

Public Policy as a Ground for Refusal to Enforce EU Antitrust Damages Awards

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ABSTRACT

The Brussels I Regulation is crucial for the effectiveness of EU competition law in the field of private enforcement because it provides a legal framework for the recognition and enforcement of judgments in civil and commercial matters, which includes antitrust damages cases. However, the interaction between the rules governing private enforcement of EU competition law and the Regulation is unclear. This article discusses one of the issues arising from this interaction, namely, whether the public policy objection envisaged in the Regulation may be invoked to refuse recognition and enforcement of an antitrust damages award. The argument advanced in this article is that the public policy exception can be invoked successfully in the case of a serious violation of the procedural rights of the defendant. By contrast, the public policy exception is generally not applicable if enforcement of a foreign award may lead to infringement of substantive national provisions, even those of fundamental importance for the Member State in which enforcement is sought. This would go against the rights and principles of EU competition law, such as the principle of effectiveness and the right to full compensation for antitrust-related damages.

Keywords

Public policy, antitrust damages, Brussels I Regulation

I. INTRODUCTION

This article examines legal issues arising from application of the ‘public policy’ exception laid down in the Brussels I Regulation¹ to refuse recognition and enforcement of rulings in antitrust damages cases issued by a court of another European Union (EU) Member State.

The concept of public policy in the Brussels I Regulation has been interpreted in a number of rulings of the Court of Justice of the European Union (CJEU). However, no cases have so far addressed the application of this concept in cases involving cross-border enforcement of antitrust damages awards. Case C-302/13 *FlyLAL-Lithuanian Airlines, in liquidation v Starptautiska Lidosta Riga and AirBaltic Corporation AS*² is relevant for this discussion because, in this case, the CJEU addresses the application of the Brussels I Regulation in a competition case, albeit with respect to enforcement of an order for a provisional measure. The *FlyLAL* case gives an opportunity to re-visit the concept of public policy in EU law and explore it in the context of a new category of cases: private enforcement of EU competition law.

This article examines whether the ‘public policy’ exception in the Brussels I Regulation may be invoked under existing EU law to preclude enforcement of a foreign antitrust damages award. Should this exception be available at all in antitrust damages cases, and what are the contents and limits of the exception in such cases?

The *FlyLAL* case forms part of a wider dispute involving a Lithuanian airline company, FlyLAL Lithuanian Airlines (in liquidation due to bankruptcy at the time of the proceedings before the CJEU), the claimant, and Riga International airport (wholly owned by the Latvian state) and air company AirBaltic (approximately 52 % owned by the Latvian state), the defendants. In 2008, FlyLAL brought a case before a Lithuanian court claiming that it had suffered economic damage due to abuse of a dominant position by the co-defendants, i.e. Riga International Airport and AirBaltic, in the market for flights from or to Vilnius Airport (Lithuania) and anticompetitive cooperation between the co-defendants. The amount of damages claimed was around 58 million Euros.³

In the course of the proceedings on the merits, the court in Lithuania issued an order containing provisional measures, i.e. sequestration of the defendants’ assets located in Latvia. The defendants objected to enforcement of the order, arguing that enforcement would

1. Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, which replaced Council Regulation (EC) 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. All the references to the ‘Brussels I Regulation’ in this article mean the ‘recast’ Regulation of 2012, unless expressly noted otherwise.
2. Judgment of 24 October 2015 in Case C-302/13, *FlyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, ECLI:EU:C:2014:2319. This is not to be confused with pending case C-27/17, *AB ‘flyLAL-Lithuanian Airlines’, in liquidation, v Starptautiskā lidosta ‘Rīga’ VAS, ‘Air Baltic Corporation A/S’ (FlyLAL II)*.
3. At the time of writing, the proceedings on the merits appear to be still on-going in Lithuania. However, according to a media report in 2016, the Vilnius Regional Court lifted charges against Riga International Airport and ordered AirBaltic to pay around 16 million Euros: <http://bnn-news.com/lithuanian-court-refuses-to-re-calculate-airbaltic-s-compensation-to-flylal-141259> (last visited 9 February 2018).

violate the ‘public policy’ of the state in which enforcement was sought within the meaning of the Brussels I Regulation. After having been appealed, the question of non-enforceability came before the Supreme Court in Latvia, which referred a number of questions to the CJEU, including a question on the application of the public policy exception.

The *FlyLAL* case is interesting because the referring court did not follow the conclusions in the CJEU’s preliminary ruling, and declined to enforce the provisional measures ordered by the Lithuanian court. Notably, the conclusions in the CJEU’s ruling on the availability of the ‘public policy’ exception laid down in the Regulation were not accepted by the referring court.

As *FlyLAL* demonstrates, the Brussels I Regulation is crucial for the smooth functioning of private enforcement of EU competition law. However, its application in this untested category of cases requires further clarification. It is not ruled out that, when the proceedings on the merits are finalised in the Lithuanian court system, and if the outcome of the proceedings is in favour of the claimant, the question of the applicability of the ‘public policy’ exception to refuse enforcement will again be raised in the Latvian courts.

The article is structured as follows. After this introduction, it first explains the importance of the Regulation for enforcement of antitrust damages awards (2). Then it proceeds with examining the ‘public policy’ exception in the Regulation generally (3) and with respect to antitrust damages awards (4) before discussing what limits EU law imposes on this exception in the field of the private enforcement of competition law (5). Finally, it draws several conclusions (6).

2. THE IMPORTANCE OF THE BRUSSELS I REGULATION FOR ENFORCING ANTITRUST DAMAGES AWARDS IN THE EU

By establishing uniform rules across the EU on jurisdiction, recognition and enforcement of judgments, the Brussels I Regulation promotes free movement of judgments in the internal market.⁴

As a main rule, the Regulation applies to ‘civil and commercial matters’ but excludes, for example, administrative matters.⁵ Does the Regulation apply to cases involving private enforcement of EU competition law? In *FlyLAL*, one of the questions referred to the CJEU for clarification was whether a dispute involving a request to enforce an order of sequestration in an antitrust damages case concerned a ‘civil and commercial matter’ within the meaning of the Regulation. The defendants were state-owned and charges at Riga airport, which were alleged to infringe competition rules, were laid down by the state.

The CJEU clarified that the Regulation was applicable to such cases because claims for damages caused by anticompetitive conduct by market actors involved in economic activ-

4. On the Brussels I Regulation(s) generally, see e.g. Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, *The Brussels I-Regulation (EC) No 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States* (Verlag C.H. Beck München 2008); Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (2nd revised edn, Sellier European Law Publishers 2012).

5. Article 1 of the Regulation.

ity would generally fall within ‘civil and commercial matters’ governed by the Regulation. This was the case with the provision of airport facilities for a fee, even if determining the rates of airport charges and reductions in those charges by Riga airport was subject to generally applicable statutory provisions in Latvia. It also did not matter for the purposes of the Regulation that the defendants were respectively fully and partly owned by the state.⁶

The right of private parties to claim compensation for damages they suffer as a result of competition law infringements is well established in EU law. The Antitrust Damages Directive was adopted in order to facilitate private enforcement of EU competition law by clarifying and harmonising Member State laws regulating antitrust damages proceedings.⁷ In particular, the Directive aims to ensure that victims of EU competition rules infringements can obtain full compensation for the harm they suffer.

The Directive also applies to cross-border situations, which in turn pre-supposes that antitrust damages awards may in some cases have to be enforced against defendants and (or) assets located in other Member States.⁸ This makes the Brussels I Regulation increasingly important in this field, as the Directive relies on the Regulation in so far as it concerns recognition and enforcement of judgments in cross-border antitrust damages cases.

So far, the CJEU has not clarified whether Article 7 of the Regulation, which sets out provisions on special jurisdiction, allows victims of competition infringements to bring damages proceedings in a Member State other than the domicile of the defendant, as is the main rule for jurisdiction under the Regulation. In the case of *FlyLAL II*, now pending before the CJEU, the Court is asked to explain whether Article 7 of the Regulation includes the courts of the place where (anticompetitive) harm occurred, so that those courts enjoy special jurisdiction to hear an antitrust damages case.⁹

The Regulation is based on the principle of mutual trust in the administration of justice in the EU. According to the CJEU, mutual trust

is that trust [...] which the Member States must accord to one another’s legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU), affords a sufficient guarantee to individuals.¹⁰

6. By contrast, control and surveillance of air space, which in essence falls within the remit of the state, is considered to be the exercise of public powers: Judgment in *FlyLAL-Lithuanian Airlines, in liquidation v Starptautiska Lidosta Riga and AirBaltic Corporation AS* (n 2) para. 23 et seq, para. 31 et seq.
7. Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1. The deadline for transposing the Directive was 27 December 2016.
8. The only express reference to the Regulation is found in recital 44 of the Directive (*lis pendens*).
9. Case C-27/17 (n 2).
10. Case C-681/13, *Diageo Brands BV v Simiramida -04 EOOD*, Judgment of 16 July 2015, ECLI:EU:C:2015:471, para. 63; C-559/14 *Rudolfs Meroni v Recoletons Limited*, Judgment of 25 May 2016, ECLI:EU:C:2016:349, para. 47.

This principle is of fundamental importance in EU law. Moreover, its observance is necessary for sound operation of the internal market, which constitutes the *raison d'être* of the Regulation.¹¹ The smooth functioning of private enforcement of EU competition law is clearly pre-conditional on mutual trust between Member States. At the same time, the interaction between the 'Brussels I' regime and the regulatory framework governing private enforcement of EU competition law is far from clear and has not been explicitly clarified in the provisions of the Directive or existing case law.

One important aspect of the mutual trust principle under the Brussels I Regulation is the prohibition, 'under any circumstances' for the courts of the country in which enforcement is sought to examine the substance of a judgment from the court of another Member State.¹² Mutual trust also implies that grounds for non-recognition of judgments are kept to the minimum required.¹³

However, the principle of mutual trust and the ensuing duty to recognise and enforce foreign awards under the Regulation is not absolute. Crucially, the Brussels I Regulation envisages a fair balance between the principle of mutual trust, on the one hand, and respect for the rights of the defence, on the other hand, enabling the defendant to invoke grounds for non-recognition or non-enforcement of the judgment if such grounds are present.¹⁴ The 'public policy' exception is one of the grounds that may be invoked to refuse the recognition and enforcement of judgments in the EU.

As the *FlyLAL* case illustrates, enforcing the judgment of a foreign court may be perceived as a threat to the essential interests of the state in which enforcement is sought, as competition infringements are frequently committed by market actors that are not only dominant but are also of special national importance to Member States, such as airports, seaports, transport and postal undertakings, and telecommunications. The amount of damages claimed may also be relatively high. This puts mutual trust between Member States under significant pressure and may raise questions of the available limitations on cross-border enforcement of judgments in the EU.

In the discussion below, the author focuses on the concept of 'public policy' under the Brussels I Regulation, and examines the application of this concept in antitrust damages cases.

11. Judgment in *Diageo Brands BV v Simiramida -04 EOOD*, *ibid.*, para. 40; Case C-533/08, *TNT Express Nederland BV v AXA Versicherung AG*, Judgment of 4 May 2010, ECLI:EU:C:2010:243, paras. 49-50.

12. Article 52 of the Regulation.

13. Case C-455/15, *PPU P v Q*, Judgment of 19 November 2015, ECLI:EU:C:2015:763, para. 35.

14. Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, Judgment of 6 September 2012, ECLI:EU:C:2012:531, para. 43; Case C-420/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Judgment of 28 April 2009, ECLI:EU:C:2009:271, para. 73.

3. PUBLIC POLICY AS A GROUND FOR NON-RECOGNITION UNDER THE BRUSSELS I REGULATION

The grounds for non-recognition and non-enforcement are listed in Section 3 of Chapter III of the Regulation. Article 45 states that, on the application of any interested party, recognition of judgment will be refused in certain cases. One of these grounds is ‘if such recognition is manifestly contrary to public policy (‘ordre public’) in the Member State addressed ...’.¹⁵

Article 46 states that ‘[o]n the application of the person against whom enforcement is sought, the enforcement of the judgment shall be refused where one of the grounds referred to in Article 45 is found to exist’. So, although no declaration of enforceability is required under the recast Regulation, interested parties can still prevent enforcement by invoking a relevant provision in cases where the grounds for refusal listed in Article 45 apply.¹⁶

‘Public policy’ as a justification for the refusal to apply foreign law or to recognise or enforce a foreign judgment has also been generally accepted in private international law.¹⁷ The public policy exception applies where it is necessary to take account of fundamental differences between states when applying foreign law or recognising or enforcing a foreign judgment. Accordingly, individual states determine the contents of their national ‘public policies.’¹⁸

In EU law, ‘public policy’ has developed into an autonomous EU-law concept modified to fit the objectives of EU law, i.e. freedoms of the internal market. TFEU provisions on the internal market also refer to ‘public policy’ as a justification for restricting the four freedoms.¹⁹

Although the inherent ambiguity of the ‘public policy’ concept has not been fully clarified in EU law, the CJEU has interpreted it strictly: the threshold is very high, so in practice it is very difficult to argue successfully that the threshold has been reached. In the field of recognition and enforcement of judgments, the CJEU has stated that recourse to the public policy clause in the Brussels I Regulation may be accepted ‘only where recognition or enforcement of the judgment given in another Member State 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*’ [author’s emphasis].²⁰ This approach has been followed in recent case law, including *FlyLAL*.²¹

15. Article 45(1) of the Brussels I ‘recast’ Regulation corresponds to Article 34(1) of the old Brussels I Regulation (EC) No. 44/2001.

16. Article 39 of the ‘recast’ Regulation: cf. Article 38 of the old Regulation.

17. Public policy is found in international instruments governing recognition and enforcement of judgments: see Article 27 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Article 34(1) of the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, and Article V.2.b of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

18. Tena Hoško, ‘Public policy as an exception to free movement within the internal market and the European judicial area: a Comparison’ (2014) 10 *Croatian Yearbook of European Law & Policy* 189, 195.

19. Part One Title II and IV of Treaty on the Functioning of the European Union (free movement of goods, persons, services and capital).

20. Judgment in *Apostolides* (n 14) para. 59.

21. *FlyLAL* (n 2) para. 49. See also Case C-38/98, *Renault SA v Maxicar SpA and Orazio Formento*, Judgment of 11 May 2000, ECLI:EU:C:2000:225, para. 30; Judgment in *Diageo Brands BV* (n 10), para. 44.

Thus, EU law permits a court of the country in which enforcement is sought to take account of the fundamental principles of its legal system. In *FlyLAL*, the CJEU confirmed that in principle Member States remain free to determine the requirements of their public policy according to their own national conceptions. Therefore, the actual content of ‘public policy’ has largely remained within the domain of Member State national legal systems. However, the fundamental principle that will be violated in case of recognition or enforcement must be clearly identifiable.²²

But how is one to determine whether a principle of fundamental importance is at stake in a particular case, permitting a Member State to invoke the ‘public policy’ exception?

The legal literature systematises the concept of ‘public policy’ by distinguishing between its procedural and substantive dimensions.²³ In its procedural dimension, the ‘public policy’ exception protects the basic procedural rights of the parties in cases where a foreign court seriously infringes those rights. Those same rights are protected under EU law and international human rights instruments. They include the right to a fair trial and the obligation to give reasons for judgments. For example, by not respecting the right to be heard, a court will violate a party’s right to a fair trial.

In a separate provision of Article 45, the Brussels I Regulation expressly states that a judgment in default of appearance is not enforceable if the defendant was not given a real opportunity to appear before the court.²⁴ Does the existence of a provision designed specifically to protect a basic right of the defendant narrow down procedural public policy? Can procedural rights other than those protected by Article 45(1)(b) be protected under the public policy exception? The Court has explained that manifest breach of some other essential procedural rights may in principle be protected under the public policy exception.²⁵

Taking account of differences between substantive rules of law in different states, the substantive dimension of ‘public policy’ in EU law deserves a critical look. An inherent contradiction seems to exist between freedom of movement of judgments in the internal market and the public policy justification: in areas of EU law which are harmonised, the question arises whether any place at all (for the purposes of the Brussels I Regulation) exists for an exception based on the need to protect a rule of law regarded as essential in the legal order of the state in which enforcement is sought or a right recognised as being fundamental within that legal order.

In its Communication on the ‘recast’ Regulation, the Commission argued in favour of abolishing the substantive public policy exception.²⁶ Although the Commission was not

22. *Magnus and Mankowski* (n 4) 658-660.

23. *Magnus and Mankowski* (n 4) 662 et seq.; *Hess, Pfeiffer and Schlosser* (n 4) 144. Also the Commission distinguished between the two dimensions: substantive public policy was considered unnecessary or otherwise undesirable in the ‘recast’ Regulation: see Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final, 6.

24. See Article 45(1)(b) of the Regulation.

25. Case C-7/98, *Krombach v Bamberski*; Judgment of 28 March 2000, ECLI:EU:C:2000:164; Case C-394/07, *Gambazzi v Chrysler*, Judgment of 2 April 2009, ECLI:EU:C:2009:219. See also *Magnus and Mankowski* (n 4) 669; Recital 38 of the Regulation.

26. Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, p. 6.

successful in removing this exception from the Regulation altogether, the prohibition on reviewing the substance of a judgment does limit ‘quite drastically the hypothesis in which the tribunal will be able to consider a contradiction with its substantive policy’.²⁷

At the same time, the wording of the recast Regulation contains no direct indications that a change has been introduced reducing the legal scope of substantive ‘public policy’. Thus, refusal to enforce a foreign court award on the grounds of substantive public policy is not ruled out in principle. As discussed further below, this creates complex issues in the field of private enforcement of EU competition law in cross-border cases.

The case law does not give much guidance on how to determine the contents of the ‘public policy’ concept under the Brussels I Regulation, except that it must protect a ‘fundamental principle’ of the enforcing state.²⁸ TFEU provisions on the single market also envisage justifications for restrictions on the four freedoms where exercise of those freedoms will compromise public policy, public morality and public security. In those few cases where such justifications for direct discrimination were invoked successfully, the Court accepted Member State concerns relating to morality, human dignity and other aspects of the unique constitutional identity of the Member State.²⁹ Do the exceptions provided in the TFEU and the Regulation have the same scope, provided that the Regulation does not single out morality and security interests? Could the ‘public policy’ exception in the Regulation be interpreted as including the morality and security interests of the enforcing state?

In the competition law field, and more specifically in the field of enforcement of anti-trust damages awards, there seem to be no concerns related to morality as can be the case with the four freedoms.³⁰ In addition, the substantive rules of EU competition law have been developed and clarified through a vast case law by the CJEU along with Commission guidelines and decisions, so they are the same for all Member States.³¹ However, public security concerns may be considered relevant by Member States, as the *FlyLAL* case shows.

One consequent aspect in interpreting the internal market provisions of the TFEU and the Regulation has been to exclude ‘economic’ interests from the scope of derogation on the ground of public policy. However, the seriousness of the consequences (of a particular measure, or non-taking of such a measure) may, in exceptional cases, transcend purely economic considerations and thereby be considered as capable of constituting a public (secu-

27. Magnus and Mankowski (n 4) 662.

28. For a review of the existing case law on the concept of public policy under the Brussels I Regulation, see Matthias Weller, ‘Mutual trust: in search of the future of European Union private international law’ (2015) 11(1) *Journal of Private International Law* 64, <http://dx.doi.org/10.1080/17536235.2015.1033203>.

29. See, e.g., Case C-34/79, *Regina v Maurice Donald Henn and John Frederick Ernest Darby*, Judgment of 14 December 2009, ECLI:EU:C:1979:295; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of 14 October 2004, ECLI:EU:C:2004:614; Case C-438/14, *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, Judgment of 2 June 2016, ECLI:EU:C:2016:401.

30. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, Oxford University Press 2015) 696.

31. In any case, a mere difference in legislation does not amount to a breach of public policy: Magnus and Mankowski (n 4) 662.

riety) objective.³² This argument is considered more closely below when scrutinising the ‘public policy’ exception in the context of antitrust damages cases.

When examining the applicability of the corresponding derogation from TFEU internal market provisions, the Court undertakes a proportionality test and assesses whether the restrictive measure is the least restrictive possible to attain the end in view.³³ Although the CJEU does not expressly perform a proportionality assessment in its judgments interpreting ‘public policy’ under the Brussels I Regulation, nevertheless it does review the limits of that policy similarly to the suitability and necessity test.

Having set the general stage for analysis, it is now appropriate to proceed with discussing whether the ‘public policy’ concept applies in cases involving cross-border enforcement of antitrust damages awards.

4. CAN ‘PUBLIC POLICY’ BE INVOKED TO JUSTIFY NON-ENFORCEMENT OF AN ANTITRUST DAMAGES AWARD?

In *FlyLAL*, the CJEU was asked by the referring court to determine whether the ‘public policy’ provision of the Regulation could be invoked to refuse enforcement of an order by the issuing (Lithuanian) court. While the proceedings on the merits of the antitrust damages case were still pending, the order required sequestration, on a provisional and protective basis, of the moveable and immoveable assets and property rights of AirBaltic and Riga International Airport in an amount equivalent to around 58 million Euros.³⁴

The question from the referring court indicated two worrying circumstances pertaining to enforcement of the order. First, the provisional and protective measures in question amounted to a considerable sum, which was allegedly set without a well-founded and substantiated calculation having been made by the issuing court.

Second, recognition and enforcement of the order could allegedly cause the defendants damage for which the claimant, a company in liquidation, would not be able to provide compensation in the event that the claim for compensation was dismissed. If the outcome of the claimant’s antitrust damages case were unsuccessful, recognition and enforcement of the order might affect the economic interests of the state in which recognition was sought, thereby jeopardising the security of the state (keeping in mind that the Republic of Latvia held 100% of the shares in Starptautiska Lidosta Riga and 52.6% in AirBaltic). Although this is not explained in the judgment, it appears that the referring court assumed that the sequestered assets would somehow diminish in value in an irrecoverable manner or be used in an unsafe way threatening public security after having been taken over by the bankrupt claimant.

32. Case C-72/83, *Campus Oil Limited and others v Minister for Industry and Energy and others*, Judgment of 10 July 1984, ECLI:EU:C:1984:256; Case 7/61 *Commission v Italy*, Judgment of 19 December 1961, ECLI:EU:C:1961:31. See also Craig and de Búrca (n 30) 699.

33. Craig and de Búrca (n 30) 696.

34. Paras. 15 and 16 of the judgment.

The questions from the referring court in *FlyLAL* give an opportunity to discuss the scope and limits of the ‘public policy’ concept in competition cases. The first concern of the referring court, i.e. that the order for provisional and protective measures amounting to a considerable sum of money was adopted without a well-founded and substantiated calculation having been made, may be interpreted as pointing to defects in arguments by the issuing court (i.e. poor and insufficient reasoning). To the extent the criticism is addressed to the contents of a judgment rendered by the court of another Member State, it is not permitted and goes against the letter and spirit of the Regulation. This was also confirmed by the CJEU in the *FlyLAL* judgment.³⁵

It may also be possible to interpret – as the CJEU did – this part of the question as indicating that certain procedural mistakes were made when adopting the order. If so, the problem is indeed not the substance of the order as such but omission by the court to give reasons for the order.

Generally, significant differences exist between domestic rules applicable to private enforcement of competition law in EU Member States. This may lead to objections being raised against enforcement of foreign antitrust damages awards on the grounds of violations of ‘procedural’ public policy.

The *FlyLAL* judgment provides some guidance on the application of procedural public policy in future cases of cross-border enforcement of antitrust damages rulings. In principle, failure to give reasons for a ruling may result in infringement of the right to fair trial because the defendants may not be able to understand the judgment and therefore bring an appropriate and effective appeal against it. The *FlyLAL* judgment confirmed the earlier case law that such an omission may result in the public policy exception being applicable in the case of serious violations of procedural rights.³⁶

But when is violation of procedural rights serious enough to justify refusal to enforce an antitrust damages award? With respect to determination of the amounts for the provisional order, the CJEU said that no such situation arises if it is ‘possible to follow the line of reasoning which led to the determination of the amount of sums at issue’.³⁷ In this case, the CJEU found that the amount had been discussed in the Lithuanian courts, even though the defendants and the referring court were in doubt as to the quality of this discussion. In addition, the parties had had an opportunity to bring an action against that decision. So no sufficiently serious infringement had been committed to qualify for Article 45(1)(a).

The Antitrust Damages Directive aims at resolving some of the differences between procedural rules of Member States governing private enforcement actions. As significant differences still remain between national rules applicable to private enforcement of EU competition law after the Directive was implemented, it is likely that national courts of different Member States may in some cases be willing to allow defendants to challenge enforcement under Article 45(1)(a) of the Regulation.

35. See para. 45 of the judgment.

36. *FlyLAL* (n 2) para. 51, quoting judgment in *Trade Agency Ltd v Seramico Investments Ltd* (n 14) para. 53. See also *Krombach* (n 25).

37. *FlyLAL* (n 2) para. 53.

The second point of concern in *FlyLAL* related to the amount of the sequestration order, which the defendants and the referring court considered very high. They argued that recognition and enforcement of the order might result in infringement of an ‘essential’ rule and a fundamental principle of the state, in which enforcement was sought by causing irrecoverable damage affecting the economic interests of that state, to such an extent that it would jeopardise the security of the state.

This point is interesting, because it addresses the substantive public policy exception on the basis of what seems to be economic interests – such as possible economic loss for the state in which enforcement was sought. These are generally not to be accepted under the ‘public policy’ exception in EU law. In *FlyLAL*, the CJEU confirmed that recourse to the public policy clause would only be permitted if the infringement breached an essential rule or a fundamental right of the legal order in the state in which enforcement was sought, subject to very strict interpretation.³⁸

The question in cases involving antitrust damages is what principle can be viewed as a ‘fundamental’ principle or a ‘rule of law regarded as essential in the legal order of the state [in which enforcement is sought]’ or ‘a right recognized as being fundamental within that legal order’³⁹. We have seen some examples in the earlier case law; however, these examples did not concern competition cases.

The CJEU made clear in its *FlyLAL* ruling that the substantial amounts of money involved in the proceedings would not as such be sufficient to invoke public policy to refuse enforcement. There must be a violation of ‘legal interests expressed through a rule of law and not purely economic interests’.⁴⁰ It also does not matter that the market actor involved is a public authority acting as a market participant (a shareholder) and thereby exposing itself to certain risks.⁴¹

The CJEU generally understood the referring court’s formulation of state security concerns as ‘mere invocation of serious economic consequences’, non-eligible as grounds to invoke public policy in EU law.⁴² However, the arguments by the defendants, as reproduced in the text of the ruling, appear to go beyond purely ‘economic interests’ and imply a connection between the large sums of the sequestration order and a threat to the security of the Latvian state. The referring court also emphasised state security concerns related to such important infrastructure objects as airports as grounds for refusal due to breach of public policy (‘seriously jeopardise the security of the state’).⁴³

The text of the preliminary ruling does not provide much guidance on the details of the arguments by the defendants or representatives of the Member State involved on this important point. In any case, the CJEU does not expressly address this aspect of the argument and only deals with it from the ‘economic interests’ perspective. In cases concerning

38. *ibid.* paras. 49-55 (referring to judgment in *Apostolides* (n 14) para. 59). See too opinion of AG Kokott, para. 73, ECLI:EU:C:2014:2046.

39. *Apostolides* (n 14) para. 59. See also *Diageo Brands BV* (n 10) and *Rudolfs Meroni* (n 10).

40. *FlyLAL* (n 2) para. 56.

41. *ibid.*

42. *ibid.* para. 58.

43. *ibid.* para. 22.

the internal market, the CJEU has consistently held that economic interests cannot justify the public policy exception.⁴⁴

In *FlyLAL*, the CJEU repeated this point but also noted that the arguments against recognition and enforcement of provisional measures were not acceptable in the circumstances of this case: the provisional and protective measures at issue did not consist in payment of a sum but simply in monitoring the assets of the defendants in the main proceedings.⁴⁵ Refusal of enforcement would not be necessary to protect state security in this case. The Court may, therefore, return to this point in future cases.

Advocate General Kokott addresses this issue at more length in her Opinion. Having pointed out that purely economic interests, however weighty, are not sufficient, she discusses whether situations where ‘economic interest develops into a legally relevant interest which must, as such, be taken into account in the context of [Article 45(1)] in any event in the case where impending economic loss represents a sufficiently specific threat to the legal order and the security of the state’.⁴⁶ This might hypothetically be the case if the measures in question could do appreciable damage to the strategic military role performed by Riga airport.

She then raises the question whether infringement of ‘public policy’ can be invoked due to a risk of ‘state impoverishment’. She quickly notes that this argument is not supported by the existing case law and is ‘highly questionable from a conceptual and a schematic point of view, because economic considerations, in principle, fall outside the ambit of public policy’.⁴⁷

In *FlyLAL*, the CJEU and the Advocate General took into account that the disputed order contained measures of a provisional and protective character: the defendants did not have to make a payment to compensate for damage, but were merely ordered to allow the plaintiff to sequester their assets until the main proceedings were finalised.⁴⁸ The integrity and ownership of state assets would remain unaffected. In the Advocate General’s opinion, the potential economic shortfall of 58 million Euros was also not high enough to create an exceptional situation of impoverishment, even if state impoverishment could be accepted – in this case for the state against which enforcement was sought: ‘[as] high as that amount is, it is in all likelihood not such as to trigger effects that would shake a state to its very foundations’.⁴⁹

Thus, application of the public policy exception went beyond what was necessary to ensure these essential interests and, therefore, exceeded the limits of EU law. Although the Court and the Advocate General do not expressly discuss the proportionality of non-enforcement, the line of thinking is the same.

So, the judgment in *FlyLAL* confirms what we already know, i.e. that public policy is interpreted strictly and may be invoked only in exceptional cases; the threshold is very high.

44. Hoško (n 18) 209.

45. *FlyLAL* (n 2) para. 57.

46. Opinion of AG Kokott (n 38) para. 86.

47. *ibid* para. 87.

48. *FlyLAL* (n 2) para. 57.

49. *ibid* para. 88.

Importantly, *FlyLAL* also clarifies that the Brussels I Regulation applies in cases involving cross-border enforcement of antitrust damages awards. However, the implications of this judgment for cross-border enforcement of antitrust damages awards in the EU are less clear. The CJEU does not rule out that the ‘public policy’ exception in Article 45(1)(a) may be applicable to such cases.

We should probably not be too eager to expand on this topic hypothetically and rather avoid interpreting too broadly the open points made by the Court and the Advocate General in the course of the proceedings before the CJEU. In *FlyLAL*, it appears far-fetched to invoke state security arguments in connection with enforcement of the sequestration order, while the main point of concern clearly related to the amount of the order.⁵⁰ However, it is hard to resist such an exercise in light of the way the preliminary ruling was received in the referring court.

The outcome of this case before the referring court was that enforcement of the Lithuanian court’s ruling on provisional measures was denied as incompatible with public policy, in spite of the preliminary ruling by the CJEU suggesting otherwise. The referring court expressed its particular concern with the possible resulting ‘non-permissible violation of state’s economic interests’ that would also ‘threaten the legal system, because the society will not be able to trust the state’s legal system’.⁵¹ The referring court also pointed out that if the result of enforcing the foreign judgment could affect the state’s economic interests, which in turn influence state security, it should be considered unfair and contradictory to Latvian public policy: the existence and stability of Riga airport is in the interests of society as a whole, to which the application of the provisional measures may have caused losses which could not be compensated.

In particular, a rule ‘of essential importance’ required by EU case law was derived directly from the Constitution (*Satversme*) protecting the territorial integrity and independence of the Republic of Latvia.⁵² No statutory provision of Latvian domestic law imposed restrictions on property or possessory rights in objects of high importance for state security. Nor were any statutory restrictions laid down pertaining to actions with such objects in the sphere of private property rights.⁵³

The information available on the referring court’s reasoning post-*FlyLAL* is too scarce to lend certainty as to its legal arguments. However, the referring court does not appear to have considered whether refusal of enforcement could be substituted by some other, less restrictive option under domestic law that would ensure that state interests were sufficiently protected.

The reaction of the Latvian national court to the judgment in *FlyLAL* raises important concerns for future private enforcement actions based on competition rules. In the unlikely situation where the state in which enforcement is sought offers convincing arguments

50. The author is not familiar, though, with how sequestration is performed in practice in this state.

51. A piece of news from the court posted on its home page: searchable at www.at.gov.lv. (in Latvian, last visited 9 February 2018).

52. Article 1 of the Constitution provides that Latvia is an independent democratic republic.

53. This follows from the Civil Cases department of the Supreme Court communication in relation to its ruling post-*FlyLAL*. News 2015 at www.at.gov.lv (in Latvian, last visited 9 February 2018).

relating to the applicability of the ‘public policy’ exception because refusal of enforcement is both justified by that state’s essential interests and proportionate, then further issues arise. How do we reconcile such a refusal with the right to full compensation for antitrust damages, now codified in the Antitrust Damages Directive? What about the principle of effectiveness of EU law in this category of cases?

In the ensuing discussion, a closer look is taken at the limits of the ‘public policy’ concept in light of other EU law rights and principles.

5. HOW TO BALANCE INTERESTS PROTECTED UNDER ‘PUBLIC POLICY’ AND THE EU LAW RIGHT TO FULL COMPENSATION FOR ANTITRUST DAMAGES?

The CJEU is not very specific on how to determine the limits that EU law imposes on the concept of ‘public policy’ under the Brussels I Regulation. Below, it is argued that a national court that receives an application for refusal of enforcement under Article 45(1)(a) of the Regulation must examine the applicability of ‘public policy’ (including the proportionality of non-enforcement) in light of EU law rights pertaining to private competition law enforcement.

As pointed out earlier, the Antitrust Damages Directive relies on the Brussels I Regulation in so far as it concerns recognition and enforcement of judgments. The Directive is clearly not intended to change the regime set in the Brussels I Regulation; to the contrary, the importance of the Regulation is emphasised in the preparatory materials to the Directive and mentioned in the text of the Directive.⁵⁴

Therefore, it is not ruled out *a priori* that the public policy exception can be successfully invoked in antitrust damages cases. At the same time, it is reasonable to argue that the Regulation, including its provisions on ‘public policy’, should be interpreted in light of the relevant case law and the objectives pursued by the Directive. Two interrelated provisions of the Directive are especially relevant for the discussion herein: Article 3 on the principle of full compensation for antitrust damages, and Article 4 on the principle of effectiveness of EU competition law.

Firstly, Article 3 of the Directive requires Member States to ensure that a person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm. As pointed out earlier, antitrust cases may often involve such strategic actors as airports, seaports, railways and similar entities naturally suited to abuse of a dominant position and thereby likely to become defendants in antitrust proceedings. In addition, the amount of damages inflicted can be very high. If one follows the line of thinking of the referring court in *FlyLAL*, private enforcement of EU competition law may nearly always compromise essential state interests. Thus, Member States may effectively preclude victims from receiving compensation by invoking the ‘public policy’ exception. This would inevitably circumscribe the right to full compensation to an extent that is unlikely to be accepted in EU law.

54. See recital 44 and Article 15(2) of the Directive.

Secondly, Article 4 on the principle of effectiveness of EU competition law also limits Member State discretion: ‘Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of Union right to full compensation for harm caused by an infringement of competition law’.⁵⁵ Generally, application of the ‘public policy’ exception to refuse enforcement of a foreign damages award will automatically imply that victims will not be able to benefit actually from the successful outcome of litigation to obtain compensation for economic damage caused by infringement of EU competition rules.⁵⁶ This would compromise the requirement of effectiveness of EU competition law as codified in the Directive.

The principle of effectiveness in EU law does not apply in cases where the basic procedural rights of the defendant are infringed by a foreign court so as to justify the application of the ‘public policy’ exception. Procedural infringements involving situations envisaged under Article 45(1)(b) of the Brussels I Regulation should clearly rule out the relevance of the argument of effectiveness in this assessment. Nothing in the text of the Directive or the existing case law suggests that the provisions of the Regulation, including the grounds for non-enforcement, can be overridden in antitrust damages cases.⁵⁷

As discussed above, *FlyLAL* and earlier case law does not preclude possible application of Article 45(1)(a) to protect procedural rights other than those envisaged in Article 45(1)(b).⁵⁸ In *FlyLAL*, for example, the CJEU said that a judgment that does not discuss how a calculation of sums was made may infringe a defendant’s right to fair trial (although that was not the case in *FlyLAL*). Therefore, defendants may succeed in relying on the ‘public policy’ exception in cases of serious infringements of procedural public policy.

‘Public policy’ in its substantive dimension is nearly impossible to reconcile with the principles of full compensation and effectiveness of EU law. In the *FlyLAL* case, one may argue that no actual infringement of the right to full compensation took place, simply because it involved a sequestration order rather than an award of compensation. Yet, would it be compatible with EU law to rely on national law, be it a constitutional provision or a statute, to refuse cross-border enforcement of an award of compensation for anti-trust damages? In the author’s view, if the national court examines this issue properly, the chances that application of substantive public policy will be deemed compatible with EU law are quite minimal.

Of course, the right to full compensation does not always ensure that the victim will actually receive compensation. For example, the offender may become bankrupt and therefore be unable to pay. However, this situation differs from cases where a national court

55. The requirement for Member States to make EU competition law effective has been reinforced by the CJEU: see Case C-557/12, *Kone AG and Others v ÖBB-Infrastruktur AG*, Judgment of 5 June 2014, ECLI:EU:C:2014:1317, paras. 24-26, which continues the reasoning from earlier case law, such as C- 453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Judgment of 20 September 2001, ECLI:EU:C:2001:465.

56. The EU law right to claim damages has been recognised by the CJEU: see, e.g., *Courage and Crehan*, *ibid.*

57. Article 15(2) of the Directive expressly mentions that it is without prejudice to the provision of the Regulation addressing *lis pendens*.

58. *FlyLAL* (n 2) para. 51.

invokes a rule of national public policy to deny enforcement under the Brussels I Regulation in such a way that the right to full compensation becomes ineffective.⁵⁹

The outcome of *FlyLAL* in the national court system is highly intriguing. It remains to be seen how the proceedings on the merits in Lithuanian courts, if successful for the claimant, will end, assuming the claimant attempts to enforce the judgment in Latvia. In the author's view, the principles of EU law now codified in the Directive clearly show that substantive public policy does not hold water as a basis to refuse enforcement of an antitrust damages award.

6. CONCLUSIONS

While the Brussels I Regulation is important for the effective functioning of private enforcement of EU competition law, interaction between the Regulation and the Antitrust Damages Directive clearly needs further clarification. In the forthcoming ruling in *FlyLAL II*, the CJEU may also provide us with relevant insights into application of the rules of special jurisdiction in Article 7 of the Regulation to private enforcement of EU competition law in cross-border situations.

At the same time, in light of the discussion above, it seems fairly safe to conclude that applying the substantive 'public policy' exception laid down in Article 45(1)(a) of the Regulation as a justification for the refusal to enforce a foreign antitrust damages award will probably fail to meet the requirements of proportionality and effectiveness and the right to full compensation under EU law.

Before coming to this conclusion, this article examined what interests might be accepted as legitimate to justify application of the 'public policy' exception under the Regulation in antitrust damages cases. Unsurprisingly, it has proven difficult to provide a specific list of interests that may justify deviation from the Regulation in cases involving recognition and enforcement of antitrust damages awards. Arguments pertaining to state security interests and excessive economic degradation (state impoverishment) have not been accepted in the circumstances of *FlyLAL*. The CJEU may have an opportunity to examine these arguments again in cases involving refusal to enforce an actual award of damages, and not just a provisional measure.

In the field of competition law, it is difficult to argue that such fundamental differences exist between Member States that a national court of one Member State may adopt a judgment seriously compromising the interests protected under the substantive public policy of the Member State against which enforcement is sought. However, serious procedural infringements in the course of the proceedings before the issuing court are more likely to result in the judgment being non-enforceable under the provisions of Article 45 of the Regulation.

The practical implications of the Brussels I Regulation are significant for the parties to a competition law dispute in 'cross-border' situations. Under the recast Regulation, claim-

59. The same would apply to domestic cases not involving cross-border enforcement where full compensation is denied because the defendant, as a market actor, also occupies a special strategic role in that state.

ants may require that a judgment awarding compensation for antitrust damages is recognised in all Member States without the need for any special procedure: no declaration of enforceability is required by the courts of the state in which enforcement is sought.⁶⁰ Objections that public policy will be infringed by enforcement must be brought on the initiative of an interested party (e.g. the defendant) before the courts of the Member State where enforcement is sought.

In the *FlyLAL* case, the CJEU has interpreted the relevant provision of the Regulation in light of its earlier well-established case-law principles, but has not expanded on the issues in the novel context of this case. The CJEU might not have considered it necessary to adopt a more nuanced approach to substantive public policy simply because it did not think it was likely that public policy in its substantive dimension would ever be justified in competition law cases. Still, the Brussels I Regulation does not contain any provisions that allow exclusion of such a possibility *a priori*.

Although EU law protects victims of competition infringements through a number of provisions, now codified in the Antitrust Damages Directive, practical enforcement of EU law rights lies with national courts. Refusal by the referring court to follow the clear interpretation of EU law provided by the CJEU in its *FlyLAL* ruling raises concerns over the effectiveness of EU law in cases where an award is granted against market players with strategic importance for the state.

In conclusion, good reasons exist to question whether the existing concept of ‘public policy’ laid down in the Regulation is capable of adequately addressing the challenges pertaining to private enforcement of antitrust damages claims in the EU. Detailed discussion of legal-political questions has remained outside the scope of this article. Nonetheless, the function of the ‘public policy’ concept in the Regulation is highly unclear in antitrust damages cases and certainly needs to be re-visited by the CJEU.

60. Article 39 of the ‘recast’ Regulation: cf. Article 38 of the old Regulation. See also Judgment in *Diageo Brands BV v Simiramida -04 EOOD* (n 10) para. 40; Judgment in *FlyLAL-Lithuanian Airlines, in liquidation v Starptautiska Lidosta Riga and AirBaltic Corporation AS* (n 2) para 45.