An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case

ECtHR 23 May 2016, Case No. 17502/07, *Avotiņš* v *Latvia*

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Introduction

The existence of different and juxtaposed bodies of law will necessarily result in occasional normative conflicts between them. Especially in the case of European integration, much judicial and academic ink has been spilt on the relationship between the European Convention on Human Rights (the Convention) and the law of the EU, as well as on the latter's planned accession to the former.[1] With *Avotiņš* v *Latvia*,[2] the European Court of Human Rights has added another chapter to this saga and reacted to *Opinion 2/13* of the European Court of Justice, in which the latter had declared the EU/ECHR Accession Agreement to be incompatible with the specific characteristics and the legal autonomy of the Union.[3] Thus, the question arose whether the European Court of Human Rights would still apply the *Bosphorus* doctrine following the European Court of Justice's critical approach.[4] For the uninitiated, this means that, given its lack of jurisdiction *ratione personae* over the EU, the European Court of Human Rights generally calls attention to the responsibility of all Contracting Parties for all

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[1] For a comprehensive and most recent analysis of this relationship and the planned accession of the EU to the Convention *see* e.g., F. Korenica, *The EU Accession to the ECHR* (Springer 2015).

[2] ECtHR 23 May 2016 [GC], Case No. 17502/07, *Avotiņš* v *Latvia*.

[3] ECJ 14 December 2014, Opinion 2/13, *ECHR Accession II*.

[4] *See* e.g., N. Mole, 'Can *Bosphorus* Be Maintained?', 16 *ERA Forum* (2015) p. 467-480; D.T. Björgvinsson, 'The Role of the European Court of Human Rights in the Changing European Human Rights Architecture', in O.M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) p. 37.

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violations of the Convention, even when such a violation was a consequence of their obligations as an EU Member State. However, it presumes that EU law offers protection equivalent to that of the Convention, and therefore the respective Member State is in principle not responsible for the alleged violation.[5] In *Avotiņš*, a case involving EU legislation, i.e. the Brussels I Regulation on the mutual recognition of civil law judgments,[6] Strasbourg chose to maintain its *Bosphorus* presumption and to rule that the enforcement in Latvia of a judgment in Cyprus concerning the repayment of a debt did not violate the applicant's rights under Article 6(1) ECHR. *Prima facie*, this judgment does not appear to be antagonistic towards the EU in general and the European Court of Justice in particular, and it seems that Strasbourg handed Luxembourg an olive branch. A more in-depth analysis of the judgment shows, nevertheless, that this is not entirely true.[7] In this decision, Strasbourg came very close to rebutting the *Bosphorus* presumption, which would have led to a major normative conflict between the law of the EU and the Convention, in particular for Latvia, the Member State involved. It therefore seems that the European Court of Human Rights may not be inclined to shy away from direct judicial competition with the European Court of Justice in the future.

Accordingly, the ruling is not only remarkable for confirming Strasbourg's settled case law on its relationship with the law of the EU, but also for nearly rebutting this presumption for the first time. Furthermore, it also intricately engages with the principle of mutual trust in Union law, which constitutes one of the major obstacles on the road to accession.[8] Hence, the European Court of Human Rights seems to suggest some adjustments to this principle in order to ensure its future compatibility with the protection granted by the Convention. This short case note will first illustrate the facts of the case and the judgment itself, and subsequently place it in the wider context of the relationship between Strasbourg and Luxembourg. It will then conclude by detailing the judgment's consequences for the principle of mutual recognition vis-à-vis fundamental rights protection.

Facts of the case and proceedings before the national courts

The complaint was lodged by Peteris Avotiņš, a Latvian national, who in May 1999 had borrowed money from F.H. Ltd., a company registered in Cyprus.

[5] Under the crucial *caveat* that this presumption can of course be rebutted; *see* ECtHR 30 June 2005, Case No. 45036/98, *Bosphorus* v *Ireland*, paras. 150-156.

[6] Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

[7] *See* L.R. Glas and J. Krommendijk, 'From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', 17 *Human Rights Law Review* (2017) p. 1.

[8] *ECHR Accession II*, *supra* n. 3, paras. 191-194.

Afterwards, he signed an acknowledgment of debt deed before a notary and undertook to repay the sum with interest by 30 June 1999. The loan contract was governed by Cypriot law, and the Cypriot courts had non-exclusive jurisdiction to hear any disputes arising from it. In 2003, F.H. Ltd. brought proceedings against Mr Avotiņš in a Cypriot district court, arguing that he had not repaid his debt. Since the applicant did not reside in Cyprus and notice of the proceedings and summons to appear in court were served by the Latvian authorities, there is a factual disagreement concerning the serving of the application: the summons slip had indeed been signed, but the signature on the slip did not appear to correspond to the applicant's name. Therefore, Mr Avotiņš claimed never to have received the summons. In any event, on 24 May 2004 the Cypriot court ruled in his absence and ordered him to repay his debt with interest. Per the judgment, the applicant had been duly informed of the hearing but had failed to appear.[9]

In February 2005, F.H. Ltd. applied to the Riga District Court seeking the recognition and enforcement of the Cypriot judgment. Due to discrepancies regarding the applicant's postal address, this request was first rejected but, upon re-examination, granted in full without, however, any of the parties being present. Mr Avotiņš contended that it was not until June 2006 that he learned of the existence of the Cypriot judgment and of the Riga District Court's order for its enforcement. Subsequently, he immediately acquainted himself with the Cypriot judgment and the Latvian order. The Latvian government did not dispute these facts. Afterwards, the applicant did not attempt to challenge the Cypriot judgment before the Cypriot courts, but appealed the Latvian enforcement order in the Regional Court of Riga on the grounds that it breached the Brussels I Regulation, an EU act, and rules of Latvian civil procedure. First, he claimed that a judgment given in default in another Member State could not be recognised if the defendant had not been served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence.[10] And second, he argued that a judgment had to be enforceable in the State of origin in order to be enforceable in the Member State addressed, yet both F.H. Ltd. and the Cypriot court had failed to submit any documentary evidence demonstrating the judgment's enforceability.[11] The Regional Court accepted these submissions and quashed the enforcement order in October 2006. F.H. Ltd. appealed this decision to the Latvian Supreme Court, where it submitted copies of the relevant documentary evidence. Accordingly, the Supreme Court quashed and annulled

[9] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 14-20.

[10] *See* Art. 34(2) of the Brussels I Regulation as well as s. 637(2), third sub-paragraph of the Latvian Civil Procedure Law.

[11] *See* Arts. 38(1) and 55(1) as well as Annex V of the Brussels I Regulation, and s. 637(2), second sub-paragraph of the Latvian Civil Procedure Law.

the order of the Regional Court, and ordered the recognition and enforcement of the Cypriot judgment. Furthermore, it emphasised that under Article 36 of the Brussels I Regulation, a foreign judgment 'may under no circumstances be reviewed as to its substance […].' On 14 February 2007, the Riga District Court eventually issued a payment order, which was immediately complied with and paid by the applicant.[12]

The case in Strasbourg

Mr Avotiņš then lodged complaints under Article 34 ECHR against Latvia and Cyprus before the European Court of Human Rights. The original application was first dismissed by the Chamber in 2014, as no violation of the Convention was found.[13] Subsequently, the case was referred for reconsideration to the Grand Chamber in accordance with Article 43 ECHR.

The parties' submissions

Whilst the application against Cyprus was declared inadmissible as being out of time,[14] the application against Latvia was filed within the time limit and therefore admissible. In the application against Latvia, Mr Avotiņš complained that by enforcing the judgment of the Cypriot court, which was – in his view – clearly unlawful in the first place since it had disregarded his defence rights, the Latvian courts had equally failed to comply with his right to a fair trial under Article 6(1) ECHR. Moreover, Mr Avotiņš asserted that in his case, the *Bosphorus* presumption was entirely inapplicable – and not just rebuttable – for two reasons: on the one hand, in contrast to the respondent State in *Bosphorus*, Articles 34 and 35 of the Brussels I Regulation would have afforded the Latvian courts a broad margin of discretion, thereby absolving them from the obligation to automatically recognise the Cypriot judgment and ensuring their full responsibility for complying with the requirements of Article 6(1) ECHR.[15] On the other hand, the Latvian Supreme Court would have been required to request a preliminary ruling from the European Court of Justice, but had failed to do so. According to Mr Avotiņš, the European Court of Justice would most likely have indicated that the referring court was empowered to verify whether the applicant

[12] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 21-35.

[13] ECtHR 25 February 2014, Case No. 17502/07, *Avotiņš* v *Latvia*.

[14] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 4 and 70-72.

[15] *See* e.g., the seminal case in ECtHR 21 January 2011, Case No. 30696/09, *M.S.S.* v *Belgium and Greece*, and P. Gragl, 'The Shortcomings of Dublin II: Strasbourg's M.S.S. Judgment and Its Implications for the European Union's Legal Order', in W. Benedek et al. (eds.), *European Yearbook of Human Rights 2012* (NWV 2012) p. 123-139.

had indeed been duly informed of the proceedings before the Cypriot court and whether an appeal against the Cypriot judgment could have been, or still could be, lodged.[16]

Unlike the applicant, the Latvian government was of the view that the *Bosphorus* presumption applied. The respondent State argued that the national courts did not enjoy any margin of discretion, nor did the Supreme Court's failure to request a preliminary ruling from the European Court of Justice result in the rebuttal of the *Bosphorus* presumption, as this was not a case in which the domestic court had any doubts as to the correct interpretation or application of EU legislation.[17] Furthermore, the Latvian government submitted that the securing of the effective functioning of the common market was one of the EU's objectives, and that complying with that objective, and the mutual trust among the Member States, justified certain restrictions on the right to a fair hearing, especially since the fairness of proceedings was also a fundamental principle of EU law recognised by the European Court of Justice. Hence, the system established by the Brussels I Regulation respected the right to a fair hearing and the Supreme Court had in fact taken sufficient account of the applicant's rights under Article 6(1) ECHR. Lastly, the respondent State also underlined that the applicant's hearing had not been conducted unfairly, and that his lawyer had had an opportunity to make oral pleadings during the trial.[18]

Several third parties also intervened in the case, including the European Commission, which submitted a comprehensive argument on the applicability of *Bosphorus* to the case at hand and the compatibility of the Brussels I Regulation with the right to a fair trial under Article 6(1) ECHR. In this respect, it is interesting to note that the EU Commission's request to intervene in *Avotiņš* was submitted on the same day the European Court of Justice delivered its negative Opinion 2/13 on EU accession.[19]

Preliminary considerations by the Court

The European Court of Human Rights opens the operative part of its judgment by reiterating that, in disputes whose outcome is decisive for civil rights, Article 6(1) ECHR is applicable to the execution of foreign final judgments:[20] a decision to enforce a foreign judgment 'cannot be regarded as compatible with the

[16] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 70-79.

[17] This argument implicitly refers to ECJ 6 October 1982, Case C-283/81, *CILFIT*.

[18] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 80-85.

[19] *See also* Mole, *supra* n. 4, p. 476.

[20] *Avotiņš* v *Latvia*, *supra* n. 2, para. 96. *See* ECtHR 29 April 2008, Case No. 18648/04, *McDonald* v *France*; ECtHR 18 December 2008, Case No. 69917/01, *Saccoccia* v *Austria*; ECtHR 31 July 2012, Case No. 40358/05, *Sholokhov* v *Armenia and Moldova*.

requirements of [a fair trial] if it was taken without the unsuccessful party having been afforded any opportunity of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed.' As regards the relationship with EU law, it is even more interesting to note that the Strasbourg Court emphasises that this is the first time it has been asked to examine observance of the guarantees enshrined in Article 6(1) ECHR in the context of the principle of mutual recognition based on Union law. It nonetheless hastens to add that it has always applied the general principle that a request for recognition and enforcement of foreign judgments cannot be granted without first conducting some measure of review of that judgment in the light of the guarantees of a fair trial.[21] According to the European Court of Human Rights, this means that in the present case, it must be determined whether the review conducted by the Latvian Supreme Court was sufficient for the purposes of Article 6(1) ECHR.[22]

The judgment: applicability of Bosphorus

After these preliminary considerations, the Court goes on to ascertain whether and to what degree the *Bosphorus* doctrine is applicable to the case at hand. As a first step, it determines the scope of the *Bosphorus* presumption by summarising its case law as laid down in the *Michaud* judgment[23] and by recalling that the legal order of the EU offers equivalent protection of the substantive Convention guarantees. This equivalence is especially safeguarded by Article 52(3) of the Charter of Fundamental Rights, which states that insofar as the rights contained in the Charter correspond to rights guaranteed by the Convention, their meaning and scope are the same. In this vein, the European Court of Human Rights concludes that in the case before it, it can therefore still consider the protection afforded by EU law to be equivalent to that of the Convention, in particular because of the importance of compliance with the above-mentioned Article 52(3) of the EU Charter of Fundamental Rights, and because the Charter's legal value is identical to that of the EU Treaties themselves.[24]

In a second step, Strasbourg reiterates that the actual application of the presumption of equivalent protection is subject to two conditions, namely: (i) the absence of any margin of manoeuvre on the part of the domestic authorities in discharging their obligations under EU law; and (ii) the deployment of the full

[21] *See* ECtHR 26 June 1992, Case No. 12747/87, *Drozd and Janousek* v *France*; ECtHR 20 July 2001, Case No. 30882/96, *Pellegrini* v *Italy*.

[22] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 96-100.

[23] ECtHR 6 December 2012, Case No. 12323/11, *Michaud* v *France*, paras. 102-104. *See also* M. Indlekofer and D. Engel, 'Solange II Revisited: Die "Michaud"-Entscheidung des EGMR und der Beitritt der EU zur EMRK', 18 *Zeitschrift für Europarechtliche Studien* (2015) p. 75-93.

[24] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 101-104.

potential of the supervisory mechanism provided for by Union law. Concerning the first condition, the European Court of Human Rights notes that the legal provision (i.e. Article 34(2) of the Brussels I Regulation) to which the Latvian Supreme Court gave effect was contained in a directly-applicable Regulation, and not in a Directive, which would have left the Member State much more flexibility in terms of implementation. Furthermore, it is also clear from the interpretation given by the European Court of Justice that this provision does not confer any discretion on the national courts from which a declaration of enforceability is sought.[25] Hence, as opposed to cases such as *M.S.S.*,[26] the Latvian Supreme Court did not enjoy any margin of manoeuvre in this case and the *Bosphorus* presumption is, according to the European Court of Human Rights, clearly applicable.[27]

As regards the second condition, i.e. the deployment of the full potential of the supervisory mechanism provided for by EU law, the Strasbourg Court conducts a much more extensive examination. From the outset, it notes that the Latvian Supreme Court refrained from requesting a preliminary ruling from the European Court of Justice regarding the interpretation and application of Article 34(2) of the Brussels I Regulation. This inactivity is, nevertheless, not a decisive factor for the European Court of Human Rights, as this second condition should be applied without excessive formalism and by taking into consideration the specific features of the preliminary ruling procedure. Consequently, it would serve no useful purpose to make the application of the *Bosphorus* presumption subject to a requirement that the domestic court request a ruling from the European Court of Justice in all cases without exception, including those cases where no fundamental rights issues are involved or where the European Court of Justice has already stated how the provisions in question should be interpreted in a manner compatible with fundamental rights. In this context, the European Court of Human Rights distinguishes between two situations: on the one hand, there are of course situations where Article 6 ECHR requires that national courts, against whose decisions no judicial remedy exists in national law, give reasons for refusing to refer a question to the European Court of Justice, in light of the exceptions provided for by the case law of that court. This means, in other words, that national courts must state the reason why they consider it unnecessary to seek a preliminary ruling.[28] On the other hand, the Strasbourg Court hastens to add that the review conducted

[25] *See* in particular ECJ 16 June 1981, Case C-166/80, *Klomps* v *Michel*; ECJ 10 October 1996, Case C-78/95, *Hendrikman and Feyen* v *Magenta Druck & Verlag GmbH*; ECJ 14 December 2006, Case C-283/05, *ASML Netherlands BV* v *SEMIS*; ECJ 6 September 2012, Case C-619/10, *Trade Agency Ltd* v *Seramico Investments Ltd*.

[26] *M.S.S.* v *Belgium and Greece*, *supra* n. 15.

[27] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 105-108.

[28] *See* ECtHR 20 September 2011, Case Nos. 3989/07 and 38353/07, *Ilens de Schooten and Rezabek* v *Belgium*, para. 62; ECtHR 8 April 2014, Case No. 17120/09, *Dhahbi* v *Italy*, paras. 31-34.

in those situations differs from that in *Avotiņš*, where it examines the decision not to request a preliminary ruling as part of its overall assessment of the degree of protection of fundamental rights afforded by EU law. For these reasons, the Court argues that whether the domestic court's failure to request a preliminary ruling is apt to preclude the application of the *Bosphorus* doctrine should be assessed in light of the specific circumstances of the case. The specific circumstances in this case were that the applicant did not advance any specific argument regarding the interpretation of the relevant provisions of the Brussels I Regulation, and that he did not request the Latvian Supreme Court to ask the European Court of Justice for a preliminary ruling. Yet since there was no such request, this case is clearly distinguishable from *Michaud*, in which the national supreme court refused the applicant's request to seek a preliminary ruling from the European Court of Justice. Thus, the fact that the Latvian Supreme Court did not ask for such a ruling was not a decisive factor and the second condition for the application of *Bosphorus* was fully satisfied.[29]

The judgment: the question of 'manifestly deficient protection'

However, the Court's assessment does not stop here, because as a legal presumption, the *Bosphorus* doctrine can of course be rebutted if the protection of rights guaranteed by the Convention is manifestly deficient in a given case. The European Court of Human Rights is certainly mindful of the importance of the principle of mutual trust in EU law for the construction of the area of freedom, security, and justice (as set forth in Article 67 TFEU).[30] But the Court nevertheless emphasises that the methods used to create this area must not infringe upon the fundamental rights of the persons affected by the resulting mechanisms. It remains concerned that the aim of effectiveness pursued by the methods used could result in the review of observance of fundamental rights being tightly regulated or even limited.[31] To make its point, the European Court of Human Rights refers to *Opinion 2/13,* in which the European Court of Justice stated that 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that […], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental

See also O.J. Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings* (Springer 2016) p. 382-384.

[29] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 109-111.

[30] *See also* V. Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon', in V. Mitsilegas et al. (eds.), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) p. 148-167.

[31] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 112-114.

rights guaranteed by the EU.'[32] However, in the eyes of the Strasbourg Court, limiting the power of the State in which recognition is sought to review the compliance with fundamental rights by the State of origin of the judgment to only exceptional cases could in practice run counter to a crucial requirement imposed by the Convention – namely that the court in the State addressed must at least be authorised to conduct a review corresponding to the gravity of any serious allegation of a breach of fundamental rights in the State of origin. This is necessary to ensure that the protection of those rights is not manifestly deficient.[33]

The problem remains that the principle of mutual trust requires national courts to presume that the observance of fundamental rights by other Member States has indeed been sufficient, and thus they are deprived of any discretion in that matter, resulting in an automatic application of the *Bosphorus* presumption. In the words of the European Court of Human Rights, this situation paradoxically entails a two-fold limitation of the domestic court's review of the observance of fundamental rights, namely through the combined effect of the mutual trust principle and the *Bosphorus* presumption.[34] Given the Convention's status as a 'constitutional instrument of European public order'[35] (i.e. a truly pan-European human rights document), the Strasbourg Court must accordingly satisfy itself that, where the conditions for the application of the presumption of equivalent protection are met, the principle of mutual trust under EU law does not leave any gaps that would render the protection of fundamental rights under the Convention manifestly deficient within a large area of Europe. Hence mutual trust must not be applied automatically and mechanically to the detriment of fundamental rights. This means that whenever the courts of a State (which is concurrently a Contracting Party to the Convention and an EU Member State) are called upon to apply the principle of mutual trust, they cannot refrain from examining a complaint on the sole ground that they are simply applying Union law, if this complaint is serious and substantiated to the effect that the protection of a Convention right is manifestly deficient and cannot be remedied by EU law.[36]

[32] *ECHR Accession II*, *supra* n. 3, para. 192.

[33] *Avotiņš* v *Latvia*, *supra* n. 2, para. 114.

[34] Ibid., paras. 114-115. Apparently, this is not the only paradox in the context of the principle of mutual trust; *see* e.g., S. Swoboda, 'The Self-Perception of the European Court of Justice and Its Neglect of the Defence Perspective in Its Preliminary Rulings on Judicial Cooperation in Criminal Matters', 7 *Zeitschrift für Internationale Strafrechtsdogmatik* (2015) p. 361 at p. 317, drawing attention to ECJ 27 May 2014, Case C-129/14 PPU *Spašić*, where – despite the call upon Member States to trust each other – the individual has to suffer restrictions of fundamental rights, because the ECJ deems it more appropriate to allow Member States to distrust each other and to doubt each other's willingness to enforce charges and sentences for a crime.

[35] *Bosphorus*, *supra* n. 5, para. 156.

[36] *Avotiņš* v *Latvia*, *supra* n. 2, para. 116.

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Although the European Court of Human Rights considers the system of mutual trust in the Brussels I Regulation to be generally compatible with Article 6 ECHR, in the specific case of Mr Avotiņš Strasbourg finds that the applicant raised cogent arguments in the Latvian courts alleging the existence of a procedural defect which was *a priori* contrary to Article 6(1) EHCR and precluded the enforcement of the Cypriot judgment in Latvia. Furthermore, it is evident that the Latvian Supreme Court engaged in a literal and automatic application of Article 34(2) of the Brussels I Regulation, which could theoretically have led to a finding by the Strasbourg Court that the protection afforded was manifestly deficient. According to the European Court of Human Rights, this approach could theoretically lead to a finding that the protection afforded was indeed manifestly deficient, which would in turn result in the rebuttal of the equivalent protection presumption in the context of Article 6(1) ECHR. The European Court of Human Rights regards this shortcoming as regrettable, but – despite this negative conclusion – does not consider this to apply to the specific circumstances of the case at hand,[37] which include the fact that the applicant had – in the eyes of the European Court of Human Rights – a perfectly realistic opportunity to appeal the seemingly-final Cypriot judgment; that the lack of references to the available remedies in the Cypriot judgment did not release the applicant from himself enquiring as to the remedies available after becoming aware of the judgment in question; and that, as an investment consultant entering into a loan agreement, he should have familiarised himself with the manner in which possible proceedings would be conducted before Cypriot courts. In other words, the applicant himself, as a result of his inaction and lack of diligence, contributed to a large extent to bringing about the current situation, one which could have been prevented so as to avoid incurring any damage. Consequently, the European Court of Human Rights does not consider that the protection of fundamental rights was manifestly deficient such that the presumption of equivalent protection is rebutted, and accordingly there has been no violation of Article 6(1) ECHR.[38]

Analysis

In the *Avotiņš* case, a critical decision was taken that affects the relationship between the Convention system and the legal order of the EU. Whilst a first reading of the judgment appears to offer a soothing balm for the tensions between the two systems brought about by *Opinion 2/13*, considerable potential for future friction nonetheless remains. The following analysis will therefore focus on three remarkable points of conflict that had or still have the power to affect future dealings between Strasbourg and Luxembourg.

[37] Ibid., para. 121.
[38] Ibid., paras. 117-127.

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Bosphorus *revisited after* Opinion 2/13

First, it needs to be highlighted that this is the first time since *Opinion 2/13* that the European Court of Human Rights applied the equivalent protection formula of *Bosphorus*. Especially given the unusually harsh words chosen by then-President of the European Court of Human Rights, Dean Spielmann, declaring the European Court of Justice's opinion a 'great disappointment',[39] it has been argued that the European Court of Human Rights might wish to retaliate by putting an end to the *Bosphorus* doctrine.[40] However, the decision in *Avotiņš* demonstrates that Strasbourg's references to the European Court of Justice's case law and the Charter of Fundamental Rights have not decreased since the fateful blow dealt by *Opinion 2/13* to EU accession to the Convention. In fact, the European Court of Human Rights started to refer to Union law more once the Charter became binding,[41] and the relevant figures for the period after the publication of *Opinion 2/13* up until 2016 show that the European Court of Human Rights does not appear to be decreasing the number of references to EU law in response to the opinion.[42] Thus, *Avotiņš* confirms that the *Bosphorus* doctrine is still alive and well, and that the European Court of Human Rights has not decided to overturn it (yet). This, of course, does not mean that Strasbourg might not one day be inclined to move slowly but surely away from this presumption, but so far it is at least safe to say that *Avotiņš* did not offer the right opportunity to do so for the judges at the European Court of Human Rights.[43]

The extent of Bosphorus *and the question of 'manifest deficiencies'*

Second, the case at hand is highly notable for being the first case where the Strasbourg Court 'goes right up to the edge of finding that a manifest deficiency in the protection of fundamental rights has occurred', but then backs off at the last second due to the specific features of this case.[44] This raises the question of

[39] European Court of Human Rights, 2014 Annual Report, Foreword by President Spielmann, p. 6.

[40] X. Groussot et al., 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?', in O.M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) p. 24.

[41] T. Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) p. 214-215. *See also* in general T. Lock, 'The Influence of EU Law on Strasbourg Doctrines', 41 *European Law Review* (2016) p. 804-825.

[42] Glas and Krommendijk, *supra* n. 7, p. 11.

[43] *See* G. Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights', 31 *Utrecht Journal of International and European Law* (2015) p. 104 at p. 108.

[44] S. Øby Johansen, 'EU Law and the ECHR: The Bosphorus Presumption is Still Alive and Kicking – The Case of Avotiņš v. Latvia', *EU Law Analysis*, 24 May 2016, available at <eulawanalysis.blogspot.co.at/2016/05/eu-law-and-echr-bosphorus-presumption.html>, visited 1 April 2017.

whether the European Court of Human Rights applied the doctrine in a stricter fashion than it had before. Seeing that there are very few rulings in which the *Bosphorus* presumption was applicable, it is difficult to provide a definitive answer,[45] but when considering these other cases,[46] some critical conclusions can be drawn by considering the extent the *Bosphorus* doctrine is used in *Avotiņš*.[47]

To begin with, concerning the question of whether the implementation of the presumption should be subject to a requirement for domestic courts to request a preliminary ruling in all cases without exception,[48] it is interesting to note that the European Court of Human Rights for the first time explicitly acknowledges that the procedural criterion for the application of *Bosphorus* should not be applied stringently.[49] Thereby the Strasbourg Court seems to align its approach more closely to Luxembourg's case law, as the former implicitly referred to the latter's *CILFIT* exceptions regarding the obligation for the highest national courts to request a preliminary ruling.[50] Furthermore, the European Court of Human Rights does not examine any more substantively whether the Latvian Supreme Court was indeed under an obligation to request such a ruling, because this question must be left to the European Court of Justice itself. But most importantly, the European Court of Human Rights's focus is on the question of whether one of the parties requested a preliminary ruling, which was not the case.[51] *Prima facie*, the problem with this approach might be that a request from one of the parties is entirely irrelevant from the viewpoint of Union law, since Article 267 TFEU 'does not constitute a means of redress available to the parties to a case'.[52] Hence Strasbourg's reliance on the significance of the request appears to run counter to the manner in which the European Court of Justice interprets the preliminary ruling procedure.[53] Eventually, however, this should not be a major

[45] It is evident that the *Bosphorus* doctrine also plays a role in cases not related to EU law (*see* e.g., in relation to the law of the United Nations ECtHR 7 July 2011, Case No. 27021/08, *Al-Jedda* v *United Kingdom* and ECtHR 2 May 2007, Case Nos 71412/01 and 78166/01, *Behrami and Behrami* v *France* and *Saramati* v *France, Germany, and Norway*), but these cases will be disregarded here.

[46] Such as ECtHR 10 October 2006, Case No. 16931/04, *Coopérative des agriculteurs de Mayenne* v *France*; ECtHR 9 December 2008, Case No. 13762/04, *Biret* v *15 States*; ECtHR 20 January 2009, Case No. 13645/05, *Kokkelvisserij* v *Netherlands*; ECtHR 18 June 2013, Case No. 3890/11, *Povse* v *Austria*; *M.S.S.* v *Belgium and Greece*, *supra* n. 15.

[47] *See* in general Glas and Krommendijk, *supra* n. 7, p. 16-17.

[48] *Avotiņš* v *Latvia*, *supra* n. 2, para. 109.

[49] Glas and Krommendijk, *supra* n. 7, p. 16.

[50] *CILFIT*, *supra* n. 17.

[51] *See also* ECtHR 8 April 2014, Case No. 17120/09, *Dhahbi* v *Italy*, and ECtHR 21 July 2015, Case No. 38369/09, *Schipani* v *Italy*.

[52] *CILFIT*, *supra* n. 17, para. 9.

[53] Glas and Krommendijk, *supra* n. 7, p. 17.

issue, since a party which believes that the request for a preliminary ruling should be made has to make such an argument – yet not because it is required to do so under EU law (where it is indeed irrelevant), but in order to be able to claim a violation of the right to a fair trial under the Convention.

Moreover, there are some doubts regarding the European Court of Human Rights' finding that the Latvian courts had no discretion in refusing to recognise the Cypriot judgment under Article 34(2) of the Brussels I Regulation.[54] In this context, even the earlier finding of the Chamber, concluding that there had been no discretion, was called 'surprising', and identified as 'one of the reasons why [the case] was referred to the Grand Chamber.'[55] This finding is also supported by the joint dissenting opinion of Judges Ziemele, Bianku, and de Gaetano to the original 2014 Chamber judgment arguing that 'the applicable EU law does not provide for blind automaticity as concerns the execution of judgments.'[56] However, as both the Chamber and the Grand Chamber conclude, it could be argued that domestic courts do not enjoy discretion under Article 34(2) of the Regulation, as it states that a 'judgment shall not be recognized' if certain factual circumstances apply. In other words, although domestic courts have two options (either to recognise a judgment or not, depending on the facts), they do not have any margin of discretion as they do under the discretionary clauses enshrined in Article 17 of the Dublin III Regulation[57] in asylum matters.[58] Nonetheless, more critical voices object to this view and opine that the simple abolition of the declaration of enforceability effected by the Brussels I Regulation does not appear sufficient to bring the enforcement of judgments under this very Regulation within range of the *Bosphorus* presumption. Article 39 of the Regulation only abolished the exequatur as the first stage of the procedure, which means that a deliberate declaration of enforceability of foreign judgments is no longer required, and that judgments issued in one Member State can be automatically enforced in another. But this principle of automatic enforceability is without prejudice to the second stage, where applicants can still contest the foreign judgment on one or

[54] *Avotiņš* v *Latvia*, *supra* n. 2, para. 106.

[55] D. Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security, and Justice – Squaring Mutual Trust with Effective Judicial Protection', 8 *Review of European Administrative Law* (2015) p. 151 at p. 169.

[56] *Avotiņš* v *Latvia*, *supra* n. 13, Joint Dissenting Opinion of Judges Ziemele, Bianku, and de Gaetano, para. 4.

[57] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29 June 2013. *See also M.S.S.* v *Belgium and Greece*, *supra* n. 15.

[58] Glas and Krommendijk, *supra* n. 7, p. 15.

more of the aforementioned grounds for refusal. Thus, by this more critical interpretation, the existence of two options (again, either to recognise a judgment or not, depending on the facts) amounts to a margin of discretion and therefore excludes the applicability of the *Bosphorus* presumption.[59] The question of the burden of proof, which seems to be key to the outcome of the Latvian Supreme Court's judgment, appears to be especially relevant in this context, as the Latvian courts did not answer this question with regard to the existence and availability of appeal, even though Article 6(1) ECHR in principle required them to verify such matters, according to the Court. Instead, they simply assumed that the burden lay with the applicant or that appeal was possible.[60] Therefore the European Court of Human Rights criticised the Latvian courts for not verifying whether the applicant could indeed have appealed the Cypriot judgment and for not resolving the issue of the burden of proof, as they did not carefully establish the factual circumstances that eventually determined which of the two options of Article 34(2) of the Brussels I Regulation they had to choose. Thus, the Latvian Supreme Court arguably did have some 'margin of manoeuvre' in this case,[61] although this was not a decisive element in the eyes of the European Court of Human Rights.[62]

Bosphorus *and mutual trust*

Third and last, the *Avotiņš* case is notable for being the first decision where the *Bosphorus* presumption takes the principle of mutual trust head on. With *Opinion 2/13* as a major catalyst, this principle has been elevated to constitutional status within EU law by the European Court of Justice,[63] which the European Court of Human Rights – at least to a certain extent – seems to respect. It extensively quotes the relevant European Court of Justice case law, which tries to strike a balance between the principle of mutual trust and compliance with fair trial rights,[64] accepts the notion that the domestic courts of EU Member States should presume the effects of another EU Member State's judgment to be compatible with fundamental rights,[65] and discusses the interpretation of Article 34(2) of the Brussels I Regulation by clarifying that the requirement to exhaust all remedies available in the Member State of origin to contest

[59] *See* e.g., M. Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Springer 2017) p. 213-215; P. Beaumont and L. Walker, 'Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Brussels I Recast and Some Lessons from It and the Recent Hague Conventions for the Hague Judgments Project', 11 *Journal of Private International Law* (2015) p. 31 at p. 36.

[60] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 120-121.

[61] Øby Johansen, *supra* n. 44; Glas and Krommendijk, *supra* n. 7, p. 19.

[62] *Avotiņš* v *Latvia*, *supra* n. 2, para. 121.

[63] Øby Johansen, *supra* n. 44. *See also ECHR Accession II*, *supra* n. 3, paras. 191-195.

[64] *Avotiņš* v *Latvia*, *supra* n. 2, paras. 46-48.

[65] Ibid., para. 109.

the decision is compatible with Article 6(1) ECHR.[66] Having said that, the European Court of Human Rights' reasoning also clearly calls for a revision of some of the legal features of the EU's system of judicial cooperation in civil matters[67] when it emphasises that 'the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited'.[68] Furthermore, Strasbourg notes that 'if a serious and substantiated complaint is raised before [the domestic courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.'[69]

It therefore seems that there is a crucial difference between the approaches of the European Court of Human Rights and the European Court of Justice when it comes to the protection of fundamental rights within the area of judicial cooperation in civil matters. While Luxembourg construes this principle as requiring each Member State to regard all the other Member States as compliant with fundamental rights save in exceptional circumstances,[70] Strasbourg implies that the Member States should retain an active role in protecting fundamental rights,[71] even when EU law obligates the domestic courts to automatically recognise or enforce a decision originating in another Member State.[72] This means that – although this did not happen in *Avotiņš* – a Contracting Party can in principle be held responsible for the recognition or the enforcement of a judgment adopted in violation of the Convention, if there are indications that there obviously is an infringement of fundamental rights and a State completely refrains from reviewing judgments emanating from another EU Member State.[73] Thus, despite its generally diplomatic and respectful choice of words, the European Court of Human Rights did in fact fire a warning shot across the EU's bow[74] to

[66] Ibid., para. 118.

[67] G. Biagioni, '*Avotiņš v Latvia*: The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights', 1 *European Papers* (2016) p. 579 at p. 589.

[68] *Avotiņš* v *Latvia*, *supra* n. 2, para. 114.

[69] Ibid., para. 116.

[70] *See* Opinion 2/13, *ECHR Accession II*, *supra* n. 3, para. 191; ECJ 21 December 2011, Joined Cases C-411/10 and C-493/10, *N.S. and M.E*, paras. 78-80; ECJ 26 February 2013, Case C-399/11, *Melloni*, paras. 37 and 63.

[71] *Avotiņš* v *Latvia*, *supra* n. 2, para. 121.

[72] Biagioni, *supra* n. 67, p. 590. Concerning the question of a minimal standard of control of Art. 6(1) ECHR, *see also* L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (TMC Asser 2014) p. 254 ff.

[73] Biagioni, *supra* n. 67, p. 590.

[74] For this metaphor, *see also* D. Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in P. Alston et al. (eds), *The EU and Human Rights* (Oxford University Press 1999) p. 773.

demonstrate that there are clear boundaries to the principle of mutual trust in the area of human rights protection.

Conclusion: consequences for the EU-Convention relationship

The *Avotiņš* case appears to be difficult to categorise in terms of the relationship between the European Union and the Convention system, and ultimately paints a very mixed picture. On the one hand, the European Court of Human Rights is rather lenient and readily assumes that the EU legal order provides equivalent protection when it comes to the preliminary ruling procedure (or the failure to request such a ruling). On the other hand, Strasbourg displays a much stricter approach to the issue of whether the presumption of equivalent protection can be rebutted due to manifest deficiencies in the area of mutual trust. By implicitly reacting to *Opinion 2/13*, Strasbourg highlights that the EU's legal autonomy is not unlimited, which might entail that, from now on, the *Bosphorus* doctrine will be applied more strictly than before the European Court of Justice's negative decision on EU accession to the Convention. Beyond that, the European Court of Human Rights showed its dissatisfaction with the outcome of *Opinion 2/13*, but remained very hesitant to enter into open 'warfare' with Luxembourg.[75]

Similarly, the European Court of Justice also reacted rather ambiguously to the *Avotiņš* case: whereas Luxembourg was respectful vis-à-vis the European Court of Human Rights in the *Aranyosi and Căldăraru* case[76] a couple of weeks before *Avotiņš* was decided, it simply ignored that judgment in subsequent cases, even though the respective Advocate Generals referred to it in their opinions.[77] Conversely, an EU Council document dating from April 2016 quite optimistically mentions, in the context of EU accession to the Convention, that '[d]iscussions on mutual trust will be resumed after the European Court of Human Rights hands down the judgment in the *Avotins* [sic] case, presumably by summer 2016.'[78] However, a quick search in the relevant EU document databases shows that this topic has, so far, not been discussed again by the EU institutions. Thus, it remains to be seen whether both the EU itself and the European Court of Justice will accept the guidance provided by the European Court of Human Rights on the potential dangers to fundamental rights posed by the principle of mutual trust, or whether it will refrain from deviating from its settled case law.[79]

[75] Glas and Krommendijk, *supra* n. 7, p. 20.

[76] ECJ 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

[77] ECJ 30 June 2016, Case C-243/15, *Lesoochranárske zoskupenie VLK*, Opinion of Advocate General Kokott, para. 113; ECJ 8 September 2016, Case C-354/15, *Andrew Marcus Henderson,* Opinion of Advocate General Bobek, para. 36.

[78] Council of the European Union, Doc. 7551/16, 11 April 2016, 1.

[79] Biagioni, *supra* n. 67, p. 595-596.

Overall, the tone of the inter-judicial dialogue has subtly grown harsher on both sides, but nonetheless, both European courts continue to listen, defer, and show respect towards one another. More importantly, they have managed to prevent an outright conflict between them.[80]

At the end of the day, the Strasbourg Court's conclusions in this case can be interpreted as extending an olive branch to Luxembourg, but a critical reading – between the lines – also suggests that the European Court of Human Rights might be willing and prepared to reverse its stance on *Bosphorus* or to rebut this presumption in concrete EU-related cases in the future.

[80] Glas and Krommendijk, *supra* n. 7, p. 20.

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