# 20 European Values, Fundamental Rights and the Private International Law of the European Union

*Sarolta Szabó*[*]

## 20.1 Introduction

In the last two decades the system of fundamental rights and the regulation of private international law experienced a significant change in the context of the European Union (EU). On the one hand, the meaningful protection of fundamental rights was threatened due to the fact that its primary law basis was meagre. Recognising the consequences of this emerging risk, the EU sought to prevent the vacuum of fundamental rights[1] and finally became the 'pioneer of human rights'.[2] On the other hand, by adopting a series of private international law and procedural law rules, private international law has become a significant pillar of EU law. We may even say that currently, the Europeanisation of private international law is a more successful process than the unification of substantive law.

Developing and refining the culture of fundamental rights in parallel with burgeoning European values has proceeded on various levels. These levels may be identified with the two mammoth organisations of the 'old continent', namely the EU and the Council of Europe. An interesting and important similarity between the two institutions is that both of them struggle with financial problems.[3] The EU is engaged in managing a global and European financial crisis, while the Council of Europe intends to improve financial conditions by rationalizing the operation of its organisation. We may say that the European Court of Human Rights (ECtHR) is 'the victim of its own popularity'.[4] The theory of Jean Monet, namely that each crisis opens up new opportunities could be a motivating factor

* Associate professor, Péter Pázmány Catholic University, Faculty of Law. E-mail: szabo.sarolta@jak.ppke.hu.

1 E. Sándor-Szalay and Á. Mohay, 'Multilevel Protection of Fundamental Rights in the European Union and in Hungary', in Marcel Szabó (Ed.), *Hungarian Yearbook of International Law and European Law*, Eleven International Publishing, 2013, p. 424.

2 N. Chronowski, 'I. Cím 6. cikk', in András Osztovits (Ed.), *Az Európai Unióról és az Európai Unió Működéséről szóló Szerződések magyarázata 1*, Complex, 2013. p. 53.

3 Sándor-Szalay and Mohay, *supra,* p. 404.

4 *Supra*.

in the formation of a feasible 'channel of communication' between Strasbourg and Luxembourg in the framework of which Strasbourg and Luxembourg case-law could converge.[5]

Based on the above, the relationship between European values, fundamental rights and private international law must be analysed from three different perspectives. Firstly, from the perspective of the EU with respect to the newly adopted rules in the fields falling within the competence of the EU; secondly from the perspective of the relevant case-law of the Court of Justice of the European Union (CJEU); and thirdly from the perspective of Strasbourg case-law, since the ECtHR plays a pivotal role in the protection of fundamental rights.

Due to the phenomenon of parallel processes, the mutual interaction between fundamental rights and private international law provides several interesting and topical issues relevant for both jurisprudence and legal practice. This vast area of law could be explored more deeply in thought-provoking books, examining the interface between fundamental rights and private international law.[6] However, the next few pages only suffice to outline the main features of this area in order to capture the interested reader's attention.

## 20.2 Private International Law of the European Union and the Charter of Fundamental Rights

The EU policies on judicial cooperation in civil and commercial matters, in particular, the unification of private international law, and on the fundamental rights are of the same age and share the same sources, because the Tampere Summit in 1999 which was deemed a 'significant milestone if not the starting point'.[7]

It is widely known that by concluding the Amsterdam Treaty, the main aim of the EU was the gradual establishment of a community where freedom, security and law are ensured. At the Tampere Summit held on October 1999, the European Council confirmed that this objective it still first on the EU's political agenda and in order to achieve the envisaged target, the European Council developed an ambitious action programme. This action programme determined the political guidelines in detail as well as the roadmap of the concrete steps to be taken.[8] The European Council highlighted the principle of mutual recognition of judicial decisions regarding judicial cooperation in civil matters in the

5 *Supra.*

6 *See* Z. Csehi, *Alapjogok és nemzetközi magánjog – a német fejlődés*, Gondolat kiadó, Budapest, 2013.; L. R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, Springer, 2014.

7 S. Saastamoine, 'The European Private International Law and the Charter of Fundamental Rights', in Permanent Bureau of the HccH (Ed.), *A Commitment to Private International Law. Essays in Honour of Hans van Loon*, Intersentia, 2013, p. 503.

8 www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm (visited: 6 January 2014).

course of realizing European integration. At the same time and in close connection thereto, the heads of states and governments agreed on the members of a council responsible for developing a charter of fundamental rights as well as on the elaboration methods of the document.

The next milestone was the millennium, when in respect of judicial cooperation – regulated by private international law and international civil procedure law instruments – the Council and the European Commission (the 'Commission') agreed on a draft programme regarding the implementation of the principle of mutual recognition.[9] In parallel to these developments, at the Nice Summit the European Parliament (the Parliament), the Council and the Commission adopted the Charter of Fundamental Rights (the Charter) in the form of a joint declaration as a recommendation and reference point. The Charter was developed by a Convention comprised of the representatives of European institutions and national parliaments, lawyers, academics and representatives of civil society. The catalogue of fundamental rights to be protected in the EU was a mere political declaration at that time, and it was later to form the second part of the proposed European Constitution.

As is known, when the Lisbon Treaty entered into force, Article 6 paragraph 1 of the Treaty on European Union[10] (TEU) recognised the Charter as having the same legal value as the Treaties.[11] The reform treaty performed a significant revolution by ending the former dilemma and providing a solution for the EU's 'fundamental rights deficit'.[12] It is unquestionable that in the course of deepening the integration, EU law continuously and significantly influenced the everyday life of individuals; however, within the framework of primary law the EU had failed to regulate the individuals' fundamental rights. Due to the application of the principle of supremacy in case of conflict between national and EU law, the judicial forums had to set aside even constitutional provisions, notwithstanding the fact that in some cases, national law would have provided a higher level of protection. Moreover, the development of the principle of direct effect by the European Court of Justice made individuals vulnerable against the EU as its legal actions were not bound by rules containing

9 OJ 2001 C 12, 2001 January 15.

10 Art. 6 of the TEU (1) 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. – The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. – The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'

11 The Lisbon Treaty refers to the Charter as the clarified legally binding guarantees of EU and as a collection of these rights, and pursuant to the EU, every European citizen shall possess these rights. The six chapters of the Charter comprise the following: dignity of individuals, freedoms, equality, solidarity, citizens' rights and justice.

12 Chronowski, *supra,* p. 52.

provisions protecting fundamental rights.[13] We must add, that prior to the acceptance of the Charter, the most significant principles regarding the protection of fundamental rights were developed by CJEU case-law. (In lack primary law sources, such principles were mainly based on the common traditions of the Member States and on relevant international treaties.[14]) However, this legal development carried out by the CJEU was highly criticised. One of the most frequent criticisms was the 'superficial approach of the CJEU',[15] namely the lack of dogmatic foundation regarding the fundamental rights put forward in the judgement. Furthermore, the CJEU failed to assess secondary law passed by the Council and the Parliament from a fundamental rights perspective (examining instead the fundamental rights credentials of competition law and customs law provisions, as well as rules related to officials adopted by the Commission).[16]

The Lisbon Treaty also introduced novelties in respect of judicial cooperation in civil matters. Article 81 of the Treaty on the Functioning of the European Union (TFEU)[17] entitles the Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt measures, particularly when necessary for the proper functioning of the internal market. We may also say that the EU 'liberated itself' from the internal market

13 *Supra*.

14 L. Blutman, *Az Európai Unió joga a gyakorlatban*, Hvg-orac, Budapest, 2013, p. 518. The process is described by the series of the following cases: *Stauder* case (C-29/69), *Internationale Handelsgesellschaft* case (C-11/70), *Nold* case (C-4/73), *Rutili* case (C-36/75), *Prais* case (C-130/75), *Hauer* case (C-44/79), *Demirel* case (C-12/86), *Wachauf* case (C-5/88), *Orkem* case (C-374/87). *See* more: Blutman, *supra*, pp. 517-518; Chronowski, *supra*, pp. 49-51.; August Reinisch, *Essentials of EU Law*, Cambridge Univerity Press, 2013, pp. 101-108.; G. Di Federico, 'Fundamental Rights in the EU:Legal Pluralism and Multi-Level Protection After the Lisbon Treaty' in G. Di Frederico (Ed.), *The EU Chapter of Fundamental Rights – From Declaration to Binding Instrument,* Springer, 2011. pp. 18-22.

15 S. Werner, 'Neues zur Grundrechtskontrolle in der Europäischen Union' *EuZW* (2011), p. 463, cites: E. Szalayné Sándor, 'Alapjogok (európai) válaszúton – Lisszabon után', *Jogtudományi Közlöny* (2013), p. 23.

16 *Supra*.

17 (1) 'The 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. (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
   a. the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
   b. the cross-border service of judicial and extrajudicial documents;
   c. the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
   d. cooperation in the taking of evidence;
   e. effective access to justice;
   f. the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
   g. the development of alternative methods of dispute settlement;
   h. support for the training of the judiciary and judicial staff.'
   C 83/78 Official Journal of the European Union, 2010 March 30.

criterion. Of course, this did not provide the EU with a *carte blanche*, since its competences are still limited in certain matters, for instance in the field of family law, and as a consequence of the application of general principles, for instance the principles of subsidiarity and proportionality.[18]

Currently, 15 regulations, 4 directives and 3 decisions are in force in the area of private international law and civil procedure law.[19] The first EU secondary legal sources, such as the Regulation on insolvency proceedings (the 'Insolvency Regulation'),[20] the Regulation on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses (the 'Brussels II'),[21] and the Regulation on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters (the 'Service Regulation')[22] were adopted in 2000. Without providing an exhaustive list of its work, ten years after the second millennium, the Rome I (applicable law contracts)[23] and Rome II Regulations (applicable law torts)[24] were followed by the Rome III Regulation (applicable law divorce),[25] and in 2011 the Commission prepared a proposal for a Regulation on the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.[26] One year later, the Regulation relating to international succession matters (the Succession

18 *See* G-R. De Groot and J-J. Kuipers, 'The New Provisions on Private International Law in the Treaty of Lisbon', 1 *Maastricht Journal of International and Comparative Law* (2008), p. 111.

19 Summary on the sources of law, X. Kramer et al., *A European Framework for Private International Law: Current Gaps and Future Perspectives*. European Parliament, directorate-general, www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf (2012), pp. 19-21 (visited 6 January 2014). X. Kramer, *European Private International Law: The way forward* Presented in the European Parliament, Workshop for the JURI Committee, on September 2014. www.europarl.europa.eu/document/activities/cont/201409/20140924ATT89662/20140924ATT89662EN.pdf (visited 1 October 2014).

20 1346/2000/EC Regulation, OJ 2000 L 160, 30 June 2000, pp. 1-18.

21 1347/2000/EC Regulation, OJ 2000 L 160, 30 June 2000, pp. 19-36. It was replaced with the Brussels II bis Regulation, No 2201/2003 (applicable as of 1 March 2005).

22 1348/2000/EC Regulation, OJ 2000 L 160, 30 June 2000, pp. 37-52. It was replaced with the new Service Regulation, No 1393/2007 (applicable as of 13 November 2008).

23 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177, 4 July 2008, pp. 6-16.

24 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199, 31 July 2007, pp. 40-49.

25 The Rome III Regulation is the only one that was not adopted on the basis of Article 81 TFEU. It results from enhanced cooperation pursuant to Articles 326-334 TFEU. It currently applies in 15 Member States (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain), and as of 15 July 2015, it will be applicable in Greece as well. Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343, 29 December 2010, pp. 10-16.

26 COM(2011)126. és COM(2011)127.

Regulation)[27] and the recast of the Brussels I Regulation (the 'Brussels I bis')[28] were adopted. Finally, the Regulation on mutual recognition of protection measures in civil matters[29] and the Regulation establishing a European Account Preservation Order[30] closed the list of the most recent acts of EU law.

### *20.2.1 The Creation of the EU Private International Law and Fundamental Rights*

The legislative 'dumping' of the EU carried out in the past decade is especially prominent in the field of private international law and international civil procedure law. These pieces of EU legislation substantially affect the rights of individuals, therefore in order to avoid possible future conflicts with fundamental rights, it is important to fine-tune these acts from the perspective of fundamental rights. What is the Union's approach to this endeavour?

### *20.2.2 Role of the Commission and Its Instruments to Ensure the Respect of the Charter*

The EU's catalogue of fundamental rights, forming part of primary law principally binds the EU institutions and bodies. According to Article 51 paragraph 1 of the Charter, it is primarily the responsibility of Union institutions to ensure the respect for fundamental rights.[31] As such, the Charter is applicable both to the legislative efforts and the external actions of the EU.[32] The legislative, executive or judicial bodies of Member States may only be considered addressees of the Charter insofar as they execute EU law, namely, when applying regulations, decisions and directives. With respect to the Charter, the Commission

27 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201, 27 July 2012, pp. 107-134.

28 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ 2012 L 351, 20 December 2012, pp. 1-32.

29 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ 2013 L 181, 29 June 2013, pp. 4-12.

30 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 on establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. OJ 2014 L 189, 27 June 2014, pp. 59-92.

31 Art. 51 of the Charter, Scope: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

32 According to Art. 21 of TEU.

has a particularly dominant position. On the one hand, the Commission proceeds according to the provisions of the Charter when developing a proposal for a legislative instrument. On the other hand, as the guardian of the Treaties, the Commission is responsible for controlling the accurate application of the *Union aquis* by the Member States. Consequently, the Commission supervises whether Member States respect the Charter, thus, the Commission may initiate infringement proceedings if it deems necessary.[33]

As a formal statement of the compatibility of legislation, the Commission decided already in 2001 that the recitals of legislative proposals must include a reference to fundamental rights.[34] Subsequently, the Commission established the methodology for systematic and rigorous monitoring of the compliance with the Charter in its proposals.[35] This was reinforced by the Commission Communication on Strategy for the effective implementation of the Charter in 2010 which further strengthened this process. In its Communication the institution committed itself to fortifying the culture of fundamental rights within the Commission, the assessment of proposals' effect on fundamental rights, the development of a practical guidance regarding fundamental rights[36] and the evaluation of annual reports on the application of the Charter.[37]

### *20.2.3 Emergence of Fundamental Rights and References to the Charter in the EU's Private International Law Legislation*

It is clear from the foregoing, that there is an immanent relationship between the Union's private international law legislation and fundamental rights.

Naturally, the first legal instruments adopted in 2000 and 2001, for instance the Brussels I, Brussels II, the Insolvency and Service Regulations, did not mention fundamental rights or the Charter. Furthermore, the Rome I and Rome II Regulations did not contain references on fundamental rights either. However, during the elaboration of the Rome II

33 *See* for instance infringement procedures initiated against Hungary, which concerned the non-compliance of the Member State with key provisions of the Charter, detailed in Section 3.1 of the 2012 Report of the Commission on the Application of the EU Charter of Fundamental Rights, COM(2013)271. The Commission handles with priority those breaches of law which relate to matters of principle or which have serious impact on citizens. Naturally, in order to ensure the intervention of the Commission, a factor of the case needs to be connected to EU law. Otherwise, Member States guarantee the protection of fundamental rights through their respective national judicial system.

34 Saastamoinen, *supra*, p. 505.

35 COM(2005)172.

36 Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011)567, which is available at: http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf.

37 Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010)573.

Regulation the Commission proposed the establishment of a special 'safeguard clause' for violations of privacy, expressly mentioning Article 7 of the Charter on the respect for private life and Article 11 on freedom of expression and information. Nevertheless, the legislators were not able to agree on inclusion of the proposed rule in the Rome II, so the adopted Regulation does not have even a recital with a Charter reference.[38] In this respect, a new chapter may be opened for in light of the *Shevill* and *eDate* cases, furthermore, the widespread phenomenon of libel tourism, the Parliament proposed the amendment of Rome II calling for the adoption of conflict of law rules on a non-contractual obligation arising out of a violation of privacy or rights relating to the personality (including defamation).[39]

The first legislative instruments addressing their effects on fundamental rights and also mentioning the Charter were passed in 2003 and 2004: the Brussels II bis Regulation[40] and the Regulation on European Enforcement Order for uncontested claims (the 'EEO Regulation').[41]

In the course of developing the Maintenance Regulation, a legislative initiative was composed in 2005 pursuant to the results of a profound impact assessment which rested on the evaluation of potential conflict between its provisions and fundamental rights. A recital of the draft referred to the Charter on two points, namely Article 24 on the rights of children and Article 47 on the right to an effective remedy and fair trial. Surprisingly, however, the final version of the Regulation was adopted without references to the Charter.[42] During the elaboration of the Regulation on the European Payment Order[43] the Commission proposed a reference to the Charter yet again, however in 2006, at the end of the legislative procedure, the reference was missing from the final version. In contrast with the Payment

38 Saastamoinen, *supra*, p. 508.

39 European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II); (2009/2170(INI)), OJ 2013 C 261 E, 10 September 2013, pp. 17-21.

40 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2013 L 338, 23 December 2003, pp. 1-29. Recital 33: 'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Art. 24 of the Charter of Fundamental Rights of the European Union.'

41 Regulation (EC) No 805/2004 of the Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. Recital 11: 'This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.'

42 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. OJ 2009 L 7, 10 January 2009. See more, Saastamoinen, *supra*, p. 509.

43 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. OJ 2006 L 399, 30 December 2006, pp 1-32.

Procedure Regulation, recital 9 of its 'sister',[44] i.e. the Regulation on Small Claims Procedure,[45] 'seeks to promote fundamental rights and takes into account, in particular, the principles recognised by the Charter of Fundamental Rights of the European Union.'

It follows from the above that the fundamental rights compatibility of legislation preceding the Lisbon Treaty may be deemed random at best, yet the amendment of the Treaties now prescribe this as an obligation as reflected for instance in the Rome III, the Succession and Brussels I bis Regulations.

According to another categorization,[46] from among the fundamental rights set out in the Charter, Article 47 on the right to an effective remedy and to a fair trial exerted the greatest effect on EU private international law legislation; a right regulated in accordance with Article 6 paragraph 1 of the European Convention on Human Rights (ECHR).[47] The effects of this provision resulted in the abolition of *exequatur* supplemented with certain procedural safeguards, such as in the case of the EEO and small claims procedures, parts of Brussels II bis, rules on matrimonial and registered partnership property rights, as well as Brussels I bis.

Another frequently cited fundamental right is the freedom to conduct a business enshrined in Article 16 of the Charter.[48] The aim of the 2012 revision of the Insolvency Regulation was, among others, to expand its scope and to further develop its rules relating to jurisdiction. According to the Commission, the right to conduct a business would be facilitated by the expansion of the scope of the Insolvency Regulation to holdings, insolvency proceedings concerning natural persons, EU-wide recognition of national hybrid and pre-insolvency proceedings would also have beneficial effects.

The right to property, pursuant to Article 17 of the Charter, assumes a substantial role in the Succession Regulation and in the draft Regulation on matrimonial property rights.[49]

Articles 21 to 24 of the Charter, especially the provisions on non-discrimination and the rights of the child are particularly significant in the context of the Succession Regulation

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44 Saastamoinen, *supra*, p. 507.

45 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. OJ 2007 L 199, 31 July 2007, pp 1-22.

46 For a detailed analyses, see Saastamoinen, *supra*, p. 510-514.

47 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

48 Such a right recognises the freedom of economic or commercial activity and contractual freedom, in addition to free competition.

49 The Commission analysed the effects of the legislative instrument on fundamental rights. In respect of this, the Commission declared that pursuant to the national laws of the Member States, the proposition neither affects the right to respect for private and family life as it is set out in Art. 7 of the Charter, nor the right to marry and to find a family as set out in Art. 9 of the Charter. Nevertheless, the proposition strengthens the right to property as it is set out in Art. 17 of the Charter.

and the legal instruments concerning family law. For instance, on the basis of the Succession Regulation, the chances of same sex-couples to dispose of their property for the benefit of their partners have been improved, regardless of couples' habitual residence.[50]

Obviously, other Charter articles also feature in the legislative process, such as for instance Article 7 on the respect for private and family life, Article 8 on the protection of personal data, Article 10 on the freedom of thought, conscience and religion and Article 11 on the freedom of expression and information.

### *20.2.4 Case-Law of the CJEU: Fundamental Rights and Private International Law*

The second important setting is the CJEU. Following its adoption, the Charter quickly became the most frequently cited reference for the CJEU. According to the statistics of the Commission, while in 2010 the CJEU referred to the Charter in 27 different judgements' reasoning, this number increased to 42 in 2011.[51]

In the context of private international law, references to the fundamental rights document were mainly geared at the right to bear a name[52] or in matters indirectly concerning citizenship,[53] as well as issues connected to Brussels I[54] and particularly Brussels II bis[55] the unlawful abduction of a child.[56]

If we intend to categorize the CJEU's latest cases concerning fundamental rights and the Charter, we can distinguish between three different categories. Some judgements

50 According to recital 58 of the Succession Regulation: 'Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (ordre public) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Art. 21 thereof, which prohibits all forms of discrimination.'
It is important to note that some preliminary questions whether a child who was born out of wedlock, or a child of a same sex-couple in another Member State could be considered as an heir, is not covered by the Succession Regulation. Saastamoinen, *supra* p. 513.

51 A. Saiz Arnaiz and A. Torres Pérez, *Main Trends in the Recent Case Law of the EU Court of Justice and the European Court of Human Rights in the Field of Fundamental Rights*. Brussels, European Parliament, www.europarl.europa.eu/studies, (2012), pp. 9-10 (visited 6 January 2014).

52 C-391/09, *Runevič-Vardyn* case [ECR 2011 I-03787], C-208/09. *Sayn-Wittgenstein* case [ECR 2010 I-13693].

53 For example: C-34/09, *Zambrano* case [ECR 2011 I-01177], C-135/08. *Rottmann* case [ECR 2010 I-01449].

54 C-619/10, *Trade Agency Ltd and Seramico Investments Ltd* case [has not yet been published in ECR], C-292/10, *G and Cornelius de Visser* case [has not yet been published in ECR].

55 C-92/12 PPU, *Health Service Executive és S. C., A. C.* case [has not yet been published in ECR].

56 C-400/10 PPU, *J. McB. V L.E.* case [ECR 2010 I-08965], C-211/10 PPU, *Povse v. Alpago* case [ECR 2010 I-06673], C-491/10 PPU, *Zarraga v. Pelz* cases [ECR 2010 I-14247].

consider the Charter to be the primary source for determining and interpreting fundamental rights. In other cases, the CJEU merely refers to the Charter on a complementary basis, and finally, it happens that the CJEU does not consider the Charter because EU law does not extend to the given issue.[57] In order to illustrate the difficulties of demarcation, let me mention a current dilemma of the CJEU regarding cross-border surrogacy involving also private international law issues. What makes the question even more interesting is that in two similar cases, two different Advocate-General's opinions were issued on the very same day. In one of the cases, a preliminary question was submitted to the CJEU, asking whether the future or intended mother may apply for a maternity leave following the birth of the child borne by the surrogate mother.[58] Pursuant to the opinion of Advocate-General *Kokott*, maternity leave enjoys the protection of primary EU law under Articles 7 and 24 of the Charter, thus, the disputed provision of the Directive extends to the intended mother.[59] By contrast, in the other case Advocate-General *Wahl* opined that an adequately close tie to EU law needs to be substantiate for the Charter to apply. According to *Wahl*, surrogacy does not fall under the scope of EU law; therefore surrogacy may not fall under the scope of the Directive.[60] It is no surprise that some national legislators[61] as well as the Hague Conference on Private International Law[62] have started working on regulating cross-border surrogacy agreements in order to eliminate coincidentally emerging legal problems.

57 Detailed assessments on the judgements adopted in 2010 and 2011, Saiz Arnaiz and Torres Pérez *supra*.

58 The regulation ensured by Art. 2 of Directive No. 92/85 is merely applied to pregnant women, women who have been recently given birth or breastfeeding women.

59 Proposition of Advocate-General *Juliane Kokott*, 26 September 2013, C-167/12, *CD v. ST*. case, Sections 60-62, 73. Final conclusions: 'in a situation such as that in the main proceedings an intended mother who has a baby through a surrogacy arrangement has a right to receive maternity leave under Articles 2 and 8 of Directive 92/85 after the birth of the child in any event where she takes the child into her care following birth, surrogacy is permitted in the Member State concerned and its national requirements are satisfied, even where the intended mother does not breastfeed the child following birth; the leave must amount to at least two weeks and any other maternity leave taken by the surrogate mother must be deducted.'

60 Proposition of Advocate-General *Wahl*, 26 September 2013, C-363/12, *Z v. Government Department* case. Final conclusions: 'I do not believe that the court should replace the legislator by adopting such a constructive interpretation on the basis of which more assumptions are concluded from directives 2006/54 and 2000/78, or even from directive 1992/85 than it was originally included into them. According to my standpoint, this would mean the detriment of the legislator's competence. […] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation shall not be applied within circumstances when reimbursing the costs of the value of absence, equivalent to maternity or adoption leave from the women whose genetic child has been born pursuant the an agreement on surrogacy, is denied.'

61 For instance in the United Kingdom a new draft statue has been prepared on the rights of children and families, which regulates the situation of the adopting and future mother, who will be entitled to maternity leave and other benefits. However, it is expected that this statue will only enter into force in 2015. www.all-paylegal.com/news/surrogacy-and-rights-maternity-leave-02102013 (visited 6 January 2014).

62 www.hcch.net/index_en.php?act=text.display&tid=178 (visited 6 January 2014).

## 20.3 European Convention on Human Rights and the EU Private International Law Rules

Analysing the third context outlined in the introduction, namely, the Strasbourg court is indispensable, since the TEU not only confirms that the protection of fundamental rights is based on the ECHR and on the common constitutional traditions of Member States, but paragraphs 2 and 3 of Article 6 TEU also authorise the EU to join the ECHR.[63]

Although there is a multi-level system of international human rights adjudication in Europe with slight differences in standards, we may nevertheless describe the relationship between the ECtHR and the CJEU as characterized by an 'atmosphere of close cooperation'.[64] One of the features of the 'channel of communication' described in the introduction is that the two forums mutually consider and make references to the judgements of the other. On the one hand, the CJEU takes into consideration the ECtHR's case-law, declaring that both the case-law and the ECHR form part of the EU's fundamental principles, however these are not mandatory prior to the accession to the ECHR.[65] On the other hand, the approximation of the ECHR to the case-law of the CJEU is also touchable and the ECtHR refers to the Charter several times as well. *Per exemplum*, the Strasbourg forum was the first European court to explicitly cite the provisions of the Charter referring to Article 9 in the famous and notorious *Goodwin* case,[66] where the ECtHR provided a more extensive protection to transsexual marriages than ensured under Article 12 ECHR.

The other, more dominant component of the 'communication channel' is that the ECtHR established a presumption according to which the protection of fundamental rights under EU law is deemed equivalent to the protection detailed in the ECHR. The well-

63 Regardless of the publicly availably draft on the accession agreement prepared in 2011, the EU's accession to the ECHR was hindered due to the disagreement of some Member States. Finally, following the adoption of a Council agreement in 2012, the negotiations between the Council of Europe and the Commission could proceed. More information in relation to the negotiations and its assessment: 'added value' or 'procedural law complications', Sándor-Szaly and Mohay, *supra,* p. 424; Chronowski, *supra,* pp. 70-74; Blutman, 2013, pp. 532-535; L. F. M. Besselink, 'Should the European Union ratify the European Convention on Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice' in Føllesdal, Peters, Ulfstein (Eds.), *Constituting Europe – The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, 2013. pp. 301-333.

64 Chronowski, *supra,* p. 66.

65 E.g. C-121/89, *LVM* case, C-441/05, *Roquette Fréres*, C-20/00 and C-64/00, *Booker Aquacultur* case. More information: Chronowski, *supra,* pp. 62-63; Blutman, 2013, p. 519.

66 After gender reassignment surgery was carried out on the applicant, he intended to marry his partner whose gender was different than the applicant's new gender. The applicant was denied the conclusion of marriage as authorities declined to register his new gender into the birth certificate. The ECtHR amended its earlier approach and ordered the full acceptance of the new gender of transsexuals, and the court also declared the breach of the rights set out Arts. 8 and 12 of the ECHR relating to the right to respect private life and the right to conclude marriages. *Christine Goodwin v. United Kingdom* case (2002), No. 28957/95.

known Bosphorus doctrine not only confirms the conclusion of the *Matthews* case[67] but goes further when presuming that if a Member State acts according to EU law, the Member State already complies with the standard of fundamental rights ensured by the ECHR. Consequently, the legal acts of the state which fulfil the obligations deriving from EU law are lawful as long as the EU provides the protection of fundamental rights by an adequate mechanism. However, such protection could be challenged in particular cases provided that the safeguard system of ECHR is 'manifestly deficient'.[68] In this latter situation, the ECHR, as the 'constitutional instrument of the European legal order', shall be applied.[69] How difficult is it to rebute this presumption? 'It would be reasonable if the doctrine would not result in either a lower or a higher level of protection than already exists in other states.'[70] Nevertheless, currently it seems that the Bosphorus test clearly affords the EU and its Member States a significantly privileged position.

As a matter of fact, the Strasbourg court brought several judgements which have substantial impacts on private international law.[71] Such cases may be classified into three different categories: prohibition of discrimination,[72] the acceptance of a status acquired abroad[73] and unlawful child abduction.[74]

The interplay of EU law, fundamental rights, the Bosphorus test and private international law appears before the ECtHR with respect to unlawful child abduction.

The Brussels II bis Regulation implements the above described Tampere goals, the application of the principle of mutual recognition and the abolition of the *exequatur* procedure with respect to decisions granting visitation rights or ordering the return of the child in case of unlawful child abduction.[75] The CJEU has consistently abided by the

67 *Matthews v. United Kingdom* case (1999), No. 24833/94. The ECtHR declared that as the European Community is not a contracting party to the ECHR, the legal acts of the European Community could not be disputed *per se* before the ECtHR, but the responsibility of Member States still prevails, even in case of the transfer of competences.

68 *Bosphorus Airways v. Ireland* case (2005), No. 45036/98, § 152, 156. In details, for example E. Szalayné Sándor, 'Az alapjogok három jogrendszer metszéspontjában', *Állam- és Jogtudomány* (2009), pp. 383-391.; Besselink, *supra*, pp. 308-318.

69 Referring to another case, *Loizidou v. Turkey* case (preliminary objections), (1995), No. 15315/89, § 75.

70 Szalayné (2013), p. 24.

71 More information about some cases, P. Kinsch, 'Private International Law Topics before the European Court of Human Rights', in A. Bonomi and G. P. Romano (Eds.), *Yearbook of Private International Law*, 2011, pp. 37-49.; Kiestra, *supra*.

72 E.g. *Ammdjadi v. Germany* (2010), No. 51626/08; *Losonci Rose and Rose v. Switzerland* (2010), No. 664/06.

73 For example: *Hussin v. Belgium* (2004), No.70807/01; *Wagner v. Luxemburg* (2007), No. 76240/01; *McDonald v. France* (2008), No.18648/04; *Mary Green és Ajad Farhat v. Malta* (2010), No. 38797/07; *Negrepontis-Giannisis v. Greece* (2011), No. 56759/08.

74 E.g. *Neulinger and Shuruk v. Switzerland* (2010), No. 41615/07; *Sneersone and Kampanella v. Italy* (2011), No. 14737/09; *Raban v. Romania* (2010), No. 25437/08, *Buday v. Belgium* (2012), No. 4320/11, *Povse v. Austria* (2013), No. 3890/11.

75 Arts. 41 and 42, according to the provisions of the latter: 'The return of a child entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without

practice that if the decision was issued pursuant to the Brussels II bis, the recognition and enforcement of the decision shall not be refused even in case of a serious breach of fundamental rights.[76]

The *Povse* case well illustrates the gaping differences between reality and the Tampere idea. Pursuant to the facts of the case, *D. Povse* and *M. Alpago* were living together in *Vittorio Veneto* (Italy) community, until the end of January 2008, with their daughter, *Sofia*, who was born on 6 December 2006. According to the Italian Civil Code the parents have joint custody rights. At the end of January 2008, the parents separated and *Povse* left the common residence with Sofia. Upon request of the father, the Italian court forbade the mother to leave the country with her daughter, nevertheless, they moved to Austria in February 2008 where they have been living since. Subsequently, during the spring of 2008 the father sought the Austrian court to order the return of the child. In due course, the Italian court lifted the travel ban in respect of the child, granted preliminary joint custody of the child to both parents, and authorised her residence with her mother in Austria, having regard to her young age and close relationship with her mother. In the same decision the Italian court prescribed that the father must share in the maintenance of the child and the conditions of visitation granted to the father were also detailed. In November 2008, the Austrian court denied the request of the father on the grounds of the decision issued by the Italian court. In the spring of 2009 *Alpago* requested the Italian court, pursuant to Brussels II bis Regulation, to order the return of his child to Italy. On 10 July 2009 the Italian court ordered the rapid return of the child to Italy and for this purpose it issued a certification on the basis of Article 42 of the Brussels II bis Regulation. Finally, the Austrian *Oberster Gerichsthof* requested a preliminary ruling by the CJEU, submitting a number of questions concerning the application of the Brussels II bis.

The CJEU declared on 1 July 2010 that according to Article 10 of Brussels II bis, the court which has competence in the case, at least at the time of unlawful child abduction, is the court pursuant to the habitual residence of the child preceding the unlawful abduction, that is to say, the Italian court. The question was raised, whether the competent court transferred the jurisdiction to the Austrian court by means of its decision on provisional custody to both parents. According to the CJEU, the decision of the Italian court, which was deemed temporary by both courts, could not be qualified as a final decision regarding child custody in any way. Thus, the provisional measure could not be the basis of a transfer

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the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with Para. 2.'

76 In the firstly assessed *Rinau* case (C-195/08) the CJEU stated that if the authenticity of the certification has not been questioned and the certification has been issued pursuant to model form under Brussels II bis Regulation, the acceptance of the decision on the return of the child shall not be refused. Moreover, it is the duty of the requested court to declare the enforceability of the certified decision and to dispose of the rapid return of the child. Other cases: C-491/10 PPU, *Zarraga* case [ECR 2010 I-14247], C-211/10 PPU, *Povse* case [ECR 2010 I-06673].

of jurisdiction to the courts of the Member State to which the child has been unlawfully removed. The CJEU also added that it is not necessary for the competent court to render a final decision on custody rights before ordering the return of the child.[77]

The CJEU highlighted that it derives from the provisions ordering the rapid return of the child that a certificate issued under Article 42 of the Regulation, which gives to the judgment thus certified a specific enforceability, is not subject to any appeal.. The requested Austrian court can do no more than declare such a judgment to be enforceable, since the only pleas in law which can be relied on in relation to the certificate are those to support an action for rectification or doubts as to its authenticity, according to the rules of law of the Member State of origin.[78] Finally, the CJEU restated that the enforceability of the certified judgement ordering the return of the child in the Member State of enforcement could not be refused on the grounds that, as a result of a change in circumstances arising after her adoption, enforcing the judgment ordering return may be seriously detrimental to the best interests of the child. Such a change in circumstances must be resolved by the court with jurisdiction in the Member State where the original proceedings took place, i.e. only the Italian court has jurisdiction to assess the best interests of the child, and that is the court which must hear an application for any suspension of enforcement of its judgement.

Following the adoption of the CJEU's judgement, in 2011 the Italian court awarded the exclusive custody rights to the father and declared that the return of the child does not jeopardize the best interest of the child, even though the child was already 5 years old at that time and she had not seen her father for 3 years (in addition to the fact that the child did not speak Italian and the father did not speak German). *Povse* did not appeal this judgement because she could not cover the costs of an attorney. In September 2012, the Austrian Supreme Court finally refused the request of *Povse* given the fact that the CJEU clearly declared: *Povse's* argument that the return of the child would constitute a serious risk to the best interests of the child breaching Article 8 of the ECHR is not relevant in the proceedings of the Austrian courts, but may be raised before the competent Italian court. Finally, in May 2013 pursuant to the decision of the Italian court, the Austrian court ordered the return of the child to Italy with effect of the beginning of July.

Meanwhile, the ECtHR also adopted its decision regarding the case *Sofia Povse and Doris Povse v. Austria* on 18 June 2013.[79] The abstract legal question behind the case could framed as follows: can a Member State be liable for the breach of international law if, in order to fulfil its obligation deriving from EU law, it recognizes and enforces a decision

77 C-211/10 PPU, Sections 49-50 of the *Povse* case.
78 C-211/10 PPU, Section 73 of the *Povse* case.
79 No 3890/11.

adopted by the court of another Member State, which decision presumably infringes human rights?

In its arguments, Austria referred to the Bosphorus doctrine, while *Povse* claimed that the presumption of equivalenent protection is rebutted in the case.

According to the ECtHR, Austria merely satisfied its obligation flowing from Austria's membership of the EU, as Austrian courts could not and had not exercise any discretion when they, pursuant to the Brussels II bis Regulation, enforced the Italian court's decision ordering the return of the child. The Strasbourg court also mentioned that the adequate control mechanism of the EU was applied when the Austrian Supreme Court turned to the CJEU for a preliminary ruling. Regarding the rebuttable presumption, the ECtHR stated that the CJEU discussed the argument of the applicant relating to the alleged breach of fundamental rights and the judicial forum made unambiguous that such alleged breach of fundamental rights could be remedied by the Italian courts pursuant to the rules of Brussels II bis Regulation.[80] Consequently, the applicant may exercise her rights before the Italian courts. The ECtHR drew attention to the fact that on the basis of Italian civil procedure law *Povse* still has the right to request the review of the decision ordering the return of the child with reference to the change in circumstances. The ECtHR also added that in case a measure of the Italian court was detrimental, then, the applicant is entitled to initiate proceedings against Italy before the ECtHR. The action against Austria was finally dismissed.

In general, the judgement may be considered reasonable, but what about the actual facts? Prior to the handover, mother and daughter fled to Spain in July 2013, for due to an ongoing criminal procedure against the mother she could not accompany her 7 year old daughter to her father in Italy, who, by the end of the procedure had not seen his child for 5 years (!). As a result of the articles published in the Austrian press and on the Internet, as well as widespread protest, a review of the judgment was initiated before the Italian court in January 2014. Finally, the Italian forum ordered in favour of *Povse* by taking into account 'the best interest of the child'.[81]

It is worth considering the earlier practice of the ECtHR on the basis of the Hague Convention on the Civil Aspects of International Child Abduction (the 'Hague Convention'). First, in the *Neulinger* case[82] the Grand Chamber declared that Article 8 of the ECHR overrides the Hague Convention and the ECtHR introduced the test of the 'best interest of the child' (in its judgement the judicial forum specifically referred to Article 24 of the

80 *Sofia Povse and Doris Povse v. Austria* case (2013), No 3890/11, § 75, 77-83, 86-87. See more: M. Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union', *NiPR* (2014).

81 www.krone.at/Oesterreich/Fall_Sofia_Maedchen_darf_bei_Mutter_in_NOe_bleiben-Zittern_hat_Ende-Story-400668 (last visited 15 April 2014).

82 *Neulinger and Shuruk v. Switzerland* (2010), No 41615/07.

Charter). Then, in the *Raban* and *Sneersone* cases[83] the ECtHR also applied this principle and declared that the return shall not be automatic, but the time factor shall be decisive in such matters. According to the ECtHR, in the course of adopting a judgement, national courts need to consider several aspects of the case, such as factual, emotional, psychological, material and medical factors in order to find the best solution to serve the interest of the unlawfully abducted child. Consequently, an automatic mechanism of return may be contrary to Article 8 of the ECHR and the ECtHR case-law.[84]

Certainly, this automatic mechanism would also be infringing in the *Povse* case, but only in respect of Italy. In summary, according to the Strasbourg court's judgement, in case a Member State proceeds pursuant to EU law, the Member State of enforcement enjoys immunity against the fundamental rights mechanism of the ECHR. In other words, the Member State shall enforce a decision adopted by the court of another Member States, even if the decision breaches fundamental rights. However, this is contrary to the famous *Pellegrini v. Italy* case,[85] where Italy accepted the decision of the Vatican ecclesiastical court regarding the dissolution of a marriage on the basis of a bilateral international agreement. The ECtHR condemned Italy for recognizing, on the basis of an international agreement, a decision which breaches human rights, namely the right to fair trial set out in Article 6 of the ECHR. According to the *Pellegrini* judgement, the ECtHR requires minimal procedural law guarantees from signatory states, while in case of EU Member States, the Strasbourg court follows a different approach based on the Bosphorus doctrine and does not even require the fulfilment of these minimum procedural rules, affording EU legislation and Members States a genuinely privileged position as compared to other state parties.

## 20.4 Summary

European values and the basic problems of fundamental rights protection are well-known. Close links between international law, EU law and national law result in complex jurisdictional relations, while certain generations of fundamental rights connected to a specific phase of the development of fundamental rights are featured with diverse intensity and

83 *Raban v. Romania* (2010), No 25437/08; *Sneersone and Kampanella v. Italy* (2011), No 14737/09.

84 F. Trombetta-Panigadi, 'The European Court of Human Rights and the Best Interests of the Child in the Recent Case Law on International Child Abduction. International Courts', in N. Boschiero et al. (Eds.), *International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, Springer, 2013, pp. 606-607.

85 About the case and its effect: Csehi, pp. 230-232; A. Schulz, 'The Abolition of Exequatur and State Liability for Human Rights Violations through the Enforcement of Judgements in European Family Law', in Permanent Bureau of the HccH (Ed.), *A Commitment to Private International Law. Essays in honour of Hans van Loon*, Intersentia, 2013, pp. 516-518.

different efficiency;[86] moreover, from among the scope of post-modern values, currently we are witnessing the triumph of individualism.[87]

At the same time, scepticism towards EU's fundamental rights protection – emerging mainly as a result of the Lisbon Treaty – is hardly justifiable. The practice of the CJEU, the legally binding Charter, the future accession of the EU to the ECHR both 'serve the purpose that fundamental rights become a reference point in the course of preserving the common values of the EU.'[88] However, rethinking and refining Union (international)[89] fundamental rights mechanisms seems to be essential.

According to some scholars, certain judgements of the CJEU in relation to unlawful child abduction undermine the Hague Convention, the principle of mutual trust and fundamental rights.[90] Furthermore, it can be certainly inferred from the *Povse* case that according to the ECtHR, under the regime of the Brussels II bis Regulation, in relation to a decision ordering the return of the child and presumably breaching human rights, proceedings may only be initiated against the state party of the court adopting the disputed decision. In light of the above and the fact that a result of the Union's accession to ECHR, the ECtHR will have competence to assess compliance of EU law with the provisions of ECHR, it is questionable whether such an accession will bring about change in jurisprudence. Will it entail the end of the Bosphorus test, as the protection of equivalence would no longer be justified? And until then, will the ECtHR apply the Bosphorus formula regarding other private international law rules of the EU?[91]

In the meantime, the system designed by the EU does not operate properly in reality, namely before the courts of the Member States. The principle of mutual recognition entailing the abolition of the public policy clause, and the rigid application of the Bosphorus doctrine do not lead us to a correct and just solution. Hopefully, in the

86 Szalayné, 2013, p. 21.

87 *See also* B. Fekete, 'Európai értékek és az értékek Európája. Megjegyzések Rezsőházy Rudolf Értékek szociológiája c. könyvéről', *Jogtudományi Közlöny* (2010), pp. 206-212.

88 Chronowski, p. 53.

89 A new Hague Protocol, which would prohibit automatic return of the child and also exempt the parent who unlawfully abducted the child from arrest in the hearing taking place in the state concerned, could be a suitable solution. Thereby, the right of the parents and the child to fair trial, in addition to the right to respect for family life could be afforded appropriate protected. Trombetta-Panigadi, pp. 610-611.

90 G. Cuniberti and I. Rueda, 'Abolition of the Exequatur, Addressing the Commissions Concerns', *University of Luxembourg Working Paper* No. 03, 2 October 2010.

91 See more opinions: H. Muir Watt, *Abolition of Exequatur and Human Rights,* 5 October 2013, http://conflictoflaws.net/2013/muir-watt-on-povse/; *R. Arenas García, Povse v. Austria: Taking Direct Effect Seriously?* 7 October 2013, http://conflictoflaws.net/2013/povse-v-austria-taking-direct-effect-seriously/; F. Gascón Inchausti, *Povse: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?* 8 October 2013, http://conflictoflaws.net/2013/gascon-on-povse-a-presumption-of-echr-compliance-when-applying-the-european-civil-procedure-rules/; D. van Iterson, *The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective*, 6 November 2013, http://conflictoflaws.net/2013/the-ecj-and-echr-judgments-on-povse-and-human-rights-a-legislative-perspective/.

conundrum of idea and reality, emotion and activity, we will not lose sight of the European values we wish to protect.