The ECtHR’s decision in Povse: guidance for the future of the abolition of exequatur for civil judgments in the European Union

European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (Povse v. Austria)

Abstract

The European Court of Human Rights’ decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court’s Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred from the decision. It concludes that the Human Rights Court’s approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

1. Introduction

The abolition of exequatur for judicial decisions in civil and family law matters within the European Union (EU) has been an ongoing process since the Conclusions from the 1999 European Council in Tampere introduced the principle of mutual recognition in the field.1 The exequatur is the procedure by which national courts in EU Member States decide whether a judgment originating in another Member State may be enforced in their national territory.2 The abolition of the exequatur therefore in principle removes any discretion for the national courts to refuse enforcement, regardless of the circumstances.3 This development has been criticized for its potential impact on the protection of fundamental rights.4 The European Court of Human Rights’ (ECtHR) recent decision in the Povse case,5 which concerned the consequences of the abolition of exequatur for decisions ordering the return of a child, was therefore eagerly awaited.6

The applicants in this case complained that Austria would violate their right to respect for their family life (Art. 8 of the European Convention on Human Rights, hereinafter: the Convention or ECtHR) by enforcing an Italian judgment ordering the return of the child in question, as Austria was obliged to do under Regulation 2201/2003 (the Brussels Ibis Regulation).7 As the exequatur procedure has been abolished under this Regulation, thereby removing any discretion from Austria, the question was whether Austria could be held accountable for any violation resulting from the enforcement. In establishing whether Austria could be held responsible the ECtHR applied the well-known Bosphorus test. Sections 6.1-6.3.1 of this case note focus on the application of this test by the ECtHR in the Povse decision. The primary aim is to draw conclusions as to the implications of this decision for the abolition of exequatur. It is concluded that the abolition of exequatur is in principle in accordance with the ECtHR if certain conditions are fulfilled, but that there is also a caveat to this conclusion. The analysis concludes that while the application of the Bosphorus doctrine may result in a gap in the protection of fundamental rights, the intended accession of the EU to the ECtHR may provide a solution (section 6.3.2).

1 Tampere European Council, 15-16 October 1999, Presidency Conclusions, no. 34.
5 ECtHR 18 June 2013, decision on admissibility, Appl. no. 3890/11 (Povse v. Austria).
6 ‘ECHR upholds abolition of exequatur’, the website Conflict of Laws announced. G. Cumberti, ‘ECtHR Upholds Abolition of Exequatur’, <conflictoflaws.net/2013/echr-upholds-abolition-of-exequatur/>. 16 September 2013. This website has hosted a very informative ‘online symposium’ concerning this judgment, with contributions from Prof. Muir Watt (Po Law School), Dr. Arenas García (Universitat Autònoma de Barcelona), Prof. Gascón Inchausti (Universidad Complutense de Madrid), Dr. Requejo (MPI Luxembourg), and Dorothea van Iterson (former Counsellor of legislation, Ministry of Justice of the Netherlands). Their contributions have provided valuable inspiration for this article. See <http://conflictoflaws.net/2013/online-symposium-abolition-of-exequatur-and-human-rights/> , 2 October 2013.
2. Facts and procedure

The facts underlying this case have given rise to a complex series of proceedings before Italian and Austrian national courts and the Court of Justice of the European Union (CJEU), which took place over a period of nearly five years. The following summarizes the relevant facts.

The two applicants, Sofia Povse (S.P.) and Doris Povse (D.P.) are daughter and mother, respectively. S.P. was born in Italy in 2006 as the daughter of D.P. and M.A., an Italian national. They lived together in the Vittorio Veneto Community. The relationship between D.P. and M.A. deteriorated and on 4 February 2008 M.A. requested the Venice Youth Court (tribunale per I minorenni di Venezia) to award him sole custody of his daughter. It also appears that the Venice Youth Court issued a travel ban in respect of the child on 8 February 2008. On the same day, however, D.P. took her daughter to Austria, of which D.P. is a national, where they took up residence with D.P.’s parents. On 23 May 2008 the Venice Youth Court lifted the travel ban, granted preliminary joint custody to both parents, and authorized the child’s residence with her mother in Austria. M.A. was granted access rights in a neutral location twice a month. M.A. exercised his access rights, until, in June 2009, he declared that he would no longer visit his daughter, and indeed did not do so.

From this moment onwards, a legal battle over custody and the return of the child ensued. D.P., now living in Austria with her daughter, obtained an interim injunction against M.A. from the Judenburg District Court (Austria), prohibiting M.A. from contacting her and her daughter. She also obtained a judgment awarding her sole custody from the same court, which based its jurisdiction on Article 15(5) of the Brussels IIbis Regulation.

In the meantime, M.A. had applied to the Venice Youth Court (Italy) for his daughter’s return (9 April 2009). In its judgment of 10 July 2009, the court granted this request. On 21 July 2009, the Venice Youth Court issued a certificate of enforceability under Article 42 of the Regulation, and on 22 September M.A. requested the enforcement of the return order. The Leoben District Court (Austria) attempted to refuse enforcement, but this decision was quashed by the Leoben Regional Court, which found that there was no room to refuse enforcement given that the Italian court had declared the order enforceable, and that the Italian court had jurisdiction because Italy was the child’s habitual residence immediately prior to her removal. After an appeal to the Austrian Supreme Court the matter reached the CJEU, which delivered a preliminary ruling.

In its ruling of 1 July 2010 the CJEU confirmed the jurisdiction of the Italian courts and affirmed that the Austrian courts had no discretion to refuse the enforcement of the return order. On the basis of this ruling the Supreme Court dismissed D.P.’s appeal and preparations were made to enforce the return order. Next, in a second set of proceedings, on 23 November 2011 the Venice Youth Court awarded M.A. sole custody of his daughter. It withdrew D.P.’s custody rights as granted in its judgment of 23 May 2008 and ordered her to return the child to Italy.

M.A. notified the Leoben District Court of the Venice Youth Court’s judgment and, on 19 March 2012, submitted a certificate of enforceability. Despite D.P.’s appeals – and after a change of address by D.P. and S.P. – on 15 June 2012 the Wiener Neustadt District Court ordered D.P. to hand over S.P. to her father, stating that enforcement measures would be taken if she failed to comply. It was this final decision of the Wiener Neustadt District Court to enforce the Venice Youth Court’s judgment of 23 November which was the subject of the application to the Human Rights Court.

3. Legal background: abolition of exequatur in the Brussels IIbis Regulation

The central issue in the proceedings before both the CJEU and the Human Rights Court is connected with the abolition of exequatur for decisions ordering the return of a child under the Brussels IIbis Regulation. As stated in the introduction, the goal that the abolition of exequatur is intended to achieve is increased efficiency in the cross-border enforcement of judgments, by removing the need to obtain a declaration of enforceability in the Member State of enforcement, as well as the grounds on which enforcement may be refused.

The Brussels IIbis Regulation, among other things, regulates the recognition and enforcement of decisions ordering the return of a child as follows (governed by section 4 of Chapter III of the Regulation). Article 42 provides that enforceable judgments given in one Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition. The only condition for enforcement is that the judgment in question needs to have been certified in the Member State of origin (Art. 42(1)) which is done using a standardized form attached to the Regulation as Annex III. Article 42(2) lays down a number of conditions which need to be satisfied before a return order may be certified, including the right to be heard for all interested parties as well as the examination of evidence.

Judgments requiring the return of a child are thus immediately enforceable in other Member States, without any possibility of opposing the enforcement in the Member State where enforcement is sought. The responsibility to check whether the requirements laid down have been fulfilled lies with the court in the Member State of origin.

A final footnote to the story is that two sets of criminal proceedings against D.P. are pending before the Treviso Court (Italy), one for removing a minor and failing to comply with court orders and one for child abduction.

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8 On the basis of Art. 10 of the Brussels IIbis Regulation.
10 The grounds for jurisdiction are not discussed in detail in this article. The reader should refer to paras. 44-50 and 51-53 of the judgment in C-211/10 for the findings of the CJEU on this matter.
11 The Hague Convention, invoked in earlier stages of the proceedings, played no role in the Court’s examination and is therefore not discussed.
12 These two elements of the exequatur procedure are referred to as the ‘title import function’ and ‘title inspection’ function, respectively. See Oberhammer 2010 (supra note 2). Note that in literature the term ‘exequatur’ sometimes only refers to the first function and is used as a synonym for the declaration of enforceability. The distinction is necessary, however, because in some instruments, most notably the Brussels IIbis Regulation, the title import function has been abolished while the title inspection function has not. See Dickinson 2010, p. 255 (supra note 4); Beaumont and Johnston 2010a, p. 105 (supra note 4).
13 The Regulation regulates the recognition and enforcement of judgments on divorce and those concerning parental responsibility (Arts. 21 and 28, respectively), but has also abolished the exequatur for decisions concerning access rights (Art. 41(1)).
14 The reasoning behind this is that while the right of a child to maintain contact with both parents after a separation must be protected, the parent with custody must also be guaranteed the child’s return. Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of
4. The preliminary question to the European Court of Justice

The provisions of the Brussels IIbis Regulation discussed above were further clarified by the CJEU in its preliminary ruling in this case. The applicants asked five questions. The first of these questions is whether the Austrian courts could be deemed to have jurisdiction under Article 10(b)(iv) of the Regulation. The second question is whether for a return order to be enforceable, it is necessary under Article 11(8) of the Regulation that the court ordering the return has already decided on custody. Questions four and five ask whether enforcement can be refused on the basis of either of two grounds: the fact that a subsequent judgment from the Member State of enforcement awarded custody to the abducting parent, or a change of circumstances after the delivery of the return order, which means that its enforcement would result in a violation of fundamental rights.

Without analyzing in depth the answer to each question, the general line of reasoning of the Court is as follows: the Regulation, and in particular the provisions concerning the enforcement of return orders, are based on the principle of mutual trust of Member States in one another (para. 40), meaning that grounds for refusal should be kept to a minimum. This means that questions four and five must be answered in the negative. Secondly, the Regulation has introduced a system in which the court of the Member State where the child was habitually resident before its removal (in this case Italy) has jurisdiction, meaning that this court is entitled to hear all appeals and applications pertaining to its return (para. 41). This is the basis for answering questions one and four in the negative and for affirming that jurisdiction lies with the Italian courts. Following the reasoning of the CJEU, the Brussels IIbis Regulation therefore provides no basis for holding Austria accountable for enforcing the Italian court’s return order.

5. Decision of the European Court of Human Rights

Before the Court of Human Rights, the applicants nevertheless again attempted to hold Austria accountable for the enforcement of the contested return order. They complained that the Austrian courts had violated their right to respect for their family life as protected by Article 8 of the Convention.

In particular, they argued that the Austrian courts had simply ordered the enforcement of the Italian return order without examining their argument that S.P.’s return to Italy would constitute a serious threat to her well-being, and would in effect permanently separate mother and daughter. Notwithstanding the reasoning of the CJEU in its preliminary ruling, the applicants stated that the Austrian courts’ failure to acknowledge these matters resulted in a violation of Article 8 of the Convention.

In its assessment, the Court first established that there had been an interference with the applicants’ right to respect for their family life under Article 8 of the Convention. This was not in dispute (paras. 70-71). The second element of the assessment, whether the infringement was in accordance with the law, is also clear: the decisions of the Austrian court ordering enforcement were in accordance with Article 42 of the Brussels IIbis Regulation (para. 72). This in itself constitutes the required legitimate aim; moreover, the enforcement of the return order also protected the right of the father to have access to his child and is therefore also a legitimate aim as required by paragraph 2 of Article 8 of the Convention (para. 73).

The Court then turned to the question whether the interference was necessary. Given that the respondent government submitted that the Austrian courts had simply fulfilled the obligations flowing from Austria’s membership of the EU by applying relevant provisions of the Brussels IIbis Regulation as explained by the CJEU, the Court examined this question by applying the so-called ‘Bosphorus test’.

This test, so called because it was developed by the Court in its judgment in the Bosphorus case,16 is designed to establish whether in a case where a state claims to have simply fulfilled its obligations resulting from its membership of an international organization (such as the EU), it may be exempt from responsibility under the Convention because the relevant organization adequately protects fundamental rights. The rationale behind allowing a state to rely on a presumption of equivalent protection is to find a compromise between two conflicting objectives: the Member States’ freedom to transfer sovereign power to international organizations, on the one hand, and the need to protect fundamental rights on the other.17 The test consists of three criteria: 1) the international organization in question must protect fundamental rights to a degree which is equivalent to the protection provided by the Convention; if so, the state in question is presumed to have acted in accordance with the Convention (the presumption of equivalent protection); 2) the state had no discretion – if it did, the presumption does not apply; 3) there are no circumstances which may cause the presumption of equivalent protection to be rebutted. This happens when in the circumstances of a particular case it is proven that the protection of Convention rights was ‘manifestly deficient’.18

In Pourse, the Court applied this test as follows. For the first element, the Court established whether the international organization, the EU, could be said to protect fundamental rights to an adequate degree. This question had already been examined and answered in the affirmative in its previous judgments in judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM(2002) 222 final/2, p. 2; Initiative of the French Republic with the view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ, 2000, C 234/7, recitals 3 and 13.

15 Question three is not answered because it is dependent on an affirmative answer to the first two questions.

16 The CJEU’s ruling echoes an earlier one in Zarraga, in which it was also decided that Art. 42 of the Brussels IIbis Regulation left no discretion to the enforcement court, even in cases where the court of origin had failed to perform the necessary controls prior to the certification of the return order as enforceable. CJEU 22 December 2010, Case C-491/10 PPU, [2010] ECR I-14247, NIPR 2011, 4 (Joseu Andoni Aguirre Zarraga v. Simene Pele).

17 Compliance with EU law by a contracting party constitutes a legitimate general-interest objective; ECtHR 6 March 2013, Appl. no. 12323/11, para. 100 (Michaud v. France); ECtHR 30 June 2005, Appl. no. 45036/98, paras. 150-151 (Bosphorus Han Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland).


20 See for a discussion of this criterion the Concurring Opinion of Judge Ress to the Bosphorus judgment.
Bosphorus and Michaud, 21 which is why the Court needed few words to conclude that the presumption of Convention compliance applied (para. 77). The Court also examined whether the EU legislative act in question – the Brussels Ibis Regulation – protects fundamental rights. In this regard, it noted that the Regulation requires the court which orders a child’s return to hear all parties and to examine the evidence. It also pointed out that the Austrian Supreme Court made use of the most important control mechanism provided for in the EU legal system by requesting a preliminary ruling on the matter from the CJEU. The presumption of compliance therefore also applied in concreto (paras. 80-81). The Court also concluded from the examination of the rules on the enforcement of return decisions laid down by the Brussels Ibis Regulation that the Austrian courts had no discretion in ordering the enforcement. The second condition of the Bosphorus test was therefore also fulfilled (para. 82). Having concluded that the first two conditions of the test had been fulfilled, and that a presumption of compliance therefore applied, the Court turned to the question whether there were nevertheless circumstances which would rebut the presumption. The applicants argued that they had been deprived of the protection of their Convention rights because the CJEU did not examine the alleged violation of those rights. The Court rejected this argument (para. 84). It reiterated the principle, expressed by the CJEU in its preliminary ruling, that the Brussels Ibis Regulation has introduced a strict division of tasks between the courts of the Member State of origin and those of the court of enforcement. Any objections to the judgment in question should be brought before the court of origin, in this case the Venice Youth Court, which would be accountable to the ECtHR. 22 Given that the applicants did not appeal against the return order before this court, but argued their case instead before the Austrian courts, the Court decided that there had been no dysfunction in this control mechanism. This also means that the CJEU was only called upon to rule on the interpretation of the Brussels Ibis Convention and that there was no basis for it to examine the Austrian courts’ decision and whether or not it infringed the applicant’s Convention rights. Finally, the Court concluded that the mechanism for the protection of Convention rights had failed. Austria, which did no more than to fulfill its obligations under Brussels Ibis, may therefore have been presumed to have acted in accordance with the Convention. As such, the Court ruled, the application was manifestly ill-founded and had to be rejected.

6. Comments

The Court’s decision in Povse is noteworthy because it is a further development in the highly interesting body of case law on the relationships between the legal orders of the EU and the ECtHR. 23 As such, it must also be read in the context of the accession of the EU to the ECtHR. It is further remarkable for the degree of deference the ECtHR shows to the principle of mutual recognition underlying the Brussels Ibis Regulation as well as the CJEU’s interpretation of that Regulation. It is possible to draw some conclusions from it which must be considered in future decisions on how to shape the free movement of judgments between EU Member States. However, it is also concluded that some of the most difficult questions concerning the abolition of exequatur were not asked in this case, so that it may in fact not be possible to conclude that the ECtHR unequivocally upholds the abolition of exequatur (see 6.1).

Three elements of the ECtHR’s decision are analyzed, which may be of significance for the cross-border enforcement of judgments on the basis of EU legislation: the added value of minimum requirements (6.1); the discretion awarded to the court of enforcement (6.2); and the procedural mechanism for protecting fundamental rights under EU law (6.3). This last element may involve an obligation to request a preliminary ruling from the CJEU (6.3.1), but it must also be considered in the light of the EU’s intended accession to the Convention (6.3.2).

6.1 The added value of minimum requirements

In deciding whether the protection offered within the EU system was in casu equivalent the ECtHR examined the relevant provisions of the Brussels Ibis Regulation and found that the minimum requirements contained therein constitute a form of protection for the child (para. 80). The ECtHR did this in the part of the judgment where it examined whether there are any circumstances capable of rebutting the presumption of Convention compliance. We can therefore conclude that the absence of such minimum requirements may cause the presumption of equivalent protection to be rebutted. This may have consequences for the future of the abolition of exequatur in EU instruments of civil procedure.

The European legislator has taken different approaches to the abolition of exequatur. In some instruments, the exequatur has been abolished completely, 24 although in some others the traditional inspection function (carried out by the court in the Member State of enforcement) has been replaced with a number of minimum standards, to be checked by the court of origin prior to declaring the judgment enforceable. 25 These minimum standards normally relate to the service of documents and other important procedural requirements such as the right to be heard. It has been questioned whether minimum requirements are an appropriate replacement for the preconditions for recognition traditionally incorporated in the exequatur procedure, 26 because they eliminate the cross-border check provided by the exequatur procedure. 27 With this judgment the ECtHR appears to accept that the existence of minimum requirements, accompanied by a mechanism for checking them in the state of origin, is evidence that there are no conditions capable of rebutting the presumption of equivalent protection. In other words, minimum require-

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21 ECHR Michaud, paras. 102-104 (supra note 17).
22 Reiterating its judgment in ECtHR 12 July 2011, Appl. no. 14737/09 (Suermonde and Kampanella v. Italy).
26 Cuniberti and Rueda 2011, p. 297-298 (supra note 4); Kramer 2011b, p. 225 (supra note 3).
ments are a sign that fundamental rights are appropriately protected. The European legislator may therefore be well-advised to include minimum standards in future pieces of legislation which abolish lex exequatur in order to show that there is a mechanism for protecting fundamental rights. It should be noted that the ECtHR did not examine whether the minimum requirements had been observed in this particular case and proven to be effective (para. 80). Yet this is understandable, given that the minimum requirements would have to have been checked by the Italian courts, while the complaints of the applicants were made against Austria. Unfortunately, therefore, whether the mechanism of control by the court of origin on the basis of minimum standards was in casu sufficient remains untested, since the applicants did not appeal against the return order in question before the court of origin, the Venice Youth Court (whose jurisdiction had already been confirmed by the CJEU in 2010). Neither did they appeal against the earlier return order of 10 July 2009. There was therefore a mechanism of protection available to them which they did not use and was therefore not proven to be deficient—which was also not claimed by the applicants. Had they been unsuccessful in their appeal with the Italian courts, they could have ultimately lodged an application against Italy with the Court, or so the Court held. One could argue that this would have been costly and cumbersome and would have likely taken a number of years, but this was not stated by the applicants and therefore not examined by the Court. It is therefore not difficult to see why the Court ruled that ‘there has been no dysfunction in the control mechanisms for the observance of Convention rights’ (para. 87). This may also explain why the ECtHR is fairly uncritical towards the mechanism introduced by the Brussels IIbis Regulation and its interpretation by the CJEU.

One may therefore conclude that while the inclusion of minimum standards can be seen as evidence in favour of equivalent protection, the ECtHR did not give much insight as to when these minimum standards would be deemed to be effective, given that it was not asked to rule on this question. It would have been interesting to see what course the ECtHR would have taken if it had been shown that the protection afforded through the Italian courts had not been sufficient so that the Austrian courts would have been the applicants’ last resort.

6.2 Discretion left to the enforcing court

A second conclusion for the field of European private international law is found in the Court’s application of the second condition of the Bosphorus test: whether there is any discretion left for the Member State in question in the implementation of Union law. The Court held that the Povse case is distinguishable from the circumstances in M.S.S. v Belgium and Greece, which concerned a Member State’s duty to return an asylum seeker to the Member State where he first entered the Union, as required by the Dublin II Regulation. In this case the presumption of equivalent protection was found not to apply because the state in question – Belgium – was able to exercise discretion under the ‘sovereignty clause’ of this Regulation. In this regard, it is indeed true that the Brussels IIbis Regulation awards the court in the Member State of enforcement no discretion (confirmed by the CJEU and not disputed). This element therefore indeed distinguishes the Povse case from the situation in M.S.S. It should be noted, however, that the Court simply accepted the CJEU’s ruling on this point, without analyzing or even citing the wording of the Regulation in any way.

Still, the ECtHR’s findings have consequences for those instruments of EU civil procedure that still contain grounds for refusing enforcement which may be checked by the court of enforcement. The implication of the M.S.S. judgment, combined with the Povse judgment, is that in order for the presumption of equivalent protection to apply, there should be absolutely no discretion available to the Court implementing Union obligations; if there is, it becomes accountable before the ECtHR just as it would have been had it acted under national law. The ECtHR’s decision may be of limited importance for EU instruments containing grounds for refusal since these afford a measure of discretion to a national court, even though the grounds must be invoked by one of the parties and are not applied ex officio. For the majority of the wider field of EU civil procedure the consequences of Povse are therefore quite limited.

6.3 The EU mechanism for protecting fundamental rights

6.3.1 An obligation to refer for a preliminary ruling

The ECtHR expresses great trust in the preliminary ruling mechanism of the CJEU. This is proven by the fact that it considers it an essential element of the procedural mechanism for the protection of Convention rights within the EU. That it is considered essential is shown by the ECtHR’s finding in Michaël that the French Conseil d’État, by refusing to refer a preliminary question, had ‘ruled without the full potential of the relevant international machinery for supervising fundamental rights (…) having been deployed’. The ECtHR noted that in Povse, the Austrian court duly made use of this possibility, so that the control mechanism had functioned adequately as far as Austria was responsible.

Does this mean that every national court faced with a request for the enforcement of a decision from another Member State must ask the CJEU for a preliminary ruling if faced with complaints, lest they lose their immunity afforded by the Bosphorus test? It appears that it does, provided that the CJEU has not yet had an opportunity to examine the Convention rights at issue in another procedure. According to the Court, the primary

28 This is in essence what happened in Sneersone and Kampanella v. Italy (supra note 22): the applicants brought a complaint against Italy, the state which issued the return order.
29 ECtHR 21 January 2011, Appl. no. 30696/09 (M.S.S. v. Belgium and Greece).
30 Council Regulation (EC) No. 345/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003, L 50/01.
32 It has been argued that while Regulation 44/2001 allows a national judge to examine grounds for refusal on his own motion, there is no obligation for him to do so: S. Franço, ‘Article 34’, in: U. Magnus and P. Mankowski, The Brussels I Regulation, Munich: Sellier European Law Publishing 2012, pp. 650-651.
mechanism for fundamental rights protection is through the national courts, which is complemented by the preliminary ruling mechanism. The role of the preliminary ruling for fundamental rights protection within the context of Union law is therefore complementary, yet essential: it is a means of maintaining control over the Member States’ actions in this regard. What is less clear is when, according to the ECtHR, the CJEU is considered to have adequately examined the fundamental rights questions at issue. In Michaud the ECtHR was rather critical, examining precisely which questions had been put before the CJEU. Meanwhile in Poise the ECtHR seemed to be much more easily satisfied: it was enough that the Austrian Supreme Court referred its questions, even if the CJEU’s examination did not concern fundamental rights problems, simply because these were not included in the referred questions. In Poise the ECtHR therefore set the bar much lower than in Michaud: it appears to be enough that the preliminary ruling mechanism was used at all. It is therefore difficult to deduce from this a guideline for national courts faced with the dilemma whether they should refer to the CJEU, lest they be considered accountable under the Bosphorus doctrine. The ECtHR clearly attaches great value to the mechanism, but sometimes it appears to be enough that it was used at all, not that it was in casu effective.

6.3.2 Fundamental rights protection in the EU and the accession of the EU to the ECHR

There is one important qualification to this whole story: the question whether the EU system provides fundamental rights protection equivalent to that of the Convention will become obsolete once the EU accedes to the Convention. Accession has a legal basis in Article 6(2) of the Treaty on European Union and Article 59(2) of the Convention (as amended by Protocol 1). A Draft accession agreement was concluded in April 2013, though negotiations are currently still ongoing. What are the likely consequences of accession for cases like Poise? First of all, once the Union accedes, any ‘presumption’ that the Union protects fundamental rights to a level which is equivalent to that afforded by the Convention would no longer be justified, as the Union would have the same obligations as all other signatories to the Convention. The high threshold for rebutting the presumption (a ‘manifest deficiency’) would no longer be applicable.

The accession of the EU to the Convention would also improve the procedural possibilities for holding the Union institutions accountable for a failure to comply with the Convention. The discussion of the Bosphorus test has shown that in cases where the presumption of equivalent protection is found to apply, and there are no circumstances capable of rebutting the presumption, then victims of Convention infringements find themselves in the unfavourable position of being able to hold neither the individual Member State nor the EU institutions directly accountable. Currently, individual natural or legal persons have very limited standing before the CJEU.

For these situations, the Draft accession agreement provides a likely solution. Article 1(4) of the Agreement as it currently stands provides that Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission.

This provision appears to fill the current gap in protection for Bosphorus-type situations. It provides that if a Member State implements EU law, it can be held accountable before the Human Rights Court if it violates Convention rights, even if the EU legislation did not award it any discretion. There will therefore be no more room for a presumption of compliance that needs to be rebutted. In such cases, the EU may participate in the proceedings as a co-respondent, either on its own initiative or after an invitation by the President of the Court (Art. 36(1) and (2) of the Convention). It is, however, the state in question which is held accountable, according to the provision, and which will therefore bear responsibility for a potential infringement and held liable for compensation. However, the co-respondent mechanism is a valuable addition, since it allows the EU to submit its views on the interpretation of the legislation concerned. The accession of the EU to the ECHR may therefore provide a solution for these complicated situations, though there are, naturally, still a great many uncertainties surrounding it.

33 ECtHR Bosphorus v. Ireland, para. 164 (supra note 17).
34 The judgment in M.S.S. v. Belgium and Greece does not address this issue: the ECtHR did not need to examine whether the protection afforded by the EU was in casu sufficient because it had already been established that Belgium enjoyed discretion under the Dublin Regulation, so that one of the two conditions for the presumption of equivalence was already found not to be fulfilled (paras. 338-340).
35 ECtHR Michaud, para. 114 (supra note 17). In Bosphorus the ECtHR did not consider specifically whether the fundamental rights questions (pertaining to the right to the protection of property, enshrined in Art. 1 of Protocol 1 of the Convention) were examined by the CJEU, though it seems clear that they were. Bosphorus (supra note 17), para. 164; CJEU 30 July 1996, Case C-84/95, [1996] ECR I-03953, paras. 19-27 (Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others).
36 It should also be noted that in none of these cases does the ECtHR review whether the CJEU’s findings as to the fundamental rights questions were correct: its control only concerns the correct operation of the available procedural mechanism. As the EU is currently not a party to the Convention (see the following section), its actions are of course technically not subject to control by the ECtHR, but at the same time, the danger of the duplicity of standards in fundamental rights protection is unmistakable. See Hinarjo Parga 2006, p. 256 (supra note 18).
39 Under the Lisbon Treaty individuals can only hold institutions of the EU accountable in case their legislative acts are either individually addressed to them or if they are of direct and individual concern to them, a barrier which has proved very difficult to cross. P. Craig and G. de Búrca, EU Law: Text, Cases and Materials, Oxford: Oxford University Press 2011, p. 495.
7. Conclusion

The Povse decision provides some valuable insights into the preconditions for the abolition of exequatur. The Povse judgment shows that the Court will analyze whether the EU mechanism for the protection of Convention rights functioned in practice. In this regard it attaches importance to the existence of minimum standards. In some cases, a request for a preliminary ruling may also be required. Finally, the judgment only has consequences for legislation in which no discretion is left to the national authorities – those in which exequatur has been abolished completely. It must however be kept in mind that compliance with these conditions only gives rise to a presumption of equivalent protection, which may still be rebutted in severe cases.

At the same time it can be concluded that in Povse the ECtHR has left a great deal of leeway for considerations of EU policy. It deferred to the CJEU’s preliminary ruling on the matter of discretion (6.2) without performing its own examination, and appeared to be quite easily satisfied with the functioning of the preliminary ruling mechanism. On the one hand, this is not problematic because the applicants did not make use of their procedural rights in the country of origin of the return order, so that their appeal to the Austrian courts was not the last resort it would otherwise have been. On the other hand, the deference to principles underlying the European cooperation embodied in the Bosphorus doctrine does result in a gap in fundamental rights protection.\textsuperscript{42} The accession of the EU to the Convention will hopefully resolve this.

We may conclude from this decision that in principle the abolition of exequatur is compatible with the ECHR. One caveat is that the applicants in this case did not exhaust the procedural remedies granted to them under the Regulation and that this mechanism was therefore not tested. It is unfortunate that the applicants did not avail themselves of this possibility, not only because it might have provided for a more in-depth scrutiny of the enforcement of return orders in the absence of exequatur, but mainly because it may have afforded Sofia Povse more protection than she had received from the protracted legal battle between two legal systems which both intended to protect her interests. The next question, which goes beyond the remit of this case note, is perhaps whether the system of the automatic enforcement of return orders adequately protects the best interests of the child.

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\textsuperscript{42} Although it lies outside the remit of this case note, there are of course arguments to be made in principle against the Bosphorus doctrine: it has been called a ‘fundamental mistake’: Peers 2006, p. 452 (supra note 18).

\textsuperscript{43} This contribution was made possible with support from the NWO (Netherlands Organization for Scientific Research) within the framework of the Innovational Research Incentives Scheme VIDI. The author wishes to thank Kristin Henrard, Xandra Kramer and Laura van Bochove for their comments on an earlier version.