>In principle, the predecessor, Article 16 of the Rome Convention, was</td>
</tr>
</tbody>
</table>

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608 See Plender and Wilderspin, 2009, paras 12-059 to 12-060.
applied narrowly, as outlined even by the Bezirksgericht (district court) Melk609: public policy can only apply if the domestic sense of justice is intolerably violated and if the difference in social and political opinions is so significant that the basis of Austrian economic or public life would be affected.

**Germany**

A restrictive interpretation is required610. At the same time, the public policy clause is considered to be of little impact anyway because of the following reasons:

The majority of the law of obligations can be declared inapplicable by the parties 611 in any case. Articles 7 to 9 of Regulation (EC) No 593/2008 shall avoid conflicts with public interests612. Article 9 of Regulation (EC) No 593/2008 is understood as a *lex specialis* to the public policy exception because overriding mandatory provisions exclude the designation of the foreign law a priori, whereas the public policy clause corrects the result of such designation.613

If the Regulation designates the law of a Member State, many provisions of community law, in particular the fundamental freedoms, are directly applicable as a part of the law of the respective Member State, even if its explicitly formulated rules contradict the community law. Thus, an application of the public policy exception is not necessary614.

**Italy**

Scholars have suggested a narrow application of Article 21 of Regulation (EC) No 593/2008 in accordance to the case-law regarding point (1) of Article 34 of Regulation (EC) No 44/2001615.

**Spain**

No cases about Regulation (EC) No 593/2008 were found. The three cases dealing with public policy according to the Rome Convention 1980 suggest that the exception will be applied narrowly (since the application of a foreign provision will only be refused if it violates constitutional rights or fundamental principles of Spanish law). This narrow approach is consistent with the application of the public policy exception under Spanish national rules governing the conflict of laws: Article 12(3) of the Spanish Civil Code (which refers to the exception) is also interpreted narrowly.

**United Kingdom & Republic of Ireland**

The approach of the English and Scots Courts in certain cases616 suggests a narrow approach, with the courts being astute not to strike down a foreign rule solely on the basis of its inconsistency with local

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611 Martiny in MüKo-BGB, 2010 Art. 21 Rom I-VO, para 2.
613 Martiny in MüKo-BGB, 2010, Art. 9 Rom I-VO para 111.
615 Biagioni, 2009, Commento all’articolo 21 regolamento Roma I, 916-917.
616 E.g. Continental Enterprises v Shandong Zhucheng [2005] EWHC 92 (Comm); Re Atlantic Telecom GmbH, 2004 Scot (D) 34/7 and Re Colt Telecom Group plc [2002] EWHC 2815 (Ch).
contract law. By contrast, the approach taken more recently by the English High Court in Duarte v Black and Decker Corporation\(^\text{617}\), appears open to criticism. Having noted (rightly) that Art. 16 of the Rome Convention meant that pre-Convention decisions concerning the potentially overriding effect of public policy could not be decisive, the judge relied on English contract law texts and cases to justify his view that, if the applicable laws were to uphold the validity of the restrictive covenant (which, he ultimately held, they do not) it would be manifestly incompatible with English public policy. This approach may be argued not to discriminate sufficiently between “domestic” and “international” public policy, and greater restraint shown in the cases referred to in the preceding paragraph appears more in line with the spirit and wording of the Regulation and its predecessor Convention.

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Sweden.

(b) In cases where a rather broad interpretation is detectable, which reasons have been brought forward?

There is no evidence for a broad interpretation of the Regulation in any Member State. The fact that the Austrian Bezirksgericht (district court) Melk 21.09.2005, 5C1296/05y (regarding the Rome Convention) considered the application of public policy without a prior examination of German law might be seen as a rather broad application which, however, seems to be justified due to the very flagrant breach of fundamental values in this particular case.

(c) Have national authorities developed limits to the application of Article 21 of Regulation (EC) No 593/2008?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Limits</th>
</tr>
</thead>
</table>
| Germany      | (a) Special link to the German legal system  
The application of the public policy exception requires a special connection of the case to the German legal system. If community law was violated, a connection to any Member State is considered sufficient\(^\text{618}\).  
(b) Divergences due to different implementations of harmonising directives  
A violation of German public policy by foreign law implementing a EU directive is considered impossible: it could be assumed that the  

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\(^{617}\) Duarte v The Black and Decker Corporation [2007] EWHC 2720 (QB) (23 November 2007).

\(^{618}\) Martiny in MüKo-BGB, 2010, Art. 21 Rom I-VO, para 6; Sonnenberger in MüKo-BGB, 2010, IPR Einl. para 211.

leeway given by the directive still ensures the equality of law in the Member States\textsuperscript{619}.

**United Kingdom & Republic of Ireland**

Courts have been astute not to strike down a foreign rule solely on the basis of its inconsistency with local contract law. In *Re Atlantic Telecom GmbH*\textsuperscript{620}, Lord Brodie (in the Scots Court of Session) stated (at [33]): "[I]n my opinion, in a case where choice of law otherwise does fall to be determined in terms of the Convention, subject only to the possibility of refusing to apply Convention rules in terms of article 16 by reason of manifest incompatibility with public policy, there is no scope for a domestic court declining to adopt a foreign substantive rule simply because it is unfamiliar or because its consequences are very different from the consequences which would flow from application of the equivalent domestic rule." This seems the correct approach.

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

**d)** How do procedural aspects influence the application of Article 21 of Regulation (EC) No 593/2008 (as application or fact-finding *ex officio*, consideration of facts not considered or not acknowledged by the court in the state of origin, burden of proof)?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>In civil matters, the parties normally have the burden of pleading, e.g. to enunciate the relief sought, and the burden of proving the facts that they rely on. If the law of a foreign state is to apply and the court does not know the contents of this law, the court shall, as a general rule, exhort the party to present evidence on the same. The court may also itself obtain evidence thereon. However, the extent to which such foreign law breaches public policy is a matter of Finnish law and ultimately a matter that falls within the principle of <em>jura novit curia</em>. Regardless of that principle, the court should, in line with the principle of audiatur et altera pars and within its case management powers, strive to hear the parties on public policy if it becomes evident that it may be relevant.</td>
</tr>
<tr>
<td>Germany</td>
<td>The application of the public policy exception has to be examined <em>ex officio</em>\textsuperscript{621}.</td>
</tr>
<tr>
<td>Italy</td>
<td>No cases about Regulation (EC) No 593/2008 were found. However, pursuant to Article 14 of the Italian Statute on Private International Law of 31 May 1995, No 218, an Italian Court has to ascertain the</td>
</tr>
</tbody>
</table>

\textsuperscript{619} Atlantic Telecom GmbH plc 2004 Scot (D) 34/7.

\textsuperscript{620} Martiny in MüKo-BGB, 2010, Art. 21 Rom I-VO para 2; Leible/Lehmann, 2008, p. 543.
<table>
<thead>
<tr>
<th>Country</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lithuania</td>
<td>The role of the court in Lithuania depends on the subject of a case. In cases regarding employment contracts and consumer contracts, the court would be able to collect evidence on its own initiative. In other cases the burden of proof would lie with the parties.</td>
</tr>
<tr>
<td>Portugal</td>
<td>See the response at the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>Spain</td>
<td>The litigant has to prove the foreign law that he/she is willing to apply in Spain (Article 217 and Article 281(2) of the Civil Procedure Act 2000). The opposing party may argue the public policy exception and the Court will have to give a ruling on that issue (Articles 216 and 218 of the Civil Procedure Act 2000). However, since judges tend to understand that any matter relating to &quot;public policy&quot; can be taken into account ex officio, if the opposing party does not claim the exception, the Court might also deal with the issue (by asking both parties what they think about it and, eventually, giving a decision). In fact, the public policy issue seems to have been raised <em>ex officio</em> in one of the cases referred to in this report.622</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic Ireland</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.


#### 3.8.1. Statistical Data

Pursuant to Article 26 of the Regulation, the application of a foreign provision may be refused *"if such application is manifestly incompatible with the public policy (ordre public) of the forum"*.

It was examined how often courts dismissed the application of foreign law on the ground of Article 26 of the Regulation but no case-law was found in any Member State.

#### 3.8.2. Content of the public policy exception according to Article 26 of Regulation (EC) No 864/2007

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622 Judgment of TSJ Galicia, Sala de lo Social, Sec. 1 (Sede A Coruña), 26 april 2004, recurso de suplicación no. 946-2004.
(a) If courts made use of the public policy exception, on which grounds did they decide?

There is no case-law in any Member State to answer this question. In the only German case dealing with this provision, a breach of public policy was denied: the case concerned the application of Dutch provisions on the burden of proof for fault in traffic accident cases. Unlike German law, Dutch law does not know a *prima facie* evidence for the fault of the driver who drives into another vehicle. However, the German court held that this difference does not violate German public policy under Article 6 EGBGB and Article 26 of the Regulation.

(b) Is there any case-law dealing with the violation of public policy by foreign methods of calculating damages? As Regulation (EC) No 864/2007 is universally applied, Article 3 of the Regulation, methods of non-Member States can be taken into account as well.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Considerations regarding foreign methods of calculating damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>No decision regarding Regulation (EC) No 864/2007 was found. However, one judgment of the OGH should be mentioned. It dealt with damages incurred by a traffic accident in the Czech Republic. Czech law was designated by the Hague Convention on the law applicable to traffic accidents. As this law does not provide for damages for pain and suffering, it was envisaged whether public policy was violated because, due to the influence of European law, such damages are more and more recognised within the EU. However, the OGH rejected these considerations.</td>
</tr>
<tr>
<td>France</td>
<td>Two interesting cases in French autonomous private international law have been reported: Firstly, the French supreme court has held that the principle of full compensation does not belong to French public policy, and that a foreign law excluding the compensation of some particular losses, for instance psychological loss, does not violate public policy. Secondly, the French supreme court has held that an American judgment granting punitive damages was not necessarily contrary to French public policy, unless granting a disproportionate amount of punitive damages. In the said case, a ratio of 1:1 (i.e. the same amount of compensatory damages had been granted) was found to be disproportionate.</td>
</tr>
<tr>
<td>Germany</td>
<td>No relevant case-law was found. In legal literature, the following considerations regarding punitive damages have been made:</td>
</tr>
</tbody>
</table>

623 AG Geldern 27.10.2010, 4 C 356/10.
624 OGH 04.11.2004, 2Ob237/04y.
(1) Some authors considered it doubtful whether the award of punitive damages was a “civil matter” according to Article 1(1) of Regulation (EC) No 864/2007. However, this approach is not tenable since Recital (32) explicitly refers to punitive damages and thus presupposes that these cases fall within the scope of the Regulation. An exception is only considered if the damages have to be paid to the state or other public institutions and not to the affected person.

(2) Concerns are expressed regarding consolidations into a lump sum and maximum limits as provided by Danish and Spanish law.

(3) The wording of Recital (32), according to which the application of foreign law can be refused if it awards non-compensatory exemplary or punitive damages of an excessive nature, is criticised: the excessive nature of the damages itself should be a reason to apply the public policy clause. An exemplary or punitive purpose was not necessary. Thus, the so-called treble damages of American law, which principally aim to compensate the damage but then provide for a tripling of the sum, should be refused by means of the public policy exception.

<table>
<thead>
<tr>
<th>Country</th>
<th>Case-law/reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>No case-law was found. The so called “punitive damages”, which aim to punish and deter wrongful conduct and not to compensate the damage, may be considered as being contrary to Italian public policy.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>This provision does not appear to have been discussed in any published decision. In a contractual context, the view has been expressed that a foreign award of punitive damages would not (automatically) be considered as being contrary to English public policy referring to other English cases. It is considered that (taking into account the wording of Recital (32)), this view would likely prevail also in the context of Regulation (EC) No 864/2007, although the method of calculation of damages would likely be closely scrutinised.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from Belgium, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

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627 Mörsdorf-Schulte, 2005, p. 248 et seq.
632 Franzina, 2008, p. 1042 et seq.
(c) Is case-law relating to European procedural instruments considered relevant for the application of Article 26 of the Regulation?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transferable case-law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>The case-law regarding Regulation (EC) No 44/2001 and the Brussels Convention is considered transferable634.</td>
</tr>
<tr>
<td>United Kingdom &amp; Republic of Ireland</td>
<td>In view of the similarities in wording, and the close connections between the instruments, it is considered that the ECJ’s case-law with respect to Regulation (EC) No 44/2001 may be influential in limiting the scope of the public policy exception in Regulation (EC) No 864/2007635.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from any other Member State under scrutiny.

3.8.3. Scope of the public policy exception according to Article 26 of Regulation (EC) No 864/2007

a) Is Article 26 of the Regulation applied narrowly or broadly?

<table>
<thead>
<tr>
<th>Member State</th>
<th>Narrow or broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>See the mentioned decision of the Amtsgericht (local court) Geldern636. With reference to Recital (32) (only “in exceptional circumstances”), the wording of Article 26 of the Regulation (“manifestly”) and the materials637, a restrictive interpretation is considered necessary638. This is also shown by the limits which have been developed for the application639. Furthermore, the scope of the public policy exception is limited by Article 7, Article 14 points (2) and (3), Articles 16, 17 and 18 of Regulation (EC) No 864/2007: these provisions already break through the mechanism of the designation of the applicable law, in particular if this is necessary in order to realise substantive rights of a party or some mandatory provisions640.</td>
</tr>
</tbody>
</table>

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635 See Dickinson, 2008, paras 15.05-15.08.
636 27.10.2010, 4 C 356/10.
639 See infra 3.8.3.b.
Article 26 is to be applied narrowly, in accordance with its wording ("manifestly incompatible with the public policy of the forum")\textsuperscript{641}.

With regard to this question, no relevant information could be gathered from any other Member State under scrutiny.

\textbf{(b) Which reasons have been given if a rather broad application took place?}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reasons for a broad application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>It has been mentioned that some authors approve a rather generous interpretation of Article 26, according to which the inadequacy of the awarded sum was sufficient for the assumption of a violation of public policy\textsuperscript{642}. This is based on the opinion that the breach of public policy is not less important if the foreign law awards exorbitant damages arbitrarily but without intending punitive or deterrent effects\textsuperscript{643}.</td>
</tr>
</tbody>
</table>

With regard to this question, no relevant information could be gathered from any other Member State under scrutiny.

\textbf{(c) Have courts developed limits to the application of Article 26 of the Regulation and to what extent?}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Limits</th>
</tr>
</thead>
</table>
| Germany      | (a) Special link to the German legal system  
For the application of Article 26 of the Regulation, a sufficient connection of the situation which underlies the legal dispute to Germany is considered necessary. The German nationality of one party, their domicile in Germany or even the localisation of the legally protected right in Germany can be taken into account\textsuperscript{644}.  
(b) Reduction of a claim instead of its refusal  
Especially regarding breaches of public policy by punitive damages, Article 26 of the Regulation induce a reduction of the amount of the awarded sum and not automatically a complete refusal of any payment\textsuperscript{645}. |

\textsuperscript{641} Franzina, 2008, p. 1042.  
\textsuperscript{642} Junker in MüKo-BGB, 2010, Art. 26 Rom II-VO para 21.  
\textsuperscript{643} Ibid.  
\textsuperscript{645} Junker in MüKo-BGB, 2010, Art. 26 Rom II-VO para 27.
With regard to this question, no relevant information could be gathered from any other Member State under scrutiny.

**What do procedural aspects influence the application of Article 26 of the Regulation (as application or fact-finding *ex officio*, consideration of facts not considered or not acknowledged by the court in the state of origin, burden of proof)?**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Influence of procedural aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>In civil matters, the parties normally have the burden of pleading, e.g. to enunciate the relief sought, and the burden of proving the facts that they rely on. If the law of a foreign state is to apply and the court does not know the contents of this law, the court shall, as a general rule, exhort the party to present evidence on the same. The court may also itself obtain evidence thereon. However, the extent to which such foreign law breaches public policy is a matter of Finnish law and ultimately a matter that falls within the principle of jura novit curia. Regardless of that principle, the court should, in line with the principle of audiatur et altera pars and within its case management powers, strive to hear the parties on public policy if it becomes evident that it may be relevant.</td>
</tr>
<tr>
<td>Germany</td>
<td>The public policy exception according to Article 26 of Regulation (EC) No 864/2007 has to be examined <em>ex officio</em>[^646]. The European Parliament proposed a provision according to which the clause should be considered only on submission of a party if the applicable law was the law of another Member State[^647]. The proposal was refused.</td>
</tr>
<tr>
<td>Italy</td>
<td>Pursuant to Article 14 of the Italian Statute on Private international law of 31 May 1995, No 218, Italian Courts have to ascertain the foreign law of its own accord[^648]. According to Article 26, the same court shall refuse, <em>ex officio</em>, the application of a foreign provision if such application would be contrary to Italian public policy[^649].</td>
</tr>
<tr>
<td>Lithuania</td>
<td>The role of the court in Lithuania depends on the subject of a case. In most cases the burden of proof would lie with the parties.</td>
</tr>
<tr>
<td>Portugal</td>
<td>See the response to the same question regarding Regulation (EC) No 44/2001.</td>
</tr>
<tr>
<td>Spain</td>
<td>The litigant has to prove the foreign law that he/she is willing to apply in Spain (Article 217 and Article 281(2) of the Civil Procedure Act.</td>
</tr>
</tbody>
</table>


[^648]: See Ballarino, 2006, p. 78; Boschiero, 1996, Commento all’art. 14, p. 1037 et seq.

[^649]: In general, on the role of public policy exception in Italian private international law: Mosconi, 1994, p. 5 et seq.
The opposing party may argue the public policy exception and the Court will have to give a ruling on that issue (Articles 216 and 218 of the Civil Procedure Act 2000). However, since judges tend to understand that any matter relating to “public policy” can be taken into account ex officio, if the opposing party does not claim the exception, the Court might also deal with the issue (by asking both parties what they think about it and, eventually, giving a decision).

| United Kingdom & Republic of Ireland | See the response to the same question regarding Regulation Regulation (EC) No 44/2001. |

With regard to this question, no relevant information could be gathered from Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Latvia, Luxembourg, the Netherlands, Poland, Slovenia and Sweden.
4. COMPARATIVE ANALYSIS AND EXAMINATION OF THE DEVELOPMENT OF A UNIFORM NOTION OF PUBLIC POLICY

This section analyses the answers obtained from the national reports in order to assess general trends in the application of the EU instruments.

4.1. Regulation (EC) No 44/2001

4.1.1. Substantive and procedural public policy

The basic assumption of the general reporters that the Member States generally distinguish between procedural and substantive public policy has been confirmed by the national reports.650 This distinction is found in all national systems and in most Member States – with the exception of Luxembourg. In the practice of the Member States, procedural public policy is of great importance while substantive public policy does not play any considerable role. The national reports revealed only the following few cases where judgments coming from other Member States were reviewed with regard to substantive public policy. Only very few judgments were not recognised because substantive public policy had been infringed:

In France, the Court d’Appel Amiens refused the recognition of an English judgment on the liability of an employee with regard to his employer in a case of malpractice of a veterinary surgeon.651 The English Court had ordered the employee to pay around 85% of the damage whereas the employer should bear only 25%.652 As the veterinary surgeon was an uninsured employee of the clinic, the Court of Appeal held that the recognition would infringe Article 34 point (1) Regulation (EC) No 44/2001, because mandatory French labour law did not permit the liability of an employee in these circumstances. Mandatory labour law equally plays a role in the practice of the German Federal Labour Court (but only with regard to third states).653 In Germany, the Bundesgerichtshof applied substantive policy in the famous Sonntag decision of 1993.654 In this case, an Italian court had ordered a German school teacher, a public officer, to pay personally damages to the parents of a school boy who had been fatally killed during a school trip in Italy. The BGH held that the payment was incompatible with German mandatory law on the compensation of victims by

650 This assumption is largely shared in the legal literature, see Fentiman, 2010, para 18.50 et seq.; Gaudemet-Tallon, 2010, para 402 et seq.

651 The ill-treatment of a horse had caused its death and a damage of 350.000 GBP. The owner obtained a judgment against the clinic and the veterinary surgeon awarding 85% of the damage to the latter. As the veterinary surgeon was an uninsured employee of the clinic, the Court of Appeal held that the recognition would infringe Article 34 point (1) Regulation (EC) No 44/2001.

652 CA Amiens, 26 janvier 2010, No 07/02364, but note that this case was not challenged in the Cour de cassation and it seems to be unclear whether the Supreme Court would have had reversed the judgment.

653 BAG, 2/27/2007, 1PRax 2009, 343. The judgment addressed the stay of action against dismissal in Germany by the opening of insolvency proceedings over the employer in the United States. The Supreme Labour Court held that the employee was entitled according to German procedural law (Section 86 Insolvency Law) to continue the proceedings. The Court also referred to public policy, but unnecessarily, as the applicable law in this respect was German procedural law, see Temming, 2009, p. 329 et seq.

public insurance excluding any personal liability of the teacher. In the legal literature, this judgment was criticised.

However, in 2004 the BGH held that a French judgment which ordered a German consumer to pay a considerable sum arising out of a guarantee was enforceable in Germany despite the Constitutional Court having developed a strict case-law on the protection of guarantors against abusive behaviour of banks in this field. Similarly, the Oberlandesgericht Hamburg granted exequatur to an Italian judgment awarding non-material damages to a moral person for the infringement of personality rights. The court correctly stated that the mere non-existence of such damage under German civil law did not amount to a violation of (substantive) public policy. In Sweden, the Supreme Court recently granted the recognition of a judgment of a Romanian court under autonomous law. This judgment ordered the payment of damages arising out of a traffic accident that were nine times higher than could be awarded in Sweden. The Appellate Court held that this was not a bar to recognition and the Supreme Court confirmed the judgment.

The practical limited importance of substantive public policy is mainly influenced by Article 36 and Article 45(2) Regulation (EC) No 44/2001, which expressly forbid any review of the substance of the foreign judgment. Accordingly, several cases were reported where the (Appellate and Supreme) Courts in the Member States reversed judgments of the lower instances because they had reviewed the foreign decision with regard to its substance. The German report mentions 15 judgments where substantive public policy was raised without success. In this respect, the case-law of the ECJ in *Renault v Maxicar* provides for clear guidance in that substantive public policy should only be applied in (very) exceptional situations. With regard to defamation, the empirical research revealed the interesting result that in this area of law almost no pertinent case-law exists. It should be noted that the scope of the review with regard to procedural public policy seems to be much broader.

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655 BGHZ 123, 268. Note that the Federal Supreme Court had referred the case to the ECJ, but without any reference to point (1) of Article 27 Brussels Convention and Article 34 Regulation (EC) No 44/2001 respectively.


657 BGHZ 140, 395.

658 This judgment was largely approved by the literature, e.g. Leible in Rauscher (ed.), 2011, Art. 34 Brüssel I-VO, para 25 with further references.


660 Regulation (EC) No 44/2001 was not applicable *ratione temporis*.

661 Swedish Supreme Court, case Ö 5591-09.

662 Example: Supreme Polish Court, 3/21/2007, I CSK 434/06 OSNC 2008/3/37; C.Cass. 2/8/2000, Europe 2000, com 126: recognition of a Spanish judgment on the suspension of staff, the appellate court had largely reviewed the judgment with reference to mandatory French labor law. The Supreme Court annulled the judgment of the Court of Appeal.


664 The French Report mentions two decisions of the Court d’Appel de Paris on the recognition of English defamation judgments, CA Paris. In these cases, the French debtors asserted that Article 6 ECHR had been infringed by the litigation costs in England. One case was reported from Germany; see the details supra at 3.2.2.f.

665 E.g. OLG Saarbrücken, 1/12/2011, nyr, on the recognition of a French judgment which was obtained in the context of criminal proceedings (cf. point (4) of Article 5 of Regulation (EC) No 44/2001) and ordered the defendant to pay several millions of euros in damages for fraud. The German debtor who was imprisoned raised several objections against the fairness of the French proceedings and asserted that the public policy exception...
With regard to procedural public policy, all national reports demonstrate the practical importance of the exception. They unanimously state that most of the case-law found relates to procedural public policy, although in most cases the exception is unsuccessfully invoked. The following recurring categories of application can be distinguished: procedural fraud; 666 foreign judgments given without reasons 667; insufficient or even misleading information about the defence in the court of origin; 668 violation of the rights of defence (language barriers 669); unacceptably high litigation costs. 670 However, it must be stated that most cases regarding the insufficient service of the defendant are dealt with by point (2) of Article 34 of Regulation (EC) No 44/2001, which has considerably improved the situation in this category. Under this provision, the interests of the claimant and the defendant seem to be balanced appropriately: most significant is the real likelihood of the defendant of being informed about the litigation and of being given the opportunity to defend his case in an appropriate time frame. Accordingly, point (2) of Article 34 of Regulation (EC) No 44/2001 imposes on the defendant a procedural duty to contest improper service in the court of origin. 671

In the national reports, there is no clear trend of whether the reported case-law related to an incorrect application of the procedural law by the court of origin or to the content of the foreign procedural law itself. In some of the Member States, the courts explicitly limit their review to the outcome of the foreign decision (e.g. France), while the Italian courts do not recognise a foreign judgment if the foreign procedural law is considered to infringe public policy. In some Member States, such as Portugal, both categories exist. Yet, the practice of the courts in the Member States is largely influenced by their attitude regarding the obligation of the debtor to exhaust the remedies in the Member State of origin in order to cure the procedural irregularity. 672 Although courts in Belgium, Finland, Hungary, Luxemburg and Sweden do not make this requirement, the civil courts in Austria, France, Germany, 673 Greece, Italy, and Netherlands and in the United Kingdom decide this issue differently and require an exhaustion of the pertinent remedies in the Member State of origin. However, from the perspective of good and balanced administration of justice within


667 Lithuania: Case 2T-154/2011; Netherlands: Rotterdam, 12/30/2009, 339640/HA RK 09-191. In Italy, the constitutional provision to provide for a reasoned decision (Article 111 no 8) is only applied to Italian decisions and not to foreign judgments.


671 Hess/Pfeiffer/Schlosser, 2008, para 473 et seq.

672 This issue is often addressed in the context of (alleged) procedural fraud, see 5.2.3.d).

673 BGH 8/26/2009, XII ZB 169/07. Note that the German practice is not consistent in this respect, see 3.4.2.b and d.
the European Judicial Area, it seems advisable to require that the debtor must exhaust the available remedies in the Member State of origin.674

4.1.2. National and European public policy

According to the case-law of the ECJ, Member States are free to determine the content of their respective public policy exceptions.675 However, the ECJ sets the limits of the exceptions and controls their application by the courts of the Member States. The comparative survey demonstrates that the practice of the Member States does not fully endorse this concept: most of the reported judgments refer to the pertinent case-law of the ECJ and determine the content of public policy according to the standards of Article 6 ECHR676 and the ECJ's case-law in Krombach, Maxicar and in Gambazzi. As a result, the courts in many Member States, such as England, France, Luxemburg and Italy mainly refer to European Union Law – national standards do not play an important role. However, in other Member States, such as Germany, Greece and Hungary, the landmark decisions of the ECJ in Krombach, Maxicar and Gambazzi play an equally predominant role. Still, the courts also refer to constitutional law and to general principles of their own procedural systems.677 The reference to the domestic legal system is not, however, formulated as the core of public policy, rather as one of several strands. Interestingly, the national reports revealed only three Member States (Spain, Poland and Lithuania) where the public policy clause is predominantly interpreted as a reference to its own system. Polish courts, however, also refer to the pertinent case-law of the ECJ when applying the public policy exception.678 Spanish courts consider Article 24 of the Spanish Constitution as corresponding to Article 6 ECHR.

Based on these empirical findings, it can be stated that the basic assumption in the case-law of the ECJ that the public policy exception is mainly determined by the national orders of EU Member States does not entirely correspond to the practice of the national courts.679 The predominant perspective of national courts relates to the case-law of the Court in Krombach and to its reference to Article 6 ECHR. This perspective is reinforced by the fact that the practical application of the public policy exception relates to procedural public policy which is comprehensively determined by Article 6 ECHR and by the pertinent case-law of the European Court of Human Rights. Even in EU Member States with predominant constitutional guarantees (such as Germany) judicial practice is currently shifting from the national procedural guarantees to European standards.680 However, it must be noted that these developments are not uniform, but appear differently in EU Member States.

677 E.g. Hungarian Supreme Civil Court, Pfv. XI.21.581/2008/11, on the non-recognition of an Austrian judgment.
680 There are only a few cases where German courts exclusively referred to the national constitution. One example is BGH, 8/26/2009, XII ZB 169/07, where the XIIth Senate held that a Polish judgment on maintenance could not be recognised as the paternity of the German father had been based on evidence of hearsay. The BGH held that recognition would infringe the right to be heard, Article 103 of the German Constitution.
Nevertheless, as a result, a growing Europeanisation of the public policy exception of point (1) of Article 34 of Regulation (EC) No 44/2001 can be ascertained.

The predominant influence of the ECJ on the interpretation of the public policy exception can be demonstrated by the outcome of Gambazzi.\footnote{ECJ, 4/2/2009, Case C-394/07 Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company [2009] ECR I-2563, para 42 et seq.} In this case, the Court developed in detail the following guidelines for the referring court on how to apply the public policy exception in the given circumstances. The ECJ advised the national court first to assess whether the debtor had been given an opportunity to participate in the proceedings and to be heard on the merits of the case. Secondly, the national court should ascertain whether the refusal of the debtor to comply with the disclosure order was justified by Swiss criminal law (on professional secrecy) and whether the debarment was proportionate with regard to its objective of permitting a sound administration of justice.

The Corte d’Appello di Milano comprehensively endorsed the guidelines of the ECJ. It first stated that Mr Gambazzi had had an opportunity to contest the jurisdiction of the English court and had then decided not to defend himself on the merits. Accordingly, an opportunity had been granted for the defence of his case. The main part of the Italian decision related to the issue of whether the sanction imposed on Mr Gambazzi had been proportionate. The Corte d’Appello repeated the statement of the ECJ several times, that the imposition of contempt of court was not per se a violation of the right to a fair trial, but only if it was disproportionate to the goals pursued, namely the proper administration of justice. The Milan court concluded that, although debarment from defending was clearly a severe sanction, and unknown in Italian civil procedure, human rights are not absolute, the proper and efficient administration of justice also being a value which had to be considered. The issue was then whether the imposed sanction had been proportionate. The Court affirmed this question for the following reasons: firstly, Mr Gambazzi had repeatedly been in default (the Court had also acknowledged, however, that Mr Gambazzi had participated actively during the first stages of the English proceedings); secondly, Mr Gambazzi had no proper reason not to comply with the order which did not entail any violation of professional secrecy or Swiss criminal law, and thirdly Mr Gambazzi had been informed about the sanction.\footnote{Corte d’Appello Milano, 11/24/2010.} As a result, the Italian court rejected the arguments of the debtor that his rights of defence had been unreasonably infringed by the debarment order of the High Court of Justice and maintained the declaration of enforceability.

### 4.2. Regulation (EC) No 2201/2003

#### 4.2.1. The recognition of divorce judgments

The national reports demonstrate that there is almost no pertinent case-law in the recognition of divorce judgments. Only five cases were reported; one from Austria, one from England, two from France and one from Germany. The Austrian case concerned the recognition of a German judgment on spousal maintenance where the Austrian Supreme Court decided on the recognition as an incidental question and held that it operated automatically under point (a) of Article 22 of Regulation (EC) No 2201/2003. In the same situation, the Irish Supreme Court addressed point (1) of Article 34 of Regulation (EC) No 44/2001 and held that "it could scarcely be suggested that public policy could any longer be
invoked in this State to refuse recognition of a foreign divorce, where such recognition is so extensively provided by law". 683

(The) legal literature in the Member States largely refers to the case-law of the ECJ regarding Article 34 no 1 JR. 684 Accordingly, the difference between substantial and procedural public policy seems to be generally accepted. 685 In addition, the literature refers to the pertinent provisions of the EHRC, especially to its Articles 6 and 8. 686 Shúilleabháin raises the interesting issue of whether the recognition of (the dissolution of) same-sex marriages under the Regulation might entail the application of point (a) of Article 22 Regulation (EC) No 2201/2003. However, the ECJ has yet to decide the issue of whether the notion of marriage (and the scope of the Regulation) includes same-sex marriages.

4.2.2. The recognition of judgments on parental responsibility

The practice in the Member States with regard to point (a) of Article 23 of Regulation (EC) No 2201/2003 in the Member States is as sparse as the practice in matrimonial matters. The national reports referred to 2 Austrian decisions, 12 decisions in England (2 appealed) and 4 in Germany (1 appealed). One appellate decision was reported from Lithuania, one from Spain and another one from Finland. However, it must be noted that these figures should be read with caution as some of the reported cases do not relate to the recognition of parental decisions under point (a) of Article 23, but to return orders under Articles 11 and 40 to 42 of the Regulation (see infra 4.2.3.).

Important issues in practice relate firstly to the hearing of the affected child and secondly and more generally, to whether the foreign order serves the best interests of the child(ren). In this context, the distinction between procedural and substantial public policy is present in Austria, Germany, Portugal and England. The Portuguese Report stresses that the best interest of the child entails an increased importance of substantive public policy. An additional and important factor which is also often taken into account is Article 8 ECHR and the pertinent case-law of the Strasbourg Court. In the scope of point (a) of Article 23 of Regulation (EC) No 2201/2003, a clear constitutionalisation of the public policy exception can be ascertained. In addition, the distinction between procedural and substantive public policy is also present in parental matters.

However, the national reports show significant divergences with regard to a broad or narrow application of point (a) of Article 23 of Regulation (EC) No 2201/2003: in Austria, Finland, and Germany this criterion is rather broadly applied; the practice in the Netherlands, Spain and in England however stresses a narrow application of the provision which is understood as an exception. It seems to be noteworthy that cross-references to the case-law of the ECJ on point (1) of Article 34 Regulation (EC) No 44/2001 is found in some judgments, 687 but that these references are rare. However, the "best interest of the

684 E.g. in Golubovich v Golubovich, [2010] EWCA Civ 810, a case concerning recognition of a Russian divorce decree under English legislation, Thorpe LJ (in the English Court of Appeal) referred to the ECJ’s decision in Case C-7/98 Krombach/Bammerski [2000] ECR I-1395, and stated (at [78]) that: “By way of generality to refuse recognition of a divorce decree pronounced by the court in another jurisdiction within the Council of Europe, absent breach of natural justice, must be regarded as truly exceptional.”
687 In Re S, [2003] EWHC 2115, the English High Court referred to the ECJ’s decision in Case 7/98 Krombach v Bammerski [2000] ECR I-1395, which regarded the Brussels Convention in emphasising that the requirement that the judgment be manifestly contrary to English public policy under Art. 15(2)(a) of Regulation (EC) No 1347/2000
child” refers to the specific circumstances of the case under consideration. Thus, a general evaluation seems to be difficult. In England and in the Netherlands the provision was used for the non-recognition of consent orders of the parents which were deemed to not correspond to the best interest of the child.

4.2.3. Mutual recognition of return orders under Articles 11 and 40 to 42 of Regulation (EC) No 2201/2003

The limited importance of point (a) of Article 23 is explained by the general jurisdictional structure of the Regulation and by its specific provisions on the immediate return of (abducted) children. According to Article 8 of the Regulation the courts at the habitual residence of the affected child(ren) usually decide on the parental responsibility and, according to Article 10, the unlawful removal of a child by one of its parents does not alter this jurisdiction. In practice, the jurisdiction at place of the child’s habitual residence entails the additional consequence that normally, there is no need for any recognition of the decision on the parental responsibility as the affected child is resident in the court’s district and the pertinent decisions are enforced in the district of the competent court.

However, cross-border enforcement of decisions on parental responsibility usually takes place when children have been removed unlawfully. These (emotional) situations occur often when parents of different nationality separate and one parent decides to return with the child or the children to his or her respective Member State of origin. In these situations, the returning parent often takes the child(ren) with him or her without the other parent’s consent. However, this unilateral action infringes the other parent’s legal position (and equally the child(ren)’s best interests). Legally, this behaviour is qualified as an unlawful abduction of the child which entails the right of the other parent to demand the immediate return of the child.

As we have explained above, one objective of the Regulation is to ensure the immediate return of abducted children in these situations. Under Articles 11 and 40 to 42 of Regulation (EC) No 2201/2003, provisional orders on the immediate return of a child (in the case of Article 11(8)) are enforced in every other EU Member State without any declaration of enforceability and any other possibility of opposing its recognition. These constituted a “high hurdle”. That approach has been approved in later cases, Re Jacob and Dawid Northern Ireland [2009] NIFam 23; S v S [2008] 2 FLR 1358; W v W [2005] EWHC 1811 (Fam); Re S [2003] EWHC 2974 (Fam).


689 S Gravenhage, 23 December 2008, Nr. FA RK 08-9154.

690 Hess, 2010, § 7 IV, para 55 et seq.

691 Supra at 3.2.2.

692 Article 11 reads as follows: (...) 6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order. 7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. (...) 8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.
provisions shall reinforce the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and avoid any defence based on the best interest of child in these situations (which was still possible under Article 13 of the Hague Convention). As a result, the court competent for the main proceedings on parental responsibility shall also decide on the immediate return of abducted child(ren).

In practice, however, the application of these provisions has proved to be difficult. In the course of the last few months, many national courts referred several cases to the ECJ and asked for an interpretation of Regulation (EC) No 2201/2003. For national courts, ordering the return of a (minor) child (even against his or her will) to the Member State of its former habitual residence appears problematic. Normally, the emotional conflict between the parents strongly affects the child who becomes entrapped in a difficult situation. Deciding upon such issues is a challenging situation for the courts of EU Member States confronted with highly emotional situations. Taking these concerns into account, it comes as no surprise that the ECJ has been repeatedly requested by the national courts on the interpretation of Regulation (EC) No 2201/2003. A prominent, but typical case was the ECJ’s decision in case C-491/10 PPU of 22 December, 2010.

In this case, a Spanish-German couple, originally resident in Lanzarote, separated in 2007. Their (at that time) eight-year-old daughter Andrea remained with the mother; both spouses applied for divorce and sought sole custody of their daughter. In May 2008, the Spanish court awarded custody to the father and the daughter temporarily moved to live with him. The mother returned to Germany. However, after a holiday visit in summer 2008, Andrea did not return to Spain. The father immediately sought her return to Spain and the 5th court for family matters in Bilbao ordered that Andrea was generally forbidden to leave Spanish grounds. An order for the return of Andrea of the same day was not recognised under the Hague Child Abduction Convention in Germany, when Andrea was heard by the German family court where she strongly objected to her return. In December 2009, the Spanish court gave a judgment on the merits and transferred the custody to the father. The court did not personally hear the mother and the daughter, although both had been summoned, but did not appear at the hearing. However, the Spanish judge denied the mother’s request for granting safe conduct and had not accepted the proposal of her lawyer to hear Andrea via video conference. Nevertheless, the Spanish court obtained a copy of the decision of the Court of Appeal Celle on the non-return of the child and a copy of her

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694 A similar situation was present in the ECJ’s judgment of 23 December 2009 in Case C-403/09 PPU Detiček v. Sguegli. Despite the decision of an Italian Court ordering the return of the child, the Slovenian court issued a contrary provisional measure permitting the stay of the child in Slovenia. As the Slovenian Report correctly states the Slovenian court could not expect the ECJ to tolerate such circumvention of the Regulation.

695 Any infringement of this order entailed criminal sanctions and the mother was therefore subject to these sanctions.

696 The German court relied on Article 13 of the Hague Child Abduction Convention. According to this provision, a non-return may be ordered in exceptional cases for preserving the best interests of the child.

697 The Spanish court had ordered the personal appearances of both mother and child.

698 It should be noted that Article 11(4) of Regulation (EC) No 2201/2003 explicitly provides for “adequate arrangements”.
hearing by the German judge. The Court of Appeal of Biskaya dismissed the mother’s appeal in April 2010 which was based on the (allegedly) insufficient hearing of the child.

Some weeks earlier, in February 2010, the 5th family court at Bilbao had issued a certificate under Article 42 of the Regulation ordering the immediate return of Andrea to her father. According to Article 11(8) of Regulation (EC) No 2201/2003, German family courts must immediately enforce the return order of the Spanish court without any recognition proceedings. Nevertheless, the mother filed a parallel action in the (competent) German family court seeking a declaration that the Spanish decision was unenforceable in Germany, because Andrea and her mother had not been personally heard by the Spanish judge. It must be noted however that this relief is not permitted by Regulation (EC) No 2201/2003.

On appeal, the Higher Regional Court of Celle took up the case and referred several questions to the ECJ (under Article 267 TFEU) which were formulated as follows: (1) Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself possess the power to examine the matter, pursuant to an interpretation of Article 42 of Regulation (EC) No 2201/2003 in conformity with the Charter on Fundamental Rights? (2) Is the court of the Member State of enforcement itself obliged to enforce notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of Regulation (EC) No 2201/2003 is clearly inaccurate?

According to the referring court, the Spanish court had not sufficiently respected the child’s right to be heard – a right which shall protect her family relations under Articles 24 and 47 CFR. The necessity of hearing the child and the parent is also expressed by Article 42(2) of the Regulation. However, the German court asked the ECJ whether a serious violation of human rights (as guaranteed by the Charta) entails the need to review a judgment of another Member State even in the context of mutual recognition. Thus, the referral of the Higher Regional Court of Celle directly challenged the concept of mutual recognition and its underlying assumption that all courts of the Member States fully and equally respect the fundamental rights of the parties.

More fundamentally, the second question raised principal concerns about the application of mutual trust: in practice, mutual recognition operates on the basis of forms which are filled out by the court of the Member State of origin. These forms pursue several functions: firstly, they shall inform the requested court about the enforceable decision and its content. Secondly, they shall reduce the need for translation of the decision. Thirdly, and most importantly, they contain factual or legal findings which shall bind the courts and judicial organs in the Member State of enforcement. However, the court of origin is not obliged to give any motivation for its findings – the forms are usually filled out by a simple ticking of boxes. As a result, the requested court must simply enforce the foreign judgment – no verification takes place. However, sometimes the forms are not filled out accurately – the

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699 Local Court no 5 Bilbao, judgment no 443 of Dec. 12, 2009 (on file with the authors). Accordingly, the Spanish judge was able to evaluate the unwillingness of the child to return to Spain.


702 Hess, 2010, § 3, para 55 et seq.

703 As a result, mutual trust operates like a kind of „blind trust“, because the requested court normally has no possibility to verify whether the information contained in the form is appropriate.
second question asked about the binding force of a form which was apparently incorrectly completed.

On the merits,704 the ECJ did not endorse the concerns of the German judge and held that the German court was not entitled to review the return order of the Spanish court and to refuse its enforcement. The ECJ referred to the principle of mutual trust, but equally stressed the need to apply the Regulation in accordance with Article 24 CFR. However, the ECJ noted that the Spanish courts are bound by Fundamental Rights to the same extent. However, the First Chamber rightly stressed that under the Regulation, the Spanish court was mainly responsible for protecting the rights and the interests of the minor.705 Contrary to the referring judge, the ECJ held that Article 42 of Regulation (EC) No 2201/2003 only requires a “possibility” to be heard (and not a personal hearing in any case). However, the ECJ also stressed the obligation of the court of the main proceedings to apply the instruments of Regulation (EC) No 1206/2001 in organising the hearing of the affected persons.706 The First Chamber took up the Conclusions of General Attorney Bot who had argued that the hearing of the child by the German court had functionally substituted the hearing by the Spanish judge.707 Thus, the Spanish court, when ordering the immediate return of the child, was well aware of the decision of the German court (on the non-recognition of the first Spanish judgment) and the declaration of the child that she did not want to return to Spain.708 As the Spanish decision on the return of the child had explicitly referred to the arguments of the German decision, it was hard to argue that the views of child had not been sufficiently explored by the Spanish judge. With this in mind, the ECJ urged the German court to fully respect the mechanism of the Regulation – because the safeguards of the Regulation had not been infringed by the Spanish court.709

One has to approve the judgment of the ECJ since the application of the Regulation by the Spanish court was correct and did not (at least not obviously) infringe the child’s right to be heard. However, the reluctance of the German judge demonstrates that the implementation of the mutual recognition of these orders sometimes triggers open resistance in the Member States.710 A major impediment to the application of these EU instruments is the lacking communication (and cooperation) of the civil courts in the EU Member States.711

As a result, it can be stated that the practice under Regulation (EC) No 2201/2003 demonstrates that the courts of the Member States are still reluctant with regard to the principle of mutual trust and the abolition of any review based on public policy. Although

704 The President of ECJ decided to apply the urgent procedure although its application had not been requested by the German court, ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU Aguirre Zaraga v Pelz, at paras 38 to 41.
705 ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU Aguirre Zaraga v Pelz, at para 46.
706 ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU Aguirre Zaraga v Pelz, at para 67.
707 Conclusions GA Bot Case C-491/10 PPU Aguirre Zaraga v Pelz, at para 101 et seq.
708 Decision of the Court Bilbao of 12/9/2009, no 5 (the judgment addressed the issues of the best interest of the child at 5 pages).
709 ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU Aguirre Zaraga v Pelz, at para 70 et seq.
710 Since 2008, the ECJ has explicitly stated three times that the certificate under Article 42 of Regulation (EC) No 2201/2003 is binding for the requested judge and that any review in the Member State of enforcement is excluded, see ECJ, 7/11/2008, Case C-195/08 PPU Rinau v Rinau [2008] ECR I-5271, para 84; ECJ 7/1/2010, ECJ, Judgment of 1 July 2010 in Case C-211/10 PPU Povse, para 70 and ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU Aguirre Zaraga v Pelz, at para 48.
711 It seems possible that the concerns expressed by the German court on the appropriate application of the EU instruments (especially on the appropriate filling out of the forms) will once again be raised in Luxembourg in the near future.
the return mechanism of Articles 11 and 40 of the Regulation leaves no doubt that an abducted child must be returned immediately and that the court of the main proceedings is the competent court for the decision on parental responsibility, it seems to be hard for the family courts to accept the preference of the foreign judge. As a consequence, parties instituted satellite litigation in the Member States of enforcement which was not immediately rejected. However, the ECJ elaborated a stringent case-law which finally implemented the mechanism of the Regulation. However, this practice under Regulation (EC) No 2201/2003 demonstrates that the abolition of review proceedings – at least in sensitive areas of law – should be carried out with great caution.


The national reports do not reveal much case-law from the Member States where the recognition of a foreign order was refused on grounds of public policy. However, case-law demonstrates that while national courts often refer to the exception, they usually deny its application. Accordingly, the exceptional character of public policy in insolvency proceedings is generally recognised in the Member State and the public policy exception is applied narrowly. In practice, courts of the Member States often refer to the case-law of the ECJ relating to point (1) of Article 34 of Regulation (EC) No 44/2001.

One example of the narrow application of Article 26 is a judgment of the Court of Appeal of Dresden. In this case, the debtor, a German lawyer, who designated himself as an expert in insolvency proceedings, moved from Dresden to London where insolvency proceedings were opened and a discharge was granted after the short period of one year. Although the period under German insolvency law amounts to seven years, the German Court held that the English order must be recognised, as Article 26 of the Regulation does not permit any review of the jurisdiction of the English court.

The cautious application of public policy might also be explained by the specific situation of international insolvency law: according to Article 16 of the Regulation, the opening of insolvency proceedings in one Member State is automatically recognised in all other Member States. This article imposes the so-called universality of insolvency proceedings. According to this principle, all assets of the debtor are encompassed, regardless of their location. However, the non-recognition of insolvency proceedings entails a distortion of the leading principle that all creditors are treated equally in insolvency proceedings. This background (which is different from the situation of the recognition of a singular, individual judgment) explains the reluctant application of the public policy exception in this area of law.

One case where Article 26 of the Regulation was expressly (but wrongly) applied is the decision of the German insolvency court at Nuremberg in the famous Brochier case. In this case, a German company had been transformed into a private limited company and its seat was transferred to England for the purpose of a reconstruction by English insolvency law.

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713 This result was confirmed by the national reports from Austria, France, Germany, Italy, Netherlands, Poland, Portugal and the UK. According to the Austrian Report, the narrow approach is supported by the Annexes A and B to the Regulation as the proceedings listed there are generally recognised.
714 Cf. answers received from Austria, Cyprus, Finland, Germany, Greece, Netherlands, Sweden and the UK.
715 OLG Dresden, unreported.
On August 4, 2006 the new board applied for the opening of insolvency proceedings in London. Forty-five minutes later, the German workers’ council applied for the opening of insolvency proceedings in Germany. The insolvency court at Nuremberg had to decide whether the English application (and provisional opening of the insolvency) barred the German proceedings.\(^{718}\) It firstly scrutinised whether the English court had correctly stated that the centre of the main interests of the debtor was in England and not in Germany, where the construction plants (and the former seat of the company) were located. According to the principle of mutual recognition, this test was incorrect – the jurisdiction of the court under Article 3 of the Regulation is not subject to review by the courts of other EU Member States.\(^{719}\) The German court went on to scrutinise whether the transfer of the seat to England had to be considered as an abuse of procedure. Finally, the court held that the lacking independence of the English administrator amounted to a violation of German public policy.\(^{720}\) When the joint English administrator visited the German site of the company, he quickly realised that the company’s main centre of interest was in Germany, not in England, and the application for opening insolvency proceedings in London was finally dismissed.\(^{721}\)

The national reports demonstrate that the distinction between substantive and procedural public policy is also present in European insolvency law.\(^{722}\) Procedural public policy especially relates to the right of the debtor to be heard (i.e. to participate actively in the opening proceedings)\(^{723}\) and to appeal the opening decision when the creditors apply for the opening of insolvency proceedings.\(^{724}\) However, the courts equally recognise that the debtor’s right to be heard must be balanced against the interests of the creditors with regard to the preservation and realisation of their claims.\(^{725}\) Procedural public policy also encompasses the administrator’s right to be informed about secondary (and parallel) proceedings in other EU Member States.\(^{726}\) On the other hand, any violation of procedural public policy presupposes that available remedies in the EU Member State of the main proceedings have been exhausted.\(^{727}\) This requirement is also derived from the guiding principle of universality in European insolvency law.

\(^{718}\) See ECJ, case C-341/04, Eurofood IFSC Ltd., ECR 2006 I-3813, para 30.


\(^{720}\) In this respect, the court did not correctly assess English insolvency law, see comprehensively Laukemann, 2010, p. 407 et seq.

\(^{721}\) Hans Brochier Ltd v Exner, [2006] EWHC 2594 (Ch.Div.).

\(^{722}\) The distinction is reported from Austria, France, Germany, Greece, Italy, Portugal, Sweden and the UK.

\(^{723}\) OLG Innsbruck, 7/8/2008, ZIP 2008, 1647; also ECJ, Case C-341/04 Eurofood IFSC Ltd. [2006] ECR I-3813, para 60.

\(^{724}\) District Court Haarlem, 7 September 2010, Nr. F. 172470. In this case, the debtor appealed against the recognition of a Greek decision on the opening of insolvency proceedings, arguing that Greek insolvency law did not provide for any remedy against the opening of insolvency proceedings.


\(^{726}\) ECJ, Case C-341/04 Eurofood IFSC Ltd. [2006] ECR I-3813, para 66.

\(^{727}\) This requirement is mentioned by the predominant legal literature in Germany, cf. Paulus, 2008, Artikel 26 EUInsVO, para 9.
In practice, the adequate protection of employees in insolvency proceedings is an important issue. There is a tendency of the courts to protect the local employees and creditors. However, protection can also be achieved through the opening of secondary insolvency proceedings. This category does not only relate to procedural, but equally to substantial public policy. It is closely related to the preferential treatment of specific debts, which is dealt with differently in the various Member States. However, the practice reported clearly reveals that the courts – except Portugal – are reluctant in applying Article 26 as a general rule of conflict of laws. So far, no case-law has been reported.

4.4. Regulation (EC) No 1206/2001

With regard to the limited public policy exception of Article 17(5)(c) of Regulation (EC) No 1206/2001, no specific case-law has been reported. However, the Greek report mentions two requests from the same court in Constanța (Romania) transmitted directly to the Athens Court of First Instance. The Romanian court requested information about possible bank accounts of the parties of a family law dispute in Athens. The Greek court refused to execute the requests applying Articles 1 and 3 of Law Decree 1059/1971, according to which the bank accounts of any kind are secret, and Greek banking institutions are only allowed to provide the authorities with personal and account information about their customers in case of a felony. However, the above mentioned refusal is not a case within the scope of Article 17(5)(c) of Regulation (EC) No 1206/2001, since it regarded a direct request of a foreign court transmitted to a Greek court and not a request for direct taking of evidence.

According to the national reports, Article 17(5)(c) of the Regulation is discussed differently in the legal literature. Some authors do not see any practical need for this specific public policy exception as the participation of witnesses under Article 17 of Regulation (EC) No 1206/2001 must be voluntarily. However, other authors refer to situations where the taking of evidence may infringe the interests of third persons or public interests like bank secrecy etc. The Italian report mentions the questioning of witnesses by phone which is not permitted under Italian law.

All in all, it must be stated that the practical importance of Article 17(5)(c) seems to be limited. The difference between substantive and procedural public policy does not play any role.

4.5. Regulation (EC) No 593/2008

Not surprisingly, the national reports describe only a small number of cases referring to the public policy clause in Article 21 of Regulation (EC) No 593/2008. This instrument is applicable only in relation to contracts concluded after 17 December 2009 so that a significant case-law could not develop. The reported case-law may nonetheless serve as an

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728 E.g. Bundesarbeitsgericht (Federal Labour Court), 2/27/2007, IPRax 2009, 343, where the German court (unnecessarily) applied the public policy exception to the non-recognition of American insolvency proceedings in order to permit a German employee of an US airline to bring a lawsuit against his dismissal.

729 The transparency of the debtor's assets and the cross-order freezing of bank accounts will be addressed in a proposal of a specific Regulation which is expected for June 2011.


732 This information was obtained from the Ministero della Giustizia – Dipartimento affari di giustizia – Direzione generale della giustizia civile – ufficio 2.
indicator for core areas, where the public policy clause is or will rather likely become relevant.

A first possible source of cases is caused by different political attitudes with regard to an appropriate answer to Nazi propaganda and related trading. Whereas some Member States have a strict policy against any use of Nazi symbols, others consider their use as being protected by the principle of free speech. That can result into public policy questions with regard to cross-border trading of such symbols. An Austrian case of 2005 (relating to the Rome Convention) gives an example; the local court held that, if the applicable law should treat such a contract as valid and enforceable, this constituted a violation of Austrian public policy. In the underlying case, the applicable law was German law. German law considers such contracts void under Section 134 Bürgerliches Gesetzbuch (Civil Code) in combination with Section 86 Strafgesetzbuch (Criminal Code), which says that the dissemination of propaganda of unconstitutional organizations is a criminal offence. However, there are Member States that do not have the same policy so that it is very well possible that the courts have to decide on a hard case where the applicable Member State law does not declare such a contract void, which legal solution will be contrary to the public policy of other Member States. Similar cases may arise with regard to the dissemination of other material, which even under standards of free speech is considered to go beyond all possible limits of tolerance in some Member States whereas it is tolerated by others.

Another typical area for public policy cases is labour law. Here, on the one hand, the policy of the Member States is different in several aspects, e.g. with regard to minimum wages or judicial control of dismissals. On the other hand, labour law is closely related to a countries social policy and the balance between different social groups in society. Thus, the application of foreign laws in labour contract law is rather likely to result into problems of public policy. This had already been noted as visible from the ECJ case-law. This case-law also indicates that public policy issues have arisen in Belgium. Relevant cases have also been noted from Italy and Germany. The Supreme Federal Labour Court has decided that, in cases of insolvency, an automatic stay of actions against unjustified dismissals under Chapter 11 US Bankruptcy Code is a violation of German public policy. Although a good argument can be made that the reference to German public policy in this case was unnecessary since German law applied in the first place and although this decision only addresses the application of the law of a non-Member State law, it might become relevant for the application of the laws of other Member states since provisions that result into a stay or an inadmissibility of actions in similar situations is also known in Member State laws.

Another potential source for public policy cases relates to general contract law. In many legal systems, there is a consent that the applicable contract law has to meet certain minimum requirements with regard to the quality of the consent, i.e. there have to be

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733 See the description of the case in the findings for Austria relating to Regulation (EC) No 593/2008 in Chapter 3.

734 See supra 2.5.2. for the discussion of ECJ 23/11/1999, Cases C 369/96 and C 376/96 Criminal proceedings v Jean-Claude Arblade and Arblade & Fils SARL v Bernard Leloup, Serge Leloup and Sofrage SARL.

735 See the findings for Italy relating to Regulation (EC) No 593/2008 in Chapter 3.


737 See supra 4.1.1.

738 This has been discussed in the unpublished cases of Labour Court Frankfurt, 3 Ca 7232/08 and 3/7 Ca 7269/09, where one of the authors of this report served as court appointed expert for English law.
remedies or defences in cases of fraud or compulsion or certain provisions against cases of immorality, e.g. an unacceptable imbalance of the respective obligations. According to the comparative experience of the Heidelberg Institute for Comparative Law, Conflicts of Law and International Business Law, which is based on numerous expert opinions on Member State laws for German courts, the contract laws in all Member States will, in most instances, comply with such general requirements. Furthermore, these requirements are, in many legal systems and to a certain extent, derived from constitutional law or from constitutional values; with regard to such constitutional values, the enactment of the CFR will result into a further converging of Member State laws. Yet, there are still aspects where the Member State law differ significantly, e.g. in cases of immorality. For instance, some Member States consider prostitution illegal whereas, e.g. German law, there is a valid and enforceable claim for the agreed remuneration. To be sure, the larger part of these cases does not involve a transnational element. However, cases involving such an element as well as exceptions from a general tendency towards convergence cannot be excluded.

A further possible source for an invocation of public policy are areas of law which are subject to intensive regulation such as the Laws against anti-competitive conduct. Moreover, this may include contracts relating to telecommunication or in the area of capital markets or banking law. On the hand, these areas of law are rather likely to be source of public policy reservation. On the other hand, it needs to be emphasised that the differences between the Member State laws in these areas of law are limited since European law and European harmonization play an important role here. Any possible role of national public policies is confined to aspects which are not or not yet harmonised.

Another relevant issue relates to cases including contractual punitive damages. Some Member States pursue a public policy, according to which punitive or excessive damages cannot be awarded, even if a foreign law applies. By contrast, English courts have indicated that contractual punitive damages under foreign laws are not definitely excluded by English public policy. For the purposes of this report, that is relevant because of its side effect on the recognition of judgments. The English position may result into judgments of English courts awarding punitive damages e.g. based on Canadian contract law. If there was no public policy control under the Regulation (EC) No 44/2001, this would have to be

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739 See the findings for Finland or for Germany relating to Regulation (EC) No 593/2008 in Chapter 3 of this report.
740 See the findings for Germany and for Lithuania relating to Regulation (EC) No 593/2008 in Chapter 3.
741 See e.g. the findings for Finland, Germany and Spain relating to Regulation (EC) No 593/2008 in Chapter 3.
742 An example for an exception from this tendency towards convergence is a German case in relation to a Dutch provision which stated that the owner (even if not the driver) of a car is liable for the use of a parking lot (article 276a Dutch Munipality Act [Gemeentewet]) Magistrate Court (Amtsgericht) Leverkusen, 14/2/1995, Neue Zeitschrift für Verkehrsrecht 1996, p. 36; however, it seems that this Dutch provision is no longer effective.
743 See the findings for the United Kingdom and Ireland relating to Regulation (EC) No 593/2008 in Chapter 3.
744 For a survey of overriding mandatory laws in German telecommunications law see Pfeiffer/Weller/Nordmeier, 2011, p. 334.
745 For a general survey on overriding mandatory contract provisions see e.g. Cheshire/North/Fawcett, 2008, pp. 732 to 738; Freitag in Reithmann/Martiny, 2010, pp. 355 to 429; Mousseron/Fabre, 2003, pp. 98 to 110.
746 See e.g. the findings for Lithuania relating to Regulation (EC) No 593/2008 in Chapter 3; see also the findings with regard to excessive penalty clauses under German law; see also the following part on Regulation (EC) No 864/2007.
recognised in other Member States although such a judgment is not unlikely to be contrary to their public policy.\footnote{The Swedish Supreme Court recently recognised a Romanian judgment which awarded damages arising out of a traffic accident which were nine times higher than the damage under Swedish law.}


With regard to extra-contractual obligations, many legal systems, relying also on Recital 32 of the Regulation, consider excessive damages as a contradiction to their public policy\footnote{See the findings for France, Germany and Italy relating to Regulation 864/07 in Chapter 3.}. Although this is mainly relevant in relation to damage claims US or Canadian Law, exemplary damages are available also in English law in the whole range of tort law.\footnote{Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd., 16/7/2004, [2004] EWHC 1704 (Com).} Thus, cases in the whole area of torts cannot be excluded.

Other concerns are expressed in German legal writing based on public policy with regard to a consolidation of damages into a lump sum and to maximum limits under Danish and Spanish laws.\footnote{See the findings for the Germany relating to Regulation (EC) No 864/2007 in Chapter 3.} Although no case-law is available so far, relevant cases can, again, not be excluded.\footnote{Note, however, that German courts repeatedly held that foreign judgment awarding damages unknown to the German legal system are recognised as long as they award proportionate sums, see supra at 3.8.2.b.}

5. COMPREHENSIVE ASSESSMENT

5.1. Main findings of the comparative reports

In the European instruments, the public policy clauses are a ground for the non-recognition of a foreign judgment and for the non-application of foreign laws. In practice, public policy is often invoked, but seldom applied. This is mainly due to the exceptional character of these clauses which only apply in extreme cases and require a “manifest” contradiction to fundamental values of the Member State of enforcement. In procedural law, the difference between substantive and procedural public policy is recognised and the procedural public policy is much more often invoked and applied than substantial public policy. However, there is a trend in the case-law of some Member States that procedural irregularities must be remedied in the Member State of origin.

With regard to the content of the exception, the ECJ underlines the difference between the content of the public policy exception as determined by national law and the limits of its application as controlled by the Court. However, the decisions in Krombach and in Gambazzi demonstrate that the ECJ does not only set the limits of the application of public policy under the Brussels I Regulation, but also determines its content positively. In Krombach, the ECJ clearly addressed the relationship between the ECHR and public policy and concluded that there was a manifest breach of the fundamental right to be heard. In Gambazzi, the ECJ even went a step further and developed detailed guidelines for the
appropriate application of the public policy exception by the national court. As a result, the content of public policy is largely determined by European Union Law. Recent case-law on Regulation (EC) No 2201/2003 demonstrates that the CFR is going to reinforce recourse to and the elaboration of European constitutional standards in European procedural law.\textsuperscript{753}

Since \textit{Krombach}, most of the national courts determine the content of (procedural) public policy by a direct reference to Article 6 ECHR and to the ECJ’s case-law. As a result, the recourse to national law (including national constitutional laws) has been largely replaced by a reference to European standards. However, there are still some Member States where the courts define the content of public policy according to national law. Nevertheless, in these Member States we found the predominant opinion that the national and the European standards are largely converging.\textsuperscript{754}

With regard to procedural public policy, the ECJ has clearly elaborated that the constitutional guarantees are not absolute, but can be restricted and justified by overriding public interests. However, any restriction of fundamental rights must be proportionate. Only a manifest or a disproportionate breach of a fundamental right (to defend a claim or to be heard) entails the non-recognition of a foreign judgment. In this context, the ECJ stressed that all Member States are bound by the ECHR and that the courts of one Member State can trust that these guarantees are respected by all courts in the European Judicial Area.\textsuperscript{755}

With regard to substantive public policy, the constitutional standards of the CFR and the ECHR seem to be less elaborated.\textsuperscript{756} One of the most prominent results of this study is the almost complete lack of case-law in this area – even in the field of the protection of privacy. The following factors may explain this finding: First, mandatory provisions aimed at the protection of the weaker party (consumers, insurants and employees) are usually implemented by the courts of the Member State where the “weaker party” resides. Consequently, cross-border enforcement of judgments against the protected person only occurs in exceptional cases. Secondly, Article 36 and Article 45(2) of Regulation (EC) No 44/2001 forbid any substantive review of the foreign judgment. Thirdly, the limited scope of the European instruments avoids that the recognition of judgments entails conflicts relating to sovereign concerns of EU Member States. However, in the case-law of the ECJ there is a clear tendency that substantive public policy shall only apply in exceptional cases where the recognition of the foreign judgment would entail unreasonable results. Thus, substantive public policy is generally subject to a principle of proportionality.

With regard to the public policy clauses in Regulations (EC) Nos 593/2008 and 864/2007, there is no ECJ case-law directly addressing the relevant provisions, which has to do with the relative newness of these instruments rather than with an irrelevance of the respective clauses.

There is ECJ case-law addressing cases where public policy played or potentially played a certain role in the underlying national proceedings. This ECJ case-law supports two conclusions, the first of which is that public policy still may have some relevance for the application of the laws of other Member States. The second is that EU law sets outer limits

\textsuperscript{753} ECJ, Judgment of 5 October 2010 in Case C-400/10 PPU \textit{J. McB v. B.}

\textsuperscript{754} Supra at 4.1.2.

\textsuperscript{755} ECJ, Judgment of 22 December 2010 in Case C-491/10 PPU \textit{Aguirre Zaraga v Pelz}, para 67 et seq.

\textsuperscript{756} For the exception of family law and the protection of privacy, see Articles 7, 8 and 24 CFR.
study on the interpretation of the public policy exception

for any application of the respective public policy clause. The former conclusion also finds support from Member State cases or legal writing, which relates to the law applicable prior to the enactment of Regulations (EC) Nos 593/2008 and 864/2007 but is still relevant. Concerned substantive areas include e.g. the law for the trading of intolerable goods (such as Nazi propaganda material) or other areas of contract law relating to deeply rooted moral or cultural attitudes and, furthermore, labour law, contract law for regulated markets and punitive or exemplary damages.

As case-law of the ECJ and of the courts of EU Member States demonstrates, a clear tendency of cross-referring among the different instruments is also found with regard to the interpretation of the public policy clauses. In this respect, the ECJ’s case-law relating to Regulation (EC) No 44/2001 has been transferred to the interpretation of the Regulation (EC) No 1346/2000 and vice versa. However, any transfer requires a similarity of the underlying factual and legal circumstances. With regard to Regulations (EC) Nos 593/2008 and 864/2007, the legal literature largely refers to the ECJ’s case-law on point (1) of Article 34 of Regulation (EC) No 44/2001. At present, it remains to be seen to what extent the ECJ will take up this approach.

5.2. Future developments of the public policy exception in European law

According to the proposal of the European Commission on the reform of Regulation (EC) No 44/2001, the exequatur procedure of Articles 32 to 48 of Regulation (EC) No 44/2001 shall be replaced by a system of automatic recognition. As explained above, the abolition of the specific exequatur procedure shall not entail the complete abolition of grounds for non-recognition. As a matter of principle, procedural deficiencies shall be remedied in the EU Member State of origin (see Article 45 of the draft Regulation for default judgments, Article 46(7) of the draft Regulation for other procedural defects). Extraordinary relief is granted in the Member State of enforcement if the judgment infringes fundamental principles underlying fair trial, Article 46(1) of the draft Regulation. According to this proposal, the public policy exception shall be modified considerably: the substantive public policy exception shall cease to exist; procedural public policy shall be substituted by a direct reference to fundamental principles underlying fair trial. According to the proposed Recital (24), this reference shall be determined by Article 47 CFR (and Article 6 ECHR).

These proposals seem to be in line with the results obtained in this study. According to our findings, the case-law of the ECJ which interprets procedural public policy by referring to Article 6 ECHR (and Article 47 CFR) has been accepted by the practice of the courts of most Member States. Furthermore, the basic idea of the draft that relief against procedural irregularities should be primarily obtained in the Member State of origin also corresponds to the current practice in many Member States. In the practice, the proposal of the European Commission will improve the present situation considerably: the present granting of formal exequatur by the civil courts in the Member State of enforcement will be given up; the grounds for non-recognition will be reviewed (and remedied) in the Member State of origin. However, the proposed Article 46 provides for extraordinary relief in the Member

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757 Dickinson, 2008, para 15.04 et seq.
759 Cf. supra at 1.2.3.
760 See supra 1.2.3.; Hess, 2011a, p. 128 et seq.
761 Supra at 3.2.2.b.
State of enforcement when efficient and adequate protection in the Member State is not available. This situation will occur when the procedural law of the Member State of origin is not entirely elaborated, e.g. when it permits exorbitant costs of litigation or does not provide for adequate remedies against procedural irregularities (including fraud or – even – corruptive practices within a judicial system of a Member State).

The main political issue, which shall also be addressed here, relates to the question of whether also substantive public policy should be entirely abolished. The Commission’s main argument for abolishing substantive public policy is the sparse case-law in this field. This practical argument is supported by the results obtained in the present study. A second argument supporting the Commission’s approach refers to the public policy clauses in Regulations (EC) Nos 593/2008 and 864/2007. These exceptions relate to substantive public policy and uniform European standards will help the national courts to avoid the application of unacceptable provisions of substantive law.

However, it remains the question whether these safeguards are sufficient. With regard to the application of (untenable) substantive law entailing unacceptable results, it must be stressed that the public policy exceptions in Regulations (EC) Nos 593/2008 and 864/2007 do not cover all pertinent situations. These provisions do not apply when courts apply their domestic laws. Yet, this situation is not unusual in cross-border settings, due to the so-called „Heimwärtsstreben“ of judges who tend to apply their own, familiar legal system. In these constellations, any recourse to public policy is excluded. Consequently, courts will apply their domestic systems without any “safeguards”.762 However, the practical need for maintaining substantive public policy within the European Union is reduced by the growing harmonisation of substantive laws. Although the scope of harmonisation is different in the affected areas, there is no doubt that harmonisation in civil and commercial law considerably reduces the “danger” that the national systems are not based on similar legal foundations. The more national systems are harmonised, the more the divergences are reduced and the corresponding danger that the application of the substantive law of other EU Member States will lead to unacceptable results.763

However, the public policy reservation in Regulations (EC) Nos 593/2008 and 864/2007 may be not sufficient to close all gaps that may be caused by an abolition of substantive public policy in Regulation (EC) No 44/2001 in the following situation: proceedings are commenced on the basis of a claim under the laws of a non Member State in the courts of Member State A. The claim under the applicable law does not violate the public policy of Member state A whereas it would be contrary to the Public Policy in Member State B. Under the present regime, Member State B could invoke its public policy when it comes to an enforcement of a judgment from Member State A; if substantive public policy was abolished, that would no longer be possible. Moreover, the view on public policy in substantive private international law has revealed some aspects, where differences between Member State policies still exist and may result into relevant cases so that there may be a need for some substantive public policy reservation.

In the present situation, the abolition of substantive public policy would certainly be a major step. Although its practical importance will not be considerable or may be limited, the psychological impact should not be underestimated. The reported practice to Articles 11 and 40 to 42 of Regulation (EC) No 2201/2003 clearly demonstrates the difficulties of

762 E.g. CA Amiens, 1/26/2010, no 07/02364, supra at 3.2.2.a.

763 One example in this field is interests. The recognition of interests in cross-border situations might entail difficulties when interests largely surpass the amount of the claim. However, Article 3 of the Late Payment Directive (2011/7/EU, OJ 2011 L 48/1) aligns the amounts in the Member States.
national courts in applying a rigid system of mutual trust in sensitive areas of law. 764 Although civil and commercial matters are usually not sensitive extraordinary situations where a limited review of the foreign judgment in the Member State of enforcement will avoid severe injustice might occur. In this respect, it seems useful to refer to the case-law of the ECJ which endorsed the principle of proportionality in the context of (substantive) public policy. 765 According to this case-law, totally disproportionate results deriving from a foreign judgment applying disproportionate substantive law may trigger the application of the public policy exception. However, this exception should be clearly formulated and limited to “clearly disproportionate” results of the foreign judgment. Another political option could be not to abolish substantive public policy completely but to add a limiting provision. Such a limiting provision could require not only a manifest disregard of a significant public policy; it could also state expressly that the public policy clause has to be applied in line with the laws and aims of the European Union and that it has to respect the principles of loyalty and proportionality with regard to the laws of other Member States.

From the perspective of the European Commission’s proposal to reduce considerably the scope of review of foreign judgments in the Member State of enforcement, the proposed enlargement of the scope Article 46 of the draft Regulation will not entail a major deviation. The most important improvement for the practical application of the Regulation relates to the abolition of the exequatur procedure. When a limited review of substantive policy should be maintained under the recasted Regulation, the basic assumption must be clear: normally, the debtor must challenge the litigation (and the corresponding judgment) in the Member State of origin. In addition, it seems to be possible to sanction the (unsuccessful) invocation of substantive public policy by the obligation of the losing party to fully reimburse the litigation costs of the opponent. 766

764 See supra at 4.2.3. with further references.
766 It seems to be advisable to require the plaintiff to give a security when initiating an action under Article 46 of the draft Regulation.
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