Fundamental Rights Score a Goal

Manifest Breaches of Fundamental Rights as a Public Policy Exception in the Real Madrid Case

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Amid the significant number of rulings delivered by the European Court of Justice on 4 October 2024, the long-awaited judgment pitting football against the media stands out. In *Real Madrid vs Le Monde*, the Court held that excessive defamation damages may breach the freedom of the press and trigger the public policy exception under Brussels Ia Regulation concerning recognition and enforcement of foreign judgments. In doing so, the ECJ allowed national courts to conduct a substantive review of foreign judgments despite the principle of mutual trust, to ensure the enforcement of fundamental rights across the EU.

Facts of the case and the judgment of the ECJ

In 2006, Spanish football club Real Madrid and a member of its medical team sued French newspaper *Le Monde* and one of its journalists for defamation over an article alleging the football club's involvement in doping scandals. In 2009, the Court of First Instance of Madrid ordered *Le Monde* and its journalist to pay EUR 330,000 to Real Madrid and its medical team member. After the Court of First Instance of Madrid ordered the judgment's execution, the Regional Court of Paris issued a declaration of enforceability of the order in France. *Le Monde* appealed to the Court of Appeal of Paris which, in 2020, overturned the declaration on the ground that it was contrary to French international public policy. In response, Real Madrid appealed before the French Court of Cassation, which stayed the proceedings and referred seven questions to the ECJ for a preliminary ruling.

The ECJ examined the conditions to refuse enforcement of the judgment being manifestly contrary to public policy under Articles 34(1) and 45(1) of the Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation), now replaced by the Brussels Ib Regulation. Namely, whether a national court may refuse enforcement of a judgment that orders a newspaper and a journalist to pay compensatory damages for harm caused to someone's reputation by published information. This refusal is based on the ground that the judgment breaches freedom of the press under Article 11 of the Charter of Fundamental Rights of the European Union (CFR), and thus violates public policy.

In line with the Opinion of Advocate General Szpunar, the Judgment of the ECJ addressed the question methodically, by analysing the Brussels Ia Regulation, Article 11 CFR, and, finally, by combining them in a joint interpretation. Firstly, the Court recalled that the public policy exception under Article 34(1) of the Brussels Ia Regulation must be used only when enforcing a foreign judgment would result in a manifest breach of a legal norm with fundamental character within the legal order of the Union, or within the Member State of the court where enforcement is sought (the enforcing court), (Case C-681/13, *Diageo Brands*; C-590/21, *Charles Taylor Adjusting*). Since the Brussels Ia Regulation constitutes implementation of EU law, the Court reminded that the enforcing court must comply with the requirements arising from the CFR. The ECJ also recalled that due to the principle of mutual trust, the enforcing court cannot verify whether the foreign court, where the judgment was adopted (the issuing court), respected fundamental rights, save in exceptional circumstances (Opinion 2/13, *Accession of the Union to the ECHR*). For example, in cases of a manifest breach of fundamental rights,

the enforcing court may rely on public policy and refuse to recognise or enforce a foreign judgment.

The Court then embarked on an analysis of the content of Article 11 CFR, relying on the corresponding Article 10 of the European Convention of Human Rights. It concluded that while Article 11 CFR is not absolute, exceptions must be interpreted narrowly. Defamation victims can seek damages, but these must not be manifestly disproportionate, to avoid a chilling effect that could deter journalists from engaging in similar discussions on matters of public interest.

As a result, the ECJ ruled that when assessing whether a judgment ordering the press to pay damages for reputational harm constitutes a manifest breach of Article 11 CFR, the enforcing court must consider whether the damages are proportionate to the harm and consistent with similar cases, considering factors like the severity of the fault, the defendant's financial means, and any other penalties imposed. If this leads to the conclusion that the damages could deter the freedom of the press, the enforcing court may rely on public policy and revoke the enforcement order. The ECJ concluded that the enforcing court should limit its refusal of enforcement to the parts of the foreign judgment that involve manifestly disproportionate damages.

Mutual trust above all

This case offers crucial insights into the interpretation of mutual trust limitations in civil judicial cooperation instruments. The rules on recognition and enforcement laid down in the Brussels Ia Regulation are underpinned by the principle of mutual trust, which requires each Member State to trust that all other Member States respect EU law and fundamental rights included thereunder (Opinion 2/13, *Accession of the EU to the ECHR*).

In line with this, Articles 36 and 45(2) of the Brussels Ia Regulation prohibit national courts from reviewing the substance of a foreign judgment. This is meant to prevent the enforcing court from refusing recognition or enforcement of a foreign judgment only because the legal rules, applied by the issuing court, differ from its own. Similarly, the jurisprudence of the ECJ has clarified that the enforcing court cannot review the accuracy of the assessments of law or fact made by the issuing court (Case C-420/07 *Apostolides*; C-559/14 *Meroni*). Mutual trust requires the enforcing court to assume that any legal or factual errors would have been corrected by exhausting the legal remedies available in the issuing court's Member State since all Member States respect EU law.

On the other hand, Articles 34(1) and 45(1) of the Brussels Ia Regulation allow an enforcing court to refuse recognition or enforcement of a foreign judgment based on public policy. While Member States may define the content of their public policy, the ECJ strictly interprets this concept and reviews the boundaries within which courts may have recourse to it (Case C-420/07 *Apostolides*; Case C-681/13, *Diageo Brands*). Accordingly, the threshold to trigger the public policy clause is quite high, and only manifest breaches of a norm that is fundamental to the legal order of the Union or the Member State concerned can justify the refusal of recognition or enforcement of a foreign judgment. This includes cases of fundamental rights violations (Case C-7/98 *Krombach*). The ECJ's strict approach to public policy prevents national courts from misusing this concept to bypass the ban on substantive review of foreign judgments which, in turn, safeguards mutual trust and the free circulation of judgments within the EU.

Substantive review in disguise?

Since only manifest infringements of the rights enshrined in the CFR can trigger the public policy clause, the ECJ spent a significant portion of its judgment on how to determine such breaches. In the context of Article 11 CFR, the ECJ provided several considerations for the enforcing court to assess whether the damages awarded in a defamation claim against a newspaper and a journal may deter the freedom of the press. The most interesting item from the Court's list is that the enforcing court may consider the sums typically awarded in its jurisdiction for comparable harm. This seems to directly contradict the Court's insistence – repeated in four separate paragraphs of the judgment – that differences in the appli-

cation of the law between the Member States of the enforcing and issuing courts do not justify refusing recognition of a judgment.

Moreover, despite its categorical stance against substantive review of foreign judgments, the ECJ allowed considerable leeway for the enforcing court to determine what constitutes a manifest breach of a fundamental right under the public policy clause. If the enforcing court is empowered to assess the seriousness of the fault, the extent of the harm caused, the proportionality of the sanction in relation to the harm suffered, the defendant's financial means compared to the awarded damages, the presence of additional sanctions and, as a cherry on top, the proportionality of the damages compared to those awarded in similar defamation cases in its jurisdiction, is it then not asked to perform a substantive review of a case?

The fact that the ECJ concluded that the enforcing court should refuse enforcement only on parts of a judgment where damages are manifestly disproportionate reinforces this presumption. This means that, in so far as the awarded damages constitute a manifest breach of a fundamental right, or otherwise of a norm that is of fundamental character in the legal order of the enforcing court's Member State, the enforcing court is allowed to reshape the foreign judgment, retaining only those portions that fit its legal system. While substantive review of foreign judgments is officially excluded by the Brussels Ia Regulation to uphold mutual trust, allowing judges to construe a foreign legal decision *à la carte* effectively reintroduces substantive review through the backdoor.

In this respect, this case fits into a growing trend in the Court's approach which seems to allow national courts to review the compatibility of foreign legal decisions with fundamental rights. A similar pattern has emerged in the context of judicial cooperation in criminal matters, where recent case law on the European Arrest Warrant illustrates the ECJ's inclination to adjust the rigid application of mutual trust by weighing judicial cooperation obligations against the need to respect fundamental rights (Case C-261/22, *GN*). Overall, a clear shift towards integrating fundamental rights assessments into EU instruments traditionally based on mutual trust seems to be emerging.

In conclusion, despite the Court's emphasis on the narrow scope of public policy, *Real Madrid vs Le Monde* shows a tendency of the ECJ to expand the scope of review by enforcing courts. By testing whether damages may be considered manifest breaches of fundamental rights, the ECJ effectively calls for a substantive review of foreign judgments to safeguard fundamental rights. This raises the question of whether the ECJ is implicitly encouraging national courts to horizontally control one another when fundamental rights are at stake, despite the principle of mutual trust, to complement the vertical control on the Member States exercised by the Court itself.

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