

PUBLIC POLICY AS GROUNDS FOR REFUSAL OF
RECOGNITION AND ENFORCEMENT UNDER REGULATION
2016/1103 AND REGULATION 2016/1104*

*EL ORDEN PÚBLICO COMO MOTIVO DE DENEGACIÓN DE
RECONOCIMIENTO Y EJECUCIÓN EN VIRTUD DE LOS REGLAMENTOS
2016/1103 Y 2016/1104*

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ABSTRACT: Public policy is one of the most well-known and important institutions of private international law. It can be found as grounds for refusal for recognition and enforcement in several European Regulations, among others also in the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, together named as Twin Regulations. They namely both determine that a decision shall not be recognised if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought. The article studies the features of grounds of public policy and emphasises the related problems that are specific in the context of the Twin Regulations.

KEY WORDS: Procedural public policy; public policy, Regulation 2016/1103, Regulation 2016/1104, substantive public policy, twin Regulations.

RESUMEN: *El orden público es una de las instituciones más conocidas e importantes del Derecho internacional privado. Puede encontrarse como motivo de denegación de reconocimiento y ejecución en varios Reglamentos europeos, entre otros en el Reglamento (UE) 2016/1103 del Consejo, de 24 de junio de 2016, por el que se establece una cooperación reforzada en el ámbito de la competencia, la ley aplicable y el reconocimiento y la ejecución de las resoluciones en materia de regímenes económico matrimoniales, y en el Reglamento (UE) 2016/1104 del Consejo, de 24 de junio de 2016, por el que se establece una cooperación reforzada en el ámbito de la competencia, la ley aplicable y el reconocimiento y la ejecución de las resoluciones en materia de efectos patrimoniales de las uniones registradas, denominados conjuntamente “Reglamentos Gemelos”. En concreto, ambos determinan que no se reconocerá una resolución si dicho reconocimiento es manifestamente contrario al orden público del Estado miembro en el que se solicita el reconocimiento. El artículo estudia las características de los motivos de orden público y hace hincapié en los problemas relacionados que son específicos en el contexto de los “Reglamentos Gemelos”.*

PALABRAS CLAVE: Proceso de orden público; orden público; Reglamento 2016/1103, Reglamento 2016/1104; orden público sustantivo, Reglamentos Gemelos.

TABLE OF CONTENTS: I. BACKGROUND. II. CONTENT OF PUBLIC POLICY.- I. Substantive public policy.- 2. Procedural public policy.- III. THE SPECIFICS OF PUBLIC POLICY IN THE TWIN REGULATIONS.- IV. INSTEAD OF A CONCLUSION.

I. BACKGROUND.

Public policy is one of the most well-known and important institutions of private international law. Such was and still is a way for individual countries to safeguard their own values, principles, and rules that comprise the foundations of their legal system. With the adoption of international and European legal documents on the recognition and enforcement of foreign court decisions, countries are exposed to the possible invasion of unknown foreign values that are different than their own. The cross-border flow of foreign decisions is generally possible, however not unrestrained. Public policy offers suitable protection and is historically and traditionally grounds for the refusal of recognition and enforcement in national private international rules. Nowadays, it can be found as grounds for refusal also in European regulations providing for the recognition and enforcement of foreign court decisions. The only attempt to remove such an obstructing rule was at the time of the drafting of the recast of Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Regulation 44/2001)¹. Reviewing public policy (at least the substantive part thereof) when dealing with foreign decisions was not deemed to be in line with the European process of integration². There was the idea that public policy as grounds for non-recognition and non-enforcement should be narrowed to only procedural public policy³. It was deemed to be a perfect opportunity to do that. It was the recast of a regulation that was well known by that time and often used in the Member States of the European Union (hereinafter: the EU). Additionally, the EU Member States already had (and still have) in some fields legal regulations that are partially unified and harmonised with the EU legal sources, as well as otherwise similar substantive law arrangements, and finally also have a similar historical and geographical background. It is possible to conclude that because of all these circumstances, the substantive public policies of these states are more or less similar if not the same.

1 OJ L 12, 16th January 2001.

2 KERESTEŠ, T.: "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow", *Lexonomica*, 2016, 8, no. 2, p. 82.

3 KRAMBERGER ŠKERL, J.: "Predlog spremembe uredbe Bruselj I", *Pravna praksa*, 2011, no. 4, p. 17.

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This can be seen also in the small number of court decisions in which the courts of the EU Member States have refused the recognition or enforcement of a foreign court decision when using Regulation 44/2001 due to the public policy exception. An opportunity to narrow this exception was therefore appropriate, however the European Commission did not succeed with such a proposal⁴.

The public policy exception therefore also appears in European regulations adopted subsequently⁵. Among these are also Council Regulation (EU) 2016/1103 of 24th June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes⁶ (hereinafter: Regulation 2016/1103) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships⁷ (hereinafter: Regulation 2016/1104), which are together referred to as the Twin Regulations. These two regulations provide for literally the same grounds for refusal of recognition⁸ and enforcement as Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁹ (hereinafter: Recognition 1215/2012), on one hand, and other regulations in the field of family law, on the other. See Council Regulation (EC) no. 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000 (hereinafter: Regulation 2201/2003)¹⁰, its recast Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Regulation 2019/1111)¹¹, and finally also Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable

4 EU Member States opposed such a proposal and the *exequatur* procedure was instead removed.

5 It is different in EU regulations that provide for special instruments and different manners of their cross-border lives. See, for example, Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21st April 2004 creating a European enforcement order for uncontested claims [2004] OJ of the European Union L 143, Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11th July 2007 establishing a European Small Claims Procedure [2007] OJ of the European Union L 1991/I, and Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12th December 2006 creating a European order for payment procedure [2006] OJ of the European Union L 399/I.

6 OJ L 183, 8th July 2016.

7 OJ L 183, 8th July 2016.

8 Hereinafter, I will only use the term grounds for refusal of recognition. The names of the Twin Regulations include the term "enforcement", while the text thereof provides for the procedure for the declaration of enforceability. When contesting such a declaration, the party can use the same grounds that are otherwise provided for refusal of recognition (see Articles 51 and 37 of the Twin Regulations).

9 OJ L 351, 20th December 2012.

10 OJ L 338, 23rd December 2003.

11 OJ L 178, 2nd July 2019.

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 Succession¹². Regardless of the fact that the concept of public policy has not changed since the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters¹³ (hereinafter: the Brussels Convention)¹⁴, it is possible to conclude that the term has at least a slightly different meaning in the Twin Regulations.

II. CONTENT OF PUBLIC POLICY.

Article 37 of both Regulation 2016/1103 and Regulation 2016/1104 regarding public policy are the same: “A decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought”¹⁵. Compared to the leading EU regulations on civil and commercial law, the provisions in the Twin Regulations are stylistically the same as in Regulation 44/2001 (Article 34) and its predecessor, the Brussels Convention (Article 34). The main difference¹⁶ is the use of the term “judgment” in Regulation 44/2001 and the Brussels Convention and the different use of the term “decision” in the Twin Regulations. The reason for such divergence is clear. The Twin Regulations can namely also apply to decisions by other bodies (for example, notaries public), not just courts.

As can be seen, the Twin Regulations, the same as other European regulations, do not provide a definition of public policy, also referred to as international public policy. They do not regulate the content thereof and the manner of its application. The EU therefore leaves it up to the Member State to apply it on their own. Consequently, the Member States interpret and apply the term determined in EU legal sources in the same manner as they do within their national legal systems. However, also national legislation generally does not provide for a definition of public policy. Broad interpretations of the term have only therefore been formed in legal theory and case law. A general explanation could be that public policy

¹² OJ L 201/107, 27th July 2012.

¹³ OJ L 299, 31st December 1972.

¹⁴ MAGNUS, U., MANKOWSKI, P.: *European Commentaries on Private International Law, ECPII, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 878. The only visible difference in the relevant provision of Regulation 44/2001 compared to the Brussels Convention is the addition of the adjective “manifestly”. From then on, all of the relevant EU regulations require effects that are manifestly contrary to public policy. The change was aimed at narrowing the exception and lowering the possibilities for refusal of recognition and enforcement; however it did not have an evident effect in practise. For more on this, see MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 881 and CUNIBERTI, G.: “Article 37 Grounds of non-recognition”, in VIARENGO, I. and FRANZINA, P. (ed.): *The Regulations on the Property Regimes of International Couples*, Edward Elgar Publishing, Cheltenham, 2020, p. 347.

¹⁵ The wording of the provision is completely the same also in Article 40 of Regulation 655/2012.

¹⁶ Another insignificant difference is the use of the term *ordre public* in the English version of the text. It is the French term for “public policy”. Such an additional name for the same term was not used in Regulation 44/2001, but appears in all subsequent regulations.

is “a set of values on which the legal, social and cultural order of an individual state is based and which must (also) be respected in so-called relations with an international element”¹⁷. Not all national mandatory rules are considered to be part of public policy¹⁸, but only the most important ones, regarding which it is sensible that they are used in international matters¹⁹. The principles and rules protected by public policy are the ones that are more fundamental than those that are protected with overriding mandatory provisions²⁰. Due to its ambiguity, doubt exists regarding the moral principles as a part of public policy²¹. This dilemma can be attributed mostly to the openness and indefinableness of the term morality itself. However, a general instruction of the CJEU for the Member States regarding public policy is to consider whether the recognition of a foreign decision “would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle” and that “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”²².

Public policy is therefore a national thing and depends on the national law. The term can therefore differ from country to country, with each of them protecting their fundamental rules, principles, and values. It evolves over time and necessarily also with the social and legal changes in an individual country. Its content is not clear and definite all the time, but is determined only in concrete cases – when considering whether a specific foreign decision (or the recognition thereof) is contrary to public policy. Due to the uncertainties accompanying this mental process, proposals to make it more predictable can be found in legal theory. Gössl proposes that a way of determining whether or how the public policy exception applies in a specific case should be more coherent among the EU Member States²³. As an advantage of such a harmonised approach, she sees a higher level of certainty for the parties that are involved in a specific case. While this could certainly be a positive outcome, in my opinion it does not outweigh the challenges and obstacles

17 KRÄMBERGER ŠKERL, J.: “Evropeizacija javnega reda v mednarodnem zasebnem pravu”, *Pravni letopis*, 2008, p. 349.

18 The Slovenian Supreme Court has confirmed this several times when deciding on the recognition of foreign court decisions, using a different legal rule regarding statutory interest than that which applies in Slovenia. The Slovenian provision regarding statutory interest is *ius cogens*. Not all violations of *ius cogens* legal rules are also violations of public policy. A provision regarding statutory interest is *ius cogens* within the country; however, it is not so fundamental and essential that its violation would lead to the refusal of recognition. See Cpg 7/2016, 15th July 2016, and Cp 1/2016, 11th February 2016.

19 KERESTES, T.: “Public Policy”, cit., p. 79.

20 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford, 2019, p. 153.

21 KERESTES, T.: “Public Policy”, cit., p. 79.

22 Case C302/13, flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiskā lidostā Rīga VAS, Air Baltic Corporation AS, ECLI:EU:C:2014:2319, para. 49.

23 GÖSSL, S. L.: “The public policy exception in the European civil justice system”, *The European Legal Forum*, 2016, no. 4, p. 92.

that would come about with the attempt to design criteria as regards how to consider and decide on the public policy exception.

While the EU has let Member States autonomously interpret and apply the public policy exception, as is determined in EU regulations, they are nevertheless not completely free. Beside the “national” part of public policy, national judges must also consider another aspect. Countries that are Member States of the EU or the Council of Europe are obliged to respect the values thereof²⁴. These represent the so-called European part of public policy, or European public policy²⁵. This part of public policy should not be interpreted freely by individual countries. Countries are bound to the interpretations of the Court of Justice of the European Union (hereinafter: the CJEU) and the European Court of Human Rights (hereinafter: the ECtHR). Because of that, it is not to be expected that there will be divergences in the understanding and interpretation of European public policy among different Member States. The CJEU has indirectly confirmed in its case law that within the public policy exception national law and Community law are equivalent²⁶. The court of recognition must therefore inspect also whether the recognition of a specific decision would be contrary to the fundamental principles and rights of EU law²⁷.

The application of the public policy exception of the Twin Regulations therefore derives from the national concept of the public policy; however, it is mandatory to respect the limits set by the CJEU in its decisions²⁸. For a national court to be able to apply the public policy exception it is necessary to provide extensive argumentation on why certain values constitute a (national) public policy. If confronted with a specific case, the CJEU inspects whether such arguments are true, which contributes to the Europeanization of the public policy exception²⁹.

As in other European regulations, also the Twin Regulations enable the public policy exception only in cases of manifest contrariety to public policy. This entails that “normal” and “average” contrarieties are not enough for the exception under Article 37(a) of the Twin Regulations to be used. This is deemed to hold when the public policy of the Member State of recognition would be violated “to an

24 Member States are therefore obliged to respect fundamental principles of the EU. However, it is not possible to say that European public policy includes all European legal sources, despite the fact that EU law is hierarchically above the national. KRAMBERGER ŠKERL, J.: “Javni red pri priznanju in izvršitvi tujih sodnih odločb”, *Zbornik znanstvenih razprav*, 2005, pp. 5-6.

25 KRAMBERGER ŠKERL, J., “Evropeizacija javnega”, cit., p. 352, distinguishes between two parts of European public policy. These are Community public policy, which includes European Union values, and Convention public policy, which includes the values of the Council of Europe.

26 Case C-38/98, *Renault SA v Maxicar SpA and Orazio Formento*, ECLI:EU:C:2000:225. See MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 886-887.

27 C-681/13, *Diageo Brands BV v Simiramida-04 EOOD*, ECLI:EU:C:2015:471, paras. 50–51.

28 MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 878.

29 GÖSSL, S. L.: “The public policy”, cit., pp. 87, 89.

unacceptable degree³⁰. Only violations of certain severity are relevant. The court may refuse recognition in the case of violations that cannot be tolerated under any circumstances³¹. However, some opine that such a requirement would entail the need for a thorough investigation of a specific decision and the procedure for its issuance, which is not appropriate³². According to legal theory, consideration of such gravity depends on the existence of a close and significant link between the specific case and the Member State addressed³³. Such a link can, for example, be the nationality or citizenship of one of the parties in the relevant Member State. The closer the link, the easier and more often the recognition of a foreign decision might violate the public policy³⁴. The application of such a link undoubtedly leads to different outcomes of the decision on refusal in different Member States even if identical content as to the term public policy is applied in all of them³⁵. While national jurisdictions often require and apply such a link³⁶, neither the Twin Regulations nor any other European regulations regulating recognition and enforcement explicitly mention it. It is possible to conclude that it is therefore not relevant when applying the public policy exception within these regulations³⁷.

As public policy as a ground for non-recognition and non-enforcement has found a place in several European regulations, in the past the CJEU has decided to interpret this term in many cases. Because the same term is also used in Regulation 2016/1103 and Regulation 2016/1104, CJEU decisions can and should be used reasonably also when interpreting Article 37(a) of the Twin Regulations³⁸. However, subsidiary and reasonable application of the CJEU decision regarding substantive public policy to the Twin Regulations will not always be appropriate.

30 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 153.

31 PAMBOUKIS, H. P.: *EU Succession Regulation No 650/2012: A Commentary*, Oxford, 2017, p. 455.

32 CUNIBERTI, G.: "Article 37 Grounds of non-recognition", in VIARENGO, I. and FRANZINA, P. (ed.): *The Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 347.

33 CUNIBERTI, G.: "Article 37", cit., p. 348; MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 882; GÖSSL, S. L.: "The public policy", cit., p. 90.

34 MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 882. GÖSSL, S. L.: "The public policy", cit., p. 90, emphasises that when a "right of a considerable interest" is involved, the link between the case and the court is less important. GÖSSL, S. L., "The public policy", cit., p. 90, emphasises that in cases of unequal treatment between men and women, the opinion exists that a link between the court and the specific case is not mandatory.

35 GÖSSL, S. L.: "The public policy", cit., p. 90. She emphasises that nevertheless it is not to be expected that the courts will refuse the application of a public policy exception due to the non-existence of a link to the case. A minimum link can namely be established with the acceptance of the jurisdiction of the court, which already requires a certain link to the forum.

36 See BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 153; GÖSSL, S. L.: "The public policy", cit., p. 90.

37 CUNIBERTI, G.: "Article 37", cit., p. 348.

38 CUNIBERTI, G.: "Article 37", cit., p. 346.

I. Substantive public policy.

The Twin Regulations regulate a specific field of law that is in many aspects different than traditional civil and commercial matters. A substantive public policy exception as grounds for refusal of recognition and enforcement was not really used in case law under the Brussels Convention, Regulation 44/2001, and Regulation 1215/2012³⁹. The reason is that substantive national legislation in the field of civil and commercial law is partially harmonised and unified, and public policy related to these fields is more or less the same in different EU Member States. However, this is not also true for the field of family law. Furthermore, it is a very sensitive matter. Due to the different cultures, religions, and the development of societies, even European countries (let alone third countries) have different regulations regarding the institutions of marriage and registered partnership. Therefore, there is a greater chance of finding a national rule, the result of which would be considered to be contrary to public policy in the Member State of recognition (e.g. favouring a male spouse or a partner above his female spouse or partner when dividing their property). This is especially true due to the particularly sensitive questions that accompany these matters (e.g. the status of same-sex couples, same-sex marriage, and the registration of a heterosexual partnership). However, when a specific court ponders arguments regarding the manifest contrariety of a foreign decision to the public policy of *lex fori*, it may under no circumstances review a decision⁴⁰ as to its substance (Article 40 of Regulation 2016/1103 and Regulation 2016/1104). This rule severely limits a court's possibility to consider the effects of the recognition of a decision and the contradiction thereof with the substantive public policy⁴¹. Every Member State must therefore assume the standpoint that EU Member States correctly apply in the specific case the applicable national law and EU law. The opposite option would ruin mutual trust, which is the foundation of the successful regime of the cross-border recognition of foreign decisions.

The court, therefore, must not audit either the findings of facts or the application of substantive law⁴². The wrong application of a substantive law is not a reason for the application of the public policy exception⁴³. Neither is the belief that the court (of recognition) would have reached a different decision on the

39 When a public policy exception was applied, it was mostly due to procedural violations.

40 Article 36 of Regulation 44/2001 and Article 52 of Regulation 1215/2012 contain a similar provision. Interestingly, these regulations regarding the cross-border enforcement of decisions in the field of civil and commercial law prohibit a merely substantive review of the *judgment*, but not the *certificate*. Consequently, the information in the certificate may be subject to a review in the state in which recognition is sought. PAMBOUKIS, H. P.: *EU Succession Regulation*, cit., p. 465, and BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 177.

41 MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 883.

42 In Decision Cpg 8/2019, 24th September 2019, the Supreme Court of the Republic of Slovenia confirmed that the (possible) wrong application of national, EU, or international law when issuing a specific court decision is not a ground for refusing recognition.

43 Case C-38/98, Renault SA v Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225, para. 29

merits if it had decided on the specific case on its own⁴⁴. Additionally, the fact that in the specific case the applied substantive law is different than the *lex fori* is not a reason to apply the public policy exception⁴⁵. When deciding on the public policy exception, the court therefore only needs to take into account the effects that would result from the recognition of a specific foreign decision. The only relevant question is therefore whether such effects would be (manifestly) contrary to public policy in the Member State in which recognition is sought.

The chances of a substantive public policy exception applying in a specific case are rather low also due to the impact of the provision of Article 31 of the Twin Regulations (in the English version) named "Public policy (*ordre public*)". This is a provision in the chapter on applicable law that determines that the application of a provision of the law of any state specified by the Twin Regulations may be refused if such application is manifestly incompatible with the public policy of the forum⁴⁶. The court of origin can therefore refuse the application of a foreign legal provision if the effects of the application of such are contrary to public policy. This weighing differs from the one determined in Article 37 (a) of the Twin Regulations. While the court of origin decides whether the application of a specific provision would be contrary to public policy, the court of recognition examines only whether the effects of the recognition of a specific foreign decision (and not its content) would be contrary to public policy. Regarding the latter, it is not relevant even if an applied foreign law itself is contrary to public policy. What is decisive is only what the effects of the recognition of such foreign decision are. Bergquist and Cuniberti give the example of polygamous marriages⁴⁷. While a Member State would not apply a foreign law allowing such a marriage due to it contradicting public policy, the same Member State might recognise a foreign court decision using such a law, because its effects (the division of assets) are not contrary to the public policy⁴⁸. This is the so-called "attenuated" effect of public policy (in French, *effet atténué*, in German, *abgeschwächte Wirkung des ordre public*), which protects the already acquired rights of the parties⁴⁹.

44 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 205.

45 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 153-154. The CJEU ruled in C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164, para. 36, that the difference in legislation is not a violation of the public policy of the Member State of recognition and enforcement.

46 The provision is not an exception. It can also be found in other EU regulations. See, for example, Article 35 of Regulation 655/2012.

47 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 154, and CUNIBERTI, G.: "Article 37", cit., p. 347-348.

48 The same principle can be found in the Slovenian Supreme Court case II Ips 462/2009, 28th January 2000. The Slovenian court was deciding on the recognition of a court decision issued in the USA, regarding the adoption of a child by a same-sex couple. The court decided that the recognition of such decision is not contrary to public policy and therefore recognised it, even if Slovenian substantive law would not allow for such adoption. For more, see KRAMBERGER ŠKERL, J.: "Nerazumevanje pridržka javnega reda in posvojitev s strani istospolnih partnerjev", *Pravna Praksa*, 2010, nos. 29-30, p. 26 ff.

49 For more on this, see KRAMBERGER ŠKERL, J., "Javni red", cit., p. 5-6.

Both provisions that include the institution of public policy use the same level of seriousness. Article 31 of the Twin Regulations requires a manifest incompatibility and Article 37(a) of the Twin Regulations requires manifest contrariety. Despite the impression that the level of gravity is the same, legal theory emphasises that public order as an exception to recognition must be applied more strictly⁵⁰. Consequently, it is easier to refuse the application of a foreign legal rule than to refuse recognition of a foreign decision. Such a first review of the possible violations of the public policy of the Member State of origin at the stage of the application of a foreign law lowers the chance that the recognition of a foreign decision would subsequently have manifestly contrary effects on the public policy of the Member State of recognition.

2. Procedural public policy.

Besides substantive public policy, there is also procedural public policy, which together form general public policy under Article 37(a) of the Twin Regulations. It includes “those fundamental principles and institutes of civil procedure without which there can be no democratic court procedure or rule of law.”⁵¹ However, national legislation is not the only source of procedural rules. It is necessary to also respect the ECHR (especially Article 6) and the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) (especially Article 47). The right to a fair trial therefore binds several countries and is a foundation for all EU Member States. Consequently, it is unquestionably a part of procedural public policy, which the Member States participating in the enhanced cooperation need to take into account when considering refusing recognition due to the public policy exception.

However, not all of the procedural mistakes made in the procedure for issuing the decision are enough to apply the public policy exception. Only fundamental ones can have such a serious result. The court of recognition must consider the entire proceedings for issuing the specific decision.

Regardless of the fact that all European countries (and also some others) are bound by the ECHR and the Charter and are therefore obliged to respect them in national court procedures, a not insignificant extent of case law on refusals due to procedural public policy exceptions exists. When applying the Brussels Convention and Regulation 44/2001, the CJEU has already dealt with cases in which recognition was established to have effects contrary to public policy. These

50 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 153. BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 156, attribute this to the fact that public policy in Article 31 of Regulation 2016/1103 and Regulation 2016/1104 consists of only substantive public policy, while Article 37 (a) of Regulation 2016/1103 and Regulation 2016/1104 also include procedural public policy.

51 KRAMBERGER ŠKERL, J., “Javni red”, cit., pp. 255.

include: a case⁵² in which the defendant was prohibited from defending himself due to the fact that he did not physically appear at the court; a case⁵³ involving the exclusion of the defendant from the proceedings because he had not respected a certain order of the court; and a case⁵⁴ involving a judgment issued in default of appearance without giving either the reasoning of its merits or an assessment of the subject matter. The existence of violations of procedural fundamental rights that are serious enough to have effects contrary to public policy can lead to two conclusions. Either the countries disrespect the fundamental procedural rights in the national procedures despite their obligation to do so, or there are different interpretations in different countries of what the right to a fair trial means.

When talking about refusing recognition of a foreign decision due to a breach of procedural principles, the first thing to think about would not be the public policy exception. It would most likely be grounds to refuse recognition due to a decision issued in default of appearance (Article 37 (b) of the Twin Regulations). This can be the case if the defendant was not served the document that instituted the proceedings or an equivalent document in sufficient time and in such a manner so as to enable him or her to arrange for his or her defence⁵⁵. However, such a rule cannot be applied if the defendant failed to commence proceedings to challenge the decision when it was possible for him or her to do so. This is a narrower ground compared to public policy and is of a strictly procedural nature. If in a specific case a party's procedural rights were violated, indent (b) is considered first. Indent (a) is considered only if such an exception cannot be applied⁵⁶. The different grounds for refusal do not overlap⁵⁷. Public policy therefore does not cover various violations that are covered by other indents of Article 37 of the Twin Regulations. The public policy exception is therefore a safety net for catching violations that do not entail other grounds for non-recognition but are contrary to public policy.

52 C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164.

53 C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, ECLI:EU:C:2009:219.

54 C619/10, Trade Agency Ltd v Seramico Investments Ltd, ECLI:EU:C:2012:531.

55 KRAMBERGER ŠKERL, J., "The Recognition and Enforcement of Foreign Judgments in Slovenia; National Law and the Brussels I (Recast) Regulation", *Yearbook of Private International Law*, 2018/2019, 20, p. 294, emphasises that the principle of contradiction is regulated as a special ground for non-recognition (and not as a part of public policy), "to emphasise its importance and eliminate every possible doubt that its violation could be the reason for the refusal of recognition and enforcement."

56 The CJEU stressed the subsidiary nature of the public policy exception in case 145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61, para. 21. MAGNUS, U. and MANKOWSKI, P., *European Commentaries*, cit., p. 882, emphasises that this is an application of the principle *lex specialis derogate generalis*.

57 MAGNUS, U. and MANKOWSKI, P.: *European Commentaries*, cit., p. 882.

Generally, it is necessary to interpret the public policy exception strictly⁵⁸, rigidly, and narrowly⁵⁹. The mere fact that the national procedural law of the Member State of recognition is different than the national procedural law that was used when issuing a court decision is not a sufficient reason to apply the public policy exception⁶⁰. The court of recognition must also not review the correctness of the application of the provisions on international jurisdiction under Regulation 2016/1103 and Regulation 2016/1104⁶¹. This is clearly determined in Article 39/II of the Twin Regulations, whereas the provisions are slightly different. While both exclude a review of international jurisdiction under Articles 4–11, Regulation 2016/1104 additionally excludes international jurisdiction for counterclaims under Article 12. An explanation for such a differentiation cannot be found in the possibly different legal arrangements of both regulations. The only option is therefore that the described difference is unintentional. Courts of recognition shall therefore not review the correctness of the application of any provisions of the Twin Regulations on international jurisdiction.

III. THE SPECIFICS OF PUBLIC POLICY IN THE TWIN REGULATIONS.

As already mentioned, public policy has survived in more or less the same form since the Brussels Convention. Nevertheless, it is possible to conclude that the term has a slightly different value in the Twin Regulations. The principle of universal application (Article 20 of Twin Regulations) determines that a law designated as applicable by the rules of either of the Twin Regulations shall be applied whether or not it is the law of an EU Member State taking part in the enhanced cooperation. It is possible that the law of other EU Member States or of third countries is applied when issuing a specific decision. It is therefore realistic to expect that in some cases a legal system with completely different values (such as Sharia law) is applied⁶². Recognition of such a decision, although issued in one of the EU Member States that are bound by the Twin Regulations, can therefore cause a violation of the fundamental principles, values, or concepts of the Member State of recognition. In order to ensure better protection of the sensitive field that is the focus of the Twin Regulations, they explicitly require the observance of fundamental rights and principles.

58 The CJEU emphasised in case I45/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, ECLI:EU:C:1988:61, that the public policy exception should only be applied in exceptional cases.

59 DOUGAN, F.: “Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov”, in GALIČ, A. and KRAMBERGER ŠKERL, J. (ed.): *Liber amicorum Dragica Wedam Lukič*, Ljubljana, 2019, p. 245.

60 GÖSSL, S. L.: “The public policy”, cit., p. 88.

61 The CJEU stated similar in the case C-7/98, *Dieter Krombach v André Bamberski*, ECLI:EU:C:2000:164, para. 32.

62 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 153.

This is the first time that a European regulation includes the obligation to respect the Charter in the text itself. In other regulations, such a rule can only be found among the Recitals (see, for example, Regulation 2201/2003 and Regulation 2019/1111). When deciding on grounds for refusal of recognition, the courts and other competent authorities of the Member States shall therefore observe the fundamental rights and principles recognised in the Charter (Article 38 of the Twin Regulations). These are, for example, equality before the law (Article 20 of the Charter), equality between women and men (Article 23 of the Charter) and the right to property (Article 17 of the Charter). Among those, the Twin Regulations explicitly underline the principle of non-discrimination (Article 21 of the Charter), which reads "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

The subject matter of the Twin Regulations is the property consequences of marriage and registered partnerships. These include, *inter alia*, also matters involving the partition, distribution, or liquidation of the property, giving powers and rights regarding the property to each of the individuals in the couple, and the classification of the property of either or both of them into different categories. When dealing with these questions, there are numerous possibilities to discriminate against one spouse or partner based on any of the personal features mentioned in Article 21 of the Charter. While all of them are important, in my opinion two stand out in the Twin Regulations and have a greater possibility of being applied.

The first such personal feature is an individual's sex. Taking into account the historical background and what is still a tradition in some societies, the tendency might exist to favour a male spouse or partner when deciding on property questions. *Sharia* law, for example, provides that 2/3 of spouses' total assets go to the (ex-)husband and 1/3 to the (ex)wife⁶³. If a Member State faces a court decision on dividing spouses' assets using such a rule, it can refuse its recognition due to it contravening its public policy.

The second personal feature that is very likely to be grounds for discrimination considering the topic of the Twin Regulations is sexual orientation. It is not a secret that the Twin Regulations were adopted using a mechanism of enhanced cooperation due to the fear of some EU Member States that a foreign decision would acknowledge various forms of same-sex institutions. Depending on the national regulations, the Twin Regulations are also used for same-sex marriages

63 BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations*, cit., p. 221.

and same-sex registered partnerships. Even if it is true that in such cases both individuals in the couple are the same sex and therefore discrimination between them on the basis of sexual orientation might not be a problem, the general principle of non-discrimination on the basis of sexual orientation is an important value in the Twin Regulations.

While the required observance of fundamental rights applies to all grounds for refusal listed in Article 37 of the Twin Regulations, it is evident that it is especially important for the public policy exception. Other grounds are regulated in more detail and the Twin Regulations themselves precisely determine when individual grounds exist. On the contrary, the ground of public policy is open and its content is not obvious only by reading the provision of Article 37 of the Twin Regulations. The help provided in the instructions in Article 38 is therefore welcome.

IV. INSTEAD OF A CONCLUSION.

The declaration of the enforceability of decisions is automatic within the Twin Regulations (*ipso iure*) (Article 47). Therefore, there is no phase in which the court would consider any of the four grounds for non-recognition on its own motion. The party that opposes such automatic recognition must apply appropriate legal remedies, in which he or she must claim and prove the existence of a specific ground. Then an adversarial procedure begins (Article 49 of the Twin Regulations). When searching for possible grounds for refusal, a party and the competent court are limited to those listed in Article 37 of the Twin Regulations. The national legislation of Member States cannot provide for any other additional grounds for refusal⁶⁴. If a court establishes that the effects of recognition would be contrary to public policy, it does not have discretion, but is obliged to refuse recognition. This is the so-called negative function of the public policy exception⁶⁵.

Despite several academic articles on public policy in private international law, the court in each specific case is the one to decide on the content of such legal standard in the specific case. It has to interpret it strictly and with the acknowledgement that the (foreign) decision has already given specific rights and legal status to the party and therefore the refusal of the recognition and enforcement of such decision is a serious limitation and interference with his or her legal position.

64 CAZORLA GONZÁLEZ, M. J., GIOBBI, M., KRAMBERGER ŠKERL, J., RUGGERI, L. and WINKLER, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 136.

65 GÖSSL, S. L.: "The public policy", cit., p. 86.

BIBLIOGRAPHY

BERGQUIST, U., DAMASCELLI, D., FRIMSTON, R., LAGARDE, P. and REINHARTZ, B.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford, 2019, p. 153.

CAZORLA GONZÁLEZ, M. J., GIOBBI, M., KRAMBERGER ŠKERL, J., RUGGERI, L. and WINKLER, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 136.

CUNIBERTI, G.: "Article 37 Grounds of non-recognition", in VIARENGO, I. and FRANZINA, P. (ed.): *The Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 347.

DOUGAN, F.: "Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov", in GALIČ, A. and KRAMBERGER ŠKERL, J. (ed.): *Liber amicorum Dragica Wedam Lukič*, Ljubljana, 2019, p. 245.

GÖSSL, S. L.: "The public policy exception in the European civil justice system", *The European Legal Forum*, 2016, no. 4, p. 92.

KERESTEŠ, T.: "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow", *Lexonomica*, 2016, 8, no. 2, p. 82.

KRAMBERGER ŠKERL, J.: "Javni red pri priznanju in izvršitvi tujih sodnih odločb", *Zbornik znanstvenih razprav*, 2005, pp. 5-6.

KRAMBERGER ŠKERL, J.: "Evropeizacija javnega reda v mednarodnem zasebnem pravu", *Pravni letopis*, 2008, p. 349.

KRAMBERGER ŠKERL, J.: "Predlog spremembe uredbe Bruselj I", *Pravna praksa*, 2011, no. 4, p. 17.

MAGNUS, U., MANKOWSKI, P.: *European Commentaries on Private International Law, ECPII, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 878.

MANKOWSKI, P.: *European Commentaries on Private International Law, ECPII, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 886-887.

PAMBOUKIS, H. P.: *EU Succession Regulation No 650/2012: A Commentary*, Oxford, 2017, p. 455.